The Supreme Court and Public Opinion in Times of War and Crisis

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Recommended Citation
Gordon Silverstein and John Hanley, The Supreme Court and Public Opinion in Times of War and Crisis, 61 Hastings L.J. 1453 (2010). Available at: https://repository.uchastings.edu/hastings_law_journal/vol61/iss6/6
Observers have long speculated about the effect of war on judicial behavior. While common lore maintains that courts are reluctant to affirm claims against the government in wartime, over the past sixty years a number of notable cases have gone against the U.S. government. Recently, empirical research has suggested that the Supreme Court does not rule differently on war-related cases which reach the Court during wartime versus those which reach the Court after the relevant war has ended. We consider the role of public opinion as a possible explanatory variable in wartime cases, noting that in a number of important verdicts which have gone against the elected branches, public opinion showed high levels of disapproval for the President, the war, or both. We examine notable Supreme Court verdicts in the separation of powers and in cases concerning claims for executive power during the period 1938 to 2008. Historically, popular presidents have won in the courts, while weaker Presidents have been less successful. We further argue that researchers must ask at what stage in a crisis was the Court's the decision made, what was the President's own popularity at that point in the war or crisis, what was the public's perception of the credibility of the threat or emergency, and what was the public's attitude about the policies the President was urging or enacting.
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INTRODUCTION

Does the U.S. Supreme Court “follow the election returns” as Finley Peter Dunne asserted, and Robert Dahl attempted to demonstrate? It all depends on the meaning of the word “follow.”

A great deal of time and energy has been devoted to trying to determine if and when the Court leads or follows public opinion, particularly in the areas of civil rights, civil liberties and social policy. These are vitally important questions, but they are not the only areas in which the Court plays a dramatic role, and in which public opinion may or may not shape and constrain judicial decisions. Particularly in times of war and crisis, the Court has been called upon to settle the struggle for power within the government itself by determining the proper allocation and balance of powers among and between Congress, the President, and the courts. Does public opinion shape or influence judicial decisions in

1. See Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy Maker, 6 J. PUB. L. 279 (1957); see also Finley Peter Dunne, Mr. Dooley's Opinions 26 (1901) ("[N]o matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns.").
these critical questions of the allocation and limits of power?

A close look at major judicial rulings in some of the most contentious, publicly salient cases with which the Court has had to grapple over the past century (cases involving claims for executive power in the midst of crisis, war, or foreign policy emergency) suggests that, while the Supreme Court may not follow or lead public opinion, its rulings are quite clearly consistent with public opinion. Court rulings favoring executive power or executive discretion correlate with high presidential approval ratings—rulings against the executive correlate with low presidential ratings.

We offer three plausible interpretations of the consistency we find between public opinion and judicial rulings in executive power claims during periods of crisis or war: (1) the Court, comprised of nine American citizens, is in broad sympathy with, and sincerely shares, the views of the public of which they are a part, particularly in the midst of a perceived threat to the nation or its political system and values; (2) the Justices are strategically calculating the limits of public tolerance, and carefully calibrating the degree to which they believe those limits can be tested or pushed, particularly in crisis (as the sense of crisis diminishes, or as a President loses popularity, the Court is emboldened to exercise more power and push back against the executive’s claims); or (3) where the Justices have to make decisions in the midst of crisis, and with little independent information available to them, there is indeed a tendency to defer or minimize the Court’s role. Over time, as the crisis subsides, the Court’s confidence in its expertise rises and concerns about the risks of a wrong decision may lead the Court to be increasingly willing to push back. Consider September 11, 2001. Barely a week later, before a Joint Session of Congress, the Bush administration asserted that everything had changed. It was impossible to deny that something had changed, but

(White, J., concurring) (contending that, absent clear legislative support, the President cannot successfully request an injunction against the publication of current events, even by arguing that publication would endanger the American war effort in Vietnam); Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 582–83 (1952) (considering whether the President could seize private property when that property was essential to the production of steel needed for the war in Korea); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 312–13, 315 (1936) (considering whether Congress could delegate to the President the authority to impose an arms embargo in the Chaco region of South America); Little v. Barreme, 6 U.S. (2 Cranch) 170, 170 (1804) (considering whether the orders of the President might excuse a violation of the law by a naval officer).

4. See Lee Epstein & Jeffrey A. Segal, Measuring Issue Salience, 44 AM. J. POL. SCI. 66, 72–73 (2000) (discussing cases that were covered on the front page of the New York Times the day after the Court handed down the decisions); see also Lee Epstein, Measuring Issue Salience: List of Salient U.S. Supreme Court Cases (2000), available at http://epstein.law.northwestern.edu/research/saliencecase.pdf.

what exactly had changed, and just what sort of changes in executive power this might require was hard to say. With good reason, the Court was initially reluctant to draw clear and hard lines.\(^6\) And yet, as time moved on it became increasingly obvious that while some things would change, many aspects of the separation of powers and the American constitutional structure could, and would, remain the same. That this lines up with public opinion should come as no surprise. In short, the Court may neither lead nor follow, but it is often consistent with public opinion about the President, the President’s policies, and the credibility of crisis claims.

Regardless of which theory ultimately seems most compelling, we are confident that students of politics and law alike need to recognize that there is great variation within times of crisis and war, and that by insisting on classifying decisions along a simple division of wartime or peacetime one masks important information about the ways in which public opinion and judicial decisionmaking may interact. Instead of simply identifying whether a decision was made during wartime or not (an increasingly difficult line to draw in an era without Declarations of War or formal Armistice agreements), we need to ask: at what stage in a crisis was the decision made, what was the President’s own popularity at that point in the war, what was the public’s perception of the credibility of the threat or emergency, and what was the public’s attitude about the policies the President was urging or enacting?

In Part I of this Article we discuss existing research that examines when and how the Court’s rulings change in times of war. Here we emphasize the need to consider not only the wider range of variables noted above, but we also suggest that these studies suffer from a definitional problem: just when is the nation at war? This has always been a troubling problem,\(^7\) but it is all the more troubling in an era in which wars are increasingly being fought by and against individuals who are members of loosely-organized groups, under no formal military command, who wear no uniforms, and who never have and likely never will sign an international protocol or treaty. If emergency, by definition, is thought to be time-bound, what happens when that time expands significantly and perhaps even indefinitely?

\(^6\) It would be three years after September 11, 2001 before the Supreme Court would issue its first important rulings concerning the war on terror. In Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004), the Court ruled that the Executive could not independently order the detention of American citizens as enemy combatants—however, the Court argued that they could be held, in this case, because the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), implicitly provided the legal authority to do so.

In Part II we examine some of the highest profile challenges to executive power in periods of crisis or war, including key cases that arose during World War II, the Korean War, the Cold War, amidst the crisis of the Iran-hostage taking, and closing with a series of post-9/11 cases concerning assertions of executive power by the Bush administration. We find that where the administration has prevailed, the President and his policies were extremely popular and the crisis was widely perceived to be just that—a legitimate and important crisis. Franklin Roosevelt, for example, was broadly popular when the Court upheld the exclusion and internment of Japanese-American citizens during World War II. Similarly, Ronald Reagan enjoyed strong popular appeal as the Court was asked to certify controversial executive agreements that were used to end the Iran hostage-taking crisis in 1981. By contrast, where the Court has overruled the President, just the opposite was the case: Harry Truman was nearly at the nadir of his popularity when the Court took up the Steel Seizure case, Richard Nixon faced the lowest approval ratings since his inauguration and the Vietnam War was massively unpopular by the time the Court decided

9. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 582-83 (1952).
14. See infra Part II.
18. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
20. Sixty-one percent of respondents replied affirmatively to the question, "In view of the developments since we entered the fighting in Vietnam, do you think the U.S. made a mistake sending
the *Pentagon Papers* case in 1971, and Nixon's popularity had dropped to just 24% when the Court ruled against his executive privilege claims in *United States v. Nixon.*

Finally, four key cases during the Bush administration offer something even more compelling: a timeline. As the Bush administration aged, it went from record public popularity in the shadow of the attacks on New York and Washington to historic lows years later, with no end in sight to U.S. military engagement in Iraq or Afghanistan. The four cases we consider reflect the steady erosion in popular support for the President and a steady relaxation of the public's perception of imminent crisis: As President Bush (and his policies) became increasingly unpopular, so too did the Court's rulings become increasingly assertive and even strident.

Does this suggest that the Supreme Court merely follows the polls? There seems to be no credible evidence to suggest that the Justices determine their votes based on popular opinion. Indeed, far from slavishly following public opinion, there is research that suggests the Court has some ability to move public opinion through its decisions and rulings by serving as something of a "republican schoolmaster," though this is mediated by the salience of the issue and the intensity of public sentiment. The public deference to judicial resolution of disputes over the allocation of power to the other branches may well diminish, however, in times of crisis when the Court may perceive a risk of backlash from a public concerned for national security and favorably inclined toward the executive. And even though the Court may have
some ability to bring public opinion over to its side, the empirical work does not suggest that the Court would be able to win public support for deeply unpopular rulings, particularly in the midst of what is widely perceived to be a national crisis—a scenario that is suggested by an alternative reading of the Court’s ruling in Korematsu which we will discuss below.\textsuperscript{30}

Ultimately, we need to recognize that the Justices are human, that they share many of the hopes, dreams and aspirations of their fellow citizens and certainly of the nation’s elite. Their decisions and the arguments they offer reflect their own experiences just as they reflect their legal judgment. Chief Justice Rehnquist, writing about the Steel Seizure case, had no qualms in saying that “it is all but impossible to conceive of judges who are in any respect normal human beings who are not affected by public opinion.”\textsuperscript{31} But what does it mean to suggest that members of the Court are “affected” by public opinion? And in what ways might this matter?

It appears that the Court’s decisions in cases confronting claims for executive power deployed in wartime or in the midst of an asserted foreign policy crisis are quite consistent with the courts of public opinion.\textsuperscript{32} How we might explain this consistency will be the subject of Part III of this paper: Is this a strategic anti-majoritarian court,\textsuperscript{33} fearful of its tenuous grasp on power and moving cautiously so as not to exceed public tolerance or offer the President an opportunity to ignore its decisions? One that is attempting to maximize opportunities, using its various weapons of standing, mootness, ripeness and, above all, its power to control its own docket\textsuperscript{34} to advance its ideological, partisan or jurisprudential preferences? Or is this a sincere Court, nine individual citizens whose own views of the crisis and of the leadership being exercised by the government are consistent with the views of their fellow citizens? Finally, we cannot dismiss the possibility that the apparent relationship between public opinion and court rulings might be attributed to common-cause spuriousness—the notion that those cases in


\textsuperscript{30}. See infra Part II.A.


\textsuperscript{32}. See infra Part II.


\textsuperscript{34}. See generally H.W. Perry, Jr., \textit{Deciding To Decide: Agenda Setting in the United States Supreme Court} 5-7 (1991) (discussing the agenda-setting role of the Court).
which the Court ruled against the President can be largely explained by factors other than public opinion. Perhaps by the time these cases were developed and ripe for decision, the crisis had passed, the conflict had moved beyond the precise point raised by the case, and a need to entertain novel claims for executive power might simply have passed by. That the decision was consistent with public opinion would be coincidental—interesting, to be sure, but not particularly useful in forming broader theories about the relationship between the Court and public opinion.

What the evidence presented here does clearly show, we hope, is that we need a more nuanced understanding of the far too crude categories of time that have been used before now in considering the relationship between public opinion and the Court. It is not enough to simply count votes and draw sharp lines between wartime and peacetime time—we need to take account of the subtle differences of timing, and of the related, subtle differences within judicial decisions themselves, paying close attention not only to wins and losses, but to the arguments and reasoning that lie behind those votes.

I. RETHINKING THE BOUNDARIES OF WAR AND PEACE

By no means is this the first effort to examine what, if any, difference war and emergency might make when it comes to Supreme Court decisionmaking. America’s periodic focus on the role of courts and law in foreign affairs, war, and emergency powers, spiked dramatically in the weeks, and now years, since September 11, 2001, largely thanks to the central role played by lawyers, legal argument and judicial decisions during the Bush administration. And in the past few


years, a number of important studies have been published, none more empirically thorough or rigorous than that written by Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal.\(^3\) Epstein and her co-authors set out to demonstrate that the Supreme Court's rulings in civil liberties cases during wartime tend to be measurably less favorable to the rights of individuals in all cases except those that explicitly and specifically concern the war itself.\(^3\) Looking at criminal cases that were decided by the courts of appeals during wartimes, Tom Clark reinforces Epstein and her co-authors' findings by showing that appellate judges are also less enamored of the rights of criminal defendants in times of war.\(^3\) And in an earlier study, William Howell found no evidence that "either the frequency of court challenges or the propensity of judges to side with the President systematically varies according to whether the country is at war."\(^4\)

These are important findings, and they certainly bear on the question of public opinion and the courts in wartime. But there is an important problem that these studies—and virtually all such studies—share. They insist (as methodologically they must) on structuring their cases into two and only two basic categories: those that arise in wartime and those that do not.

Of course it makes perfect sense to divide cases into wartime or peacetime, but there are two very significant problems with doing so, problems that will become starkly apparent as we turn to examine the variations in public opinion within these periods. First, when does a war begin and when does it end? Did World War II begin with the bombing of Pearl Harbor on December 7, 1941, or did it begin with the passage of the Lend-Lease Act in March 1941?\(^4\) Or did it begin with the fall of

37. See Epstein et al., supra note 2.
38. Id. at 1.
39. See Clark, supra note 2, at 397.
41. The Lend-Lease Agreements were signed on February 23, 1942, requiring the United States to provide war materials to the United Kingdom on a lease basis. See Avalon Project, A Decade of American Foreign Policy 1941-1949: Master Lend-Lease Agreement, http://avalon.law.yale.edu/
France on June 14, 1940?42 Or maybe it began with the Nazi invasion of Poland (September 1, 1939) or the burning of the Reichstag in February 1933?43

Identifying the conclusion of wars may be easier in a historical sense—an armistice or treaty definitively ends armed hostilities between belligerents—but the availability of dates such as August 14, 194544 or April 30, 197545 may not be empirically satisfying as the dividing line between "wartime" and "peacetime" cases in the Supreme Court. Consider Korematsu v. United States.46 Indeed, there is no question that the United States was very much at war with Japan in December 1944 when the Korematsu decision was announced.47 On the other hand, by that time it was also quite clear that any real threat of a Japanese invasion of the United States was no longer a credible concern.48 General Douglas MacArthur had fulfilled his pledge to return to the Philippines just two months earlier, on October 20, 1944.49 When the massive Battle of Leyte Gulf concluded days later, the Japanese Imperial Navy had been dealt a terrific defeat which would pave the way for the liberation of the Philippines and the beginning of the end of the Pacific war.50 Indeed, public opinion polling had already begun to probe American attitudes about how to deal with a post-war Japan. A National Opinion Research Center (NORC) Foreign Affairs Survey administered in February 1944 asked: "If Japan is made to give up all the land she has taken, and if Hirohito and the other Japanese leaders are punished, should we try to make the Japanese people pay for our cost of this war, or not?"51

By September 1944, a Gallup poll asked respondents about their

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46. 323 U.S. 214 (1944).
47. Korematsu was argued on Wednesday, October 11, 1944, and the decision was handed down on Monday, December 18, 1944. Id. at 214. The United States declared war on Japan on December 8, 1941, and the articles of surrender by the Empire of Japan were signed on September 2, 1945, nearly a year after the Korematsu decision was handed down. John W. Dower, Embracing Defeat: Japan in the Wake of World War II 40 (1999).
48. See Van der vat, supra note 44, at 343–44.
50. Id. at 88–92; see also van der vat, supra note 44, at 361.
support for the use of poison gas against Japanese cities “if it means an earlier end to the war.”53 Taken together, this evidence argues against the assumption that if a case is heard and decided while the United States is engaged in armed hostilities then national security concerns acutely bear on the disposition of the case. To compare cases decided after the conclusion of a war to those decided before the end (but when the outcome is hardly in doubt) may be to imagine the interposition of a treatment effect where none is operating. This is the comparison that Epstein and her co-authors make.53 Certainly this may have some tractability in looking at civil liberties generally, since far more cases, involving many more Justices, are available from which to compile a robust database. But the larger data set also poses a problem: civil liberties cases involve far more than just questions of the separation of powers. Civil liberties cases include those with wide and deep doctrinal histories and judicial commitments. Voting to support the government in these cases is not a simple matter of the allocation of power among the branches, but it will also concern everything from the protection of religious minorities, to free speech, due process, and equal protection, to name just a few. The larger question of ruling in favor of the government does not pose itself exclusively as that of validating one branch’s activities, but incorporates the Court’s inclinations towards religious minorities, antiwar protestors, and the like.

The frequency and variety of American military actions in the last century further muddy the question of how national concerns affect the Court, a phenomenon that defied simple categorization even before the prospect of an open-ended struggle against terrorism. There has been no time in the twentieth century, Mark Brandon writes, that the United States was “not either at war or engaged in a significant military action.”54 Consequently, he notes, “the period lacks the variation required to establish confidently the effect” of any sort of independent variable that might distinguish judicial behavior in wartime from judicial behavior in non-wartime.55 In contrast, Epstein and her co-authors (as does virtually every other study of the Court’s wartime or crisis-period decision-making) specified dates for World War II, the Korean, Vietnam and Gulf Wars, and the current war in Afghanistan, and added specific dates that covered what they labeled as “major” international conflicts: the Berlin Blockade, the Cuban Missile Crisis, and the Iran-hostage crisis.56 Since they noted the beginning and end of each crisis is information that is “readily available,” they were left “with only one

53. See generally Epstein et al., supra note 2.
54. Brandon, supra note 7, at 1835.
55. Id.
56. Epstein et al., supra note 2, at 46.
task: determining whether the Supreme Court made its decision during a crisis period.\textsuperscript{57}

Brandon’s point is well taken—particularly for the twentieth and twenty-first centuries. If amorphous wars such as the War on Terror are more likely to be the norm than wars defined by declarations and surrenders, then indeed it becomes even more important to begin to think about judicial decisions not against a simply dichotomous standard such as crisis/non-crisis, or war/peace, but rather by asking at what stage of a war or crisis a decision was made. Korematsu certainly would have looked quite different had it come up in March or April of 1942, just months after Pearl Harbor, or after the dropping of the atomic bomb on Hiroshima in August 1945.\textsuperscript{58} What would have been the fate of the Steel Seizure case had it arrived at the Court in September 1950, with American troops backed up against the sea, rather than in May 1952, just a little more than a year before a peace treaty was signed at Panmunjom in July 1953?\textsuperscript{59}

It is not enough simply to separate these cases into wartime and not-wartime, particularly if we are interested in the role of public opinion. Opinion about the war, about the threat to America and Americans, and about those leading the war efforts changed dramatically over the course of these conflicts.\textsuperscript{60} Consider President George W. Bush, whose public approval hit 89\% after 9/11, but bottomed out at 22\% shortly before the election in 2008.\textsuperscript{61} If public opinion matters, we have to consider more than simply whether or not the nation was at war.

William Howell makes clear that timing might very well matter, noting that “the age, popularity, and perceived success of a war may also bear upon the Court’s willingness to overturn assertions of presidential authority.”\textsuperscript{62} And while Tom Clark does take presidential popularity into account in his study of criminal cases at the appellate level, he notes that the pattern he observes “does not seem to extend to non-criminal cases,” adding that “the evidence suggests that exercises of executive discretion are subjected to heightened scrutiny during wartime.”\textsuperscript{63}

\textsuperscript{57} Id. at 47.
\textsuperscript{58} See John Hersey, Hiroshima, NEW YORKER, Aug. 31, 1946, at 15, 15.
\textsuperscript{59} The peace treaty was signed on July 27, 1953. See MAX HASTINGS, THE KOREAN WAR 325 (1987).
\textsuperscript{60} See JOHN MUELLER, WAR, PRESIDENTS AND PUBLIC OPINION 42-65 (1973) (discussing the decline of public support for the Korean and Vietnam Wars as the wars went on).
\textsuperscript{61} See infra Part II.G and p. 1486, fig.3.
\textsuperscript{62} Howell, Wartime Judgments, supra note 40, at 1781 n.13.
\textsuperscript{63} Clark, supra note 2, at 416.
II. CHALLENGES TO EXECUTIVE POWER IN PERIODS OF CRISIS

A. KOREMATSU/ THE JAPANESE-AMERICAN INTERNMENT CASE

Korematsu v. United States certainly would seem to provide a sharp example of a wartime case in which the Court sided with the executive and against claims of individual liberty.64 At a time when the nation was nearly uniformly supportive of the executive's war policy, the President himself was stunningly popular,65 even as millions of American troops stood in harm's way across the globe.66 Indeed, had this decision been made a year earlier—or a year later—very different results might reasonably have been expected. A year earlier, the three dissents might well have been suppressed or even changed to concurrences, as happened with the Murphy and Douglas opinions in Hirabayashi v. United States, a case decided eighteen months earlier on June 21, 1943.67 Frankfurter and Black argued strenuously with Douglas, while “[t]he combination of pressures from Reed and Frankfurter, and perhaps not wanting to be the lone dissenter in wartime, eventually convinced Murphy to change his opinion from a dissent to concurrence.”68

Justice Jackson, in his Korematsu dissent, may well have been right in thinking that had the case simply been avoided or deferred for another six months, it would have been far easier for the Court to issue an important statement against racial discrimination—or at least avoid validating “the principle of racial discrimination in criminal procedure” and the legitimacy of “transplanting American citizens.”69 If we look at a third related case in this series, Duncan v. Kahanamoku, which was decided on February 25, 1946,70 the Court indeed “rediscovered” the case of Ex parte Milligan71 and, by a vote of six-to-two, ruled that the Hawaiian Organic Act did not authorize the government to close the civilian courts and try civilians by military commission.72 This seems to confirm Edward Corwin's argument that in times of total war “the Court necessarily loses some part of its normal freedom of decision and becomes assimilated like the rest of society, to the mechanism of the

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64. 323 U.S. 214 (1944).
65. See supra note 15 and accompanying text.
67. 320 U.S. 81, 105 (1943) (holding that the application of curfews against Japanese-Americans by presidential order was Constitutional).
69. 323 U.S. at 246.
70. 327 U.S. 304, 325 (1946).
71. 71 U.S. (4 Wall.) 2 (1866) (holding that the trial of citizens in military courts is unconstitutional when civilian courts are operational).
72. Kahanamoku, 327 U.S. at 325.
national defense."  

As we now know, and every Justice on the Court at the time of Korematsu should then have known, the direct threat of national invasion by Japan had lost real credibility by December 1944. Yet their votes in these three cases quite nicely track public opinion and widely held perceptions (even if not true) about the credibility of the threat, as well as the deeply-held and bitter animosity felt about Japan and the Japanese people, including Japanese-Americans. Indeed, World War II is probably the most powerful example of a crisis in which the members of the Court understood themselves to be nine American citizens who were no more or less able to free themselves from society (and its attitudes) than the broader public. The members of the Supreme Court were not ready to lead public opinion in this case, nor do they seem to have been merely bowing to its pressure. What seems far more plausible is that they were as swept up in the war and its passions—particularly its anti-Japanese attitudes—as were their fellow citizens. A Gallup Poll in December 1942 found only 35% of Americans in favor of allowing Japanese-Americans to return to the West Coast even after the war. Six months later, in June 1943, respondents were asked:

Which of the following statements comes closest to describing how you feel, on the whole, about the people who live in . . . Japan? 

- 57% agreed that “Japanese people will always want to go to war to make themselves as powerful as possible.”
- 25% agreed that “[t]he Japanese people may not like war, but they have shown that they are too easily led into war by powerful leaders.”
- But only 11% agreed that “[t]he Japanese people do not like war. If they could have the same chance as people in other countries, they would become good citizens of the world.”

When the same question was asked about the German people—against whom the United States was then fighting for the second time in less than thirty years—only 32% imputed permanent belligerence to their European adversary, while 31% agreed that the Germans “do not

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73. Grossman, supra note 68, at 662 (quoting Edward S. Corwin, Total War and the Constitution 177 (1947)).  
74. See supra notes 48–51 and accompanying text.  
75. See infra notes 79–82, 84 and accompanying text.  
76. See infra notes 88–94 and accompanying text.  
77. See id.  
78. Gallup Org., Gallup Poll (Dec. 4–9, 1942), available at iPOLL Databank, supra note 15.  
80. Id.  
81. Id.  
82. Id.
like war."\(^{83}\)

The specter of loyalty also loomed large. In September 1944, 61% said that “white people” should get job preference over “Japanese living in the United States” after the war was over, and another 21% conditioned equal access to jobs on the loyalty of individual Japanese-Americans, with only 16% supporting equal opportunity.\(^{84}\)

Justice Hugo Black was said to have been “hopping mad” when he was assigned the duty of writing the majority opinion in Korematsu because he feared “it might compromise his reputation as a civil libertarian.”\(^{85}\) However, he never expressed any regret about his ruling, even long after the war had ended.\(^{86}\) In an interview in 1967, Black said:

I would do precisely the same thing today, in any part of the country . . . . \([T]h ey all look alike to a person not a Jap. Had they attacked our shores you’d have a large number fighting with the Japanese troops. And a lot of innocent Japanese Americans would have been shot in the panic. Under the circumstances I saw nothing wrong in moving them away from the danger area.\(^{87}\)

While racist feelings, reports of war atrocities, and the effect of years of propaganda no doubt took their toll, it is equally important to remember that the Justices were themselves citizens devoted to their nation’s war aims. The day after Pearl Harbor, Justice Frankfurter apparently said to his law clerk, Philip Elman, “Everything has changed and I am going to war.”\(^{88}\) During the war, Frankfurter frequently advised the President, helping to draft the Lend-Lease Act.\(^{89}\) Justice James Byrnes resigned from the Court in 1942 to head President

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83. Id.
85. Grossman, supra note 68, at 678.
86. Id.
87. Id. at 686. Note, though, that however troubled by public backlash against a decision favoring Japanese-Americans, a far-sighted Court might have anticipated the gradual improvement in attitudes towards both the Japanese people and Japanese-Americans. Indeed, opinion was undergoing a rapid change in the years after Korematsu. Fifty-six percent of respondents in a September 1945 poll believed that “the majority” of Japanese were “naturally cruel and brutal, if they have the chance.” Roper/Fortune Survey (Sept. 24–Oct. 1, 1945), available at iPOL L Databank, supra note 15. By November 1946, 54% said that they believed that it would be possible to “re-educate the Japanese people to a peaceful way of life.” Nat’l Opinion Research Ctr., Foreign Affairs Survey (Nov. 1946), available at iPOL L Databank, supra note 15. Another National Opinion Research Center survey conducted for the United Nations earlier in 1946 found that 50% of respondents believed that “the average Japanese person who lives in this country” was loyal to the American government, with only 25% saying they believed such a person disloyal. Nat’l Opinion Research Ctr., Minorities Survey, United Nations (May 1946), available at iPOL L Databank, supra note 15. And by 1953, only 14% said that their feelings towards the Japanese people were “unfriendly.” Gallup Org., Gallup Poll (Feb. 1–5, 1953), available at iPOL L Databank, supra note 15.
89. Grossman, supra note 68, at 673.
Roosevelt’s Office of Economic Stabilization. Worried about a negative reaction from American Catholics about plans to provide aid to the Soviet Union, President Roosevelt asked Justice Murphy (the Court’s only Catholic member at the time) to defend the administration’s plans in a speech before a Knights of Columbus national convention. Murphy also dodged a legislative restriction and found a way to enlist in the Army during a Court recess in 1942. Justice Roberts would head up a presidential commission to investigate the failures at Pearl Harbor and, of course, after the war, Justice Jackson would agree to serve as the Chief Prosecutor at the Nuremberg War Crimes tribunal.

“In theory,” Joel Grossman writes, “the Supreme Court may be an ivory tower, the Justices detached and objective agents of the law. What we find here, however, is a Court charged with assessing the means to achieve ends to which all the Justices were intensely committed.”

B. Youngstown/Steel Seizure

Korematsu represents a case decided in the midst of a popular war, and at the peak of popularity for the President who was leading that war effort. Youngstown Sheet & Tube v. Sawyer (Steel Seizure) was its mirror image, occurring against a backdrop of deep unpopularity for Harry Truman. In fourteen polls taken between February 1951 and May 1952, just 25% of the public approved of Truman, and the President failed to touch the 30% mark in even a single poll. The Youngstown debacle would not help: in seven polls taken after the Youngstown ruling, Truman would average just 31% approval, scarcely an improvement.

While the Youngstown case might well have been decided just as it was regardless of Truman’s personal popularity, the fact remains that the case was handed down at a time when the President’s personal popularity was near its nadir and amid growing public doubts the administration’s handling of the war.

91. Urofsky, supra note 88, at 3.
92. Id.
93. Id.
94. Grossman, supra note 68, at 673.
95. 343 U.S. 579 (1952).
96. See Am. Presidency Project, Presidential Popularity Over Time, supra note 17.
97. Id.
98. Id.
Had the case reached the Court two years earlier, when Congress was broadly supportive of the need to fight in Korea and when the President’s own poll ratings were still well above 40%, Neal Devins and Louis Fisher argue, “judges—leery to hinder prosecution of the war—might have sidestepped a judicial resolution of the issue” and, at the very least, allowed the seizure to continue as the litigation moved forward. Rather than turning this into a direct constitutional challenge, Chief Justice Rehnquist would later write that the courts could have accepted the argument that “an injunction would not lie against the government even if the seizure was violative of the Constitution” since there was no clear evidence that the steel firms were likely to endure any lasting damage. “[T]he steel companies would not be irreparably harmed by the seizure if they were able to get a judgment [later] for money damages based on the value of the property seized,” which indeed would appear to have been quite plausible.

But it was not 1950. It was 1952, and the public was unhappy with the President and how the war was being conducted. The President

100. Rehnquist, supra note 31, at 756.
101. Id.
102. See Am. Presidency Project, Presidential Popularity Over Time, supra note 17. A May 1952
himself initially cast the case not as a dispute over economics or domestic policy, but, quite explicitly, as a test of a novel claim of executive power.\textsuperscript{103} Asked at a news conference a week after the seizure if the same authority to seize the mills might also allow a president "under your inherent powers" to "seize the newspapers and/or the radio stations," Truman was clear: "Under similar circumstances the President has to act for whatever is for the best of the country. That's the answer to your question."\textsuperscript{104} At his next news conference, the President reinforced his claim, asserting that the President "has very great inherent powers to meet great national emergencies."\textsuperscript{105} Newspaper editorial writers, unsurprisingly, were aghast and hardly rallied around the President.\textsuperscript{106} As Devins and Fisher reported, the \textit{New York Times} condemned the President for advocating "a new regime of government by executive decree," and words like "dictatorial powers," "dangerous," and "high-handed" appeared with frequency.\textsuperscript{107} The \textit{Detroit Free Press}, they note, warned that unless Truman were stopped, "our whole constitutional system is doomed to destruction."\textsuperscript{108}

The President quickly realized that his rhetoric was not helping and began to soften the claims.\textsuperscript{109} Unfortunately, he was not well served by his Assistant Attorney General, Holmes Baldridge, head of the Justice Department's Civil Division, who argued the case in district court before Judge David Pine.\textsuperscript{110} Baldridge made broad claims for exclusive executive power.\textsuperscript{111} While his arguments may have been "plausible, or at least an interesting legal argument in the abstract," Chief Justice Rehnquist would write, "it was not the sort of argument which should have been used by the government in a case on which there was as much public attention focused as this one."\textsuperscript{112}

Meeting in New York just days after the district court hearings, the American Newspaper Publishers Association voted to censure the President's claim with just four out of the five hundred individuals

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\footnote{poll by the Roper Organization for the National Broadcasting Company found 54\% agreed with the statement that the U.S. should "[s]top fooling around and do whatever is necessary to knock the Communists out of Korea once and for all," and 13\% said that America should "pull out of Korea as quickly as we can and let them settle their own problems." Nat'l Broad. Co., Roper Commercial Survey (May 1952), \textit{available at iPOLL Databank, supra note 15.}}
\footnote{\textsc{David McCullough}, \textit{Truman} 896 (1992).}
\footnote{See Devins & Fisher, \textit{supra} note 99, at 67 (internal citation omitted).}
\footnote{\textsc{Id.}}
\footnote{\textsc{Id.} at 68.}
\footnote{\textsc{Id.}}
\footnote{\textsc{Id.}}
\footnote{\textsc{Id.}}
\footnote{\textsc{Id.}}
\footnote{\textsc{Id.}}
\footnote{See \textsc{Alan F. Westin}, \textit{The Anatomy of a Constitutional Law Case} 66–72 (1958).}
\footnote{See Rehnquist, \textit{supra} note 31, at 759.}
\footnote{See Joseph Pauill, \textit{U.S. Argues President Is Above Courts}, \textit{Wash. Post}, Apr. 25, 1952, at 1; see also \textsc{Westin, supra note 109, at 66–73.}}
\footnote{Rehnquist, \textit{supra} note 31, at 759.}
\end{footnotes}
present voting to support the President.113

U.S. District Court Judge David Pine was incensed and imposed an immediate injunction against the Secretary of Commerce (Sawyer)—and thus against the President of the United States.114 The mill owners and the government both agreed to move the case directly to the U.S. Supreme Court, which then agreed to hear it under an expedited process.115 Had Judge Pine denied the immediate injunction, Chief Justice Rehnquist writes, the case “would have had to be argued and decided by the court of appeals before it could even be presented to the Supreme Court, and in that event the Supreme Court would not have reached the case for oral argument until at least the fall of 1952.”116 By that time, the economic costs to the mill owners likely would have been such that they would have reached a settlement.117 But it was not to be. Truman turned the case into a test of a claim for executive power in wartime; Holmes Baldrige confirmed that position, and Judge Pine issued his injunction. The case bypassed the court of appeals and moved to the Supreme Court in the midst of a growing firestorm of negative elite118 and public opinion.119

The Supreme Court, though divided in its reasoning, was shockingly consistent in its ruling.120 Though four of the nine Justices had been appointed by Truman himself (Vinson, Burton, Clark, and Minton) and the remaining (Black, Reed, Frankfurter, Douglas, and Jackson) had been appointed by Franklin Roosevelt, only three would see fit to file dissents in support of the President’s claims for power in wartime (Vinson, Minton and Reed).121

The Supreme Court was by no means knuckling under to public pressure, nor did the Justices appear to be moving public opinion, but their decision most assuredly was consistent and consonant with that opinion. Just before the Court’s decision, a Gallup Poll that sampled opinions between April 27 and May 2, 1952, found that 43% of respondents opposed the seizure of the mills, with just 35% offering their endorsement for the President’s actions.122 Shortly after the ruling, on the broader question of whether the President “should take whatever action

113. Id. at 760.
114. Id.
115. Id. at 762.
116. Id. at 766.
117. Id. at 758.
119. See infra notes 122–23.
120. See Devins & Fisher, supra note 99, at 71; see also WESTIN, supra note 109, at 66–73.
121. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 667 (1952) (Vinson, C.J., dissenting, joined by Reed, J., and Minton, J.); see WESTIN, supra note 109, at 130–132 (explaining who appointed which judges).
he feels is best for the country, say in a nationwide strike in an essential industry . . . [or] he should follow the laws passed by Congress,” 68% said that the President should follow the laws, and only 25% were willing to endorse executive power.123 These results certainly do not suggest the Court was following public opinion, nor was it dramatically turning the tide of that opinion. Instead, the Justices were once again expressing judgment consistent with public opinion, putting a slightly different spin on the Court as “republican schoolmaster”124 and the Justices’ role as “teachers in a vital national seminar.”125

C. COLD WAR CASES

When Republicans attacked President Truman in 1948, arguing that his fierce anti-Communist policy overseas had not been matched by equal vigilance in fighting domestic Communism, the administration employed the Smith Act to charge members of the U.S. Communist Party with knowing or willful advocacy of the overthrow or destruction of the government of the United States by force or violence.126 The Justice Department secured indictments against members of the U.S. Communist Party’s National Board of Directors on July 20, 1948—barely a month after the start of the Berlin Blockade.127 The Party’s Secretary-General, Eugene Dennis, along with eleven other Party leaders were convicted in federal district court in 1949 and the conviction was unanimously upheld by the Court of Appeals for the Second Circuit in an opinion by Judge Learned Hand.128

Like any other war, the Cold War was not static. Between the district court’s ruling in United States v. Dennis and the ruling on that same case by the court of appeals, Senator Joseph McCarthy would stand before the Republican Women’s Club at the McClure Hotel in Wheeling, West Virginia, and clutching some papers in his hand, declare that he had a list of 205 names of communists in the State Department.129

Dennis reached the Supreme Court for oral argument on December 1, 1950, and a six-to-two decision affirming the constitutionality of the

124. Lerner, supra note 28, at 127.
126. Alien Registration Act (Smith Act) of 1940, 18 U.S.C. § 2385 (2006); see also McCulloch, supra note 103, at 552.
Smith Act handed down on June 4, 1951.\textsuperscript{130} Dennis gave the government a clear constitutional green light to prosecute known and suspected Communists. Chief Justice Vinson wrote in his opinion for the Court:

> Obviously, the [clear and present danger test] cannot mean that before the Government may act, it must wait until the \textit{putsch} is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.\textsuperscript{131}

Truman's popularity was nearly at its nadir at this point, but the anti-Communist policy was anything but unpopular, and with the Berlin Blockade, the rapid fall of the iron curtain across Eastern Europe, and the increasingly incessant drumbeat of anti-Communist rhetoric in American politics, the Court's decision was most assuredly consistent with public opinion.\textsuperscript{132}

Senator McCarthy's speech in Wheeling began his vertiginous run in the spotlight. His allegations of Communist infiltration of the State Department were rejected in an investigation and report by a subcommittee of the Senate Foreign Relations Committee.\textsuperscript{133} However, McCarthy threw his weight against the re-election bid of the subcommittee's Democratic chairman, Millard Tydings of Maryland, who lost.\textsuperscript{134} In 1952, another McCarthy antagonist, Senator William Benton, met a similar fate at the hands of Connecticut voters.\textsuperscript{135} The available evidence would show that McCarthy's intervention was probably not determinative in the Benton defeat,\textsuperscript{136} but these episodes and McCarthy's national reputation attached to him an aura of invincibility. In 1954, Joseph McCarthy reached what would be the peak of his influence and power, before rapidly crashing in disgrace. A January 1954 Gallup Poll found 50% of respondents held a favorable opinion of McCarthy versus 29% who held an unfavorable opinion.\textsuperscript{137} Within the year, his attack on the U.S. Army would prove to break McCarthy's hold on public

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  \item[130.] 341 U.S. 494.
  \item[131.] \textit{Id.} at 509.
  \item[132.] In late 1950, a poll found that 76% of respondents disagreed with the statement, "American Communists should have the same rights as Democrats, Republicans, or anyone else." Nat'l Opinion Research Ctr., Attitudes Toward Jews and Communists Poll (Nov. 1950), \textit{available at} iPOLL Databank, \textit{supra} note 15.
  \item[133.] S. Rep. No. 81-2108, at 151–52 (2d Sess. 1950) ("It is, of course, apparent that [McCarthy's] charges of Communist infiltration of and influence upon the State Department are false.").
  \item[134.] \textit{Maryland Senatorial Election of 1950: Hearings Before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin.}, 82nd Cong. 5 (1951).
  \item[137.] \textit{Id.} at 252 n.4.
\end{itemize}
\end{footnotesize}
A May 1954 Gallup poll found that McCarthy's favorable rating had dropped to 35%, while his unfavorable rating rose to 49%. On December 2, 1954, the Senate voted to censure McCarthy. Despite this rebuke and McCarthy's self-destructive descent to the grave (his alcoholism became increasingly severe and almost certainly produced his death, on May 2, 1957, at age forty-six), McCarthy retained strong backing in certain circles.

By the middle of the decade, with the Korean armistice signed, McCarthy broken politically and physically, and a tentative meeting between President Eisenhower and the Soviet leadership at the 1955 Geneva Summit, the Supreme Court cautiously began to rule against the government in some key cases. In 1955, the Court ordered the federal government's loyalty review board to withdraw its order removing Yale Professor John Peters from eligibility for federal employment. Though the Court declined to reach the constitutional issue, a new attitude (and a new Court) was taking over. The next year, in Cole v. Young, the Supreme Court insisted on a far narrower definition of national security to be used in employment cases. In a statutory interpretation case, the Court held that "national security" had to actually concern the safety of the nation and not be a simple catch-all for general welfare. Specific evidence would be required to show that the nation's safety was imperiled.

Public opinion from this era shows that Americans staunchly supported efforts to expose and remove Communists in government, as well as expressing a fairly high tolerance for false accusations. A survey conducted by the National Opinion Research Center in January 1956 asked respondents whether it was "more important to find out all the Communists in this country, even if some innocent people are accused" or "to protect people who might be innocent, even if some Communists

138. See id.
139. Id.
141. OSHINSKY, supra note 129, at 503.
144. Hobby, 349 U.S. at 349.
145. Earl Warren was nominated to the Supreme Court on January 11, 1954; John Harlan was nominated on November 9, 1954, though no action was taken, and he was renominated by President Eisenhower on January 10, 1955; William Brennan was nominated on January 14, 1957; and Charles Whittaker was nominated on March 2, 1957. See United States Senate, Supreme Court Nominations, present-1789, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited June 24, 2010).
146. 351 U.S. at 544-48.
147. Id. at 551-56.
148. Id.
are not found out?" Sixty-four percent of the public favored finding Communists, versus only 30% who said that protecting innocent people was more important.

Attitudes towards Congress's anti-Communist probes initially rejected arguments that the investigating bodies were out of control. An Opinion Research Corporation poll conducted in January 1954 found that 64% of respondents disagreed with a statement, "Congressional investigations are stirring up hysterical fear and suspicion that is doing more damage to democracy than the communists in this country." Only 22% agreed with the statement. In the same poll, 58% of those who had heard about the congressional investigations said that "proper care" had been taken to "protect the rights of those asked to testify." As the Army-McCarthy hearings in the spring of 1954 tarnished McCarthy's reputation and exposed the bullying tactics used in the earlier anti-Communist hearings, public opinion shifted away from trusting Congress as the preferred branch in uncovering Communists. While 38% of respondents said that congressional committees should "continue to investigate communists"—as opposed to the 43% who believed that this job should be left to the Federal Bureau of Investigation (FBI) and Department of Justice (DOJ)—by June 1954 only 30% of the sample believed that Congress should continue to investigate. Fully 57% wanted the job handled entirely by the FBI and DOJ.

While much of this had to do with McCarthy, the FBI and its director (who registered a 78% favorability rating in the December 1953 Gallup Poll) occupied an important role in the public consciousness. A large survey on "Communism, Conformity and Civil Liberties" conducted jointly by Gallup and the National Opinion Research Center in May 1954 asked respondents whether "[i]f J. Edgar Hoover were to say that the FBI has most of the American Communists under its eye, would you feel pretty sure it was true, or wouldn't you?" Sixty-four percent said that they would believe Hoover, against 27% who said they would feel Hoover's assessment was untrue. In the same study, only

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150. Id.
152. Id.
153. Id.
156. Id.
157. Id.
159. Id.
48% said that they would accept on faith a statement from President Eisenhower that "there no longer is any danger from the Communists within the government." 160

As the decade progressed, a gap opened between anti-Communist sentiment and a more objective understanding of the threat posed by Communists in America. In 1954 and 1955, overwhelming majorities (75% 161 and 67% 162) of those polled said that the Eisenhower administration should increase its efforts to "investigate Communists and subversives in America." 163 At the same time, fewer than one-in-five said the administration was doing a poor job at "cleaning Communists out of government." 164 Without very much initiative from the administration to satisfy the public's evident demand for more aggressive pursuit of subversives, a new sample in January 1957 would find opinion essentially unchanged: only 14% thought Eisenhower was doing a poor job removing Communists from government versus 31% who said that the administration was doing a "very good" job. 165 Did this mean that the Second Red Scare—in the sense of a potentially manipulable fear in the mass public—was over? A few months later, the Court set out on a path that would answer this very question.

On June 3, 1957, in Jencks v. United States, the Court threw out the conviction of a New Mexico labor activist on the grounds that during his trial, Jencks had been unfairly denied access to reports filed with the FBI by two undercover agents whose testimony comprised the bulk of the government's case. 166 This ruling sowed fear within the FBI and Congress that accused Communists would be able to fully review the files produced against them, uncovering informants and revealing the methods used to investigate alleged subversives. 167 One writer depicts the political reaction to the Court's ruling in terms consonant with a sustained backlash,

In the press, and overwhelmingly in Congress, there resounded a call to reverse Jencks, which was then considered by some as a "dire threat to the American way of life." Senators and congressmen appeared to trip over each other in the rush to denounce the Court and to demand wide-ranging, immediate remedial legislation. To the litany of the anti-

160. Id.
164. Id.
Court coalition was added the blasphemy of Communists and other criminals having access to FBI files.  

While legislators loudly denounced *Jencks*, the bill they produced actually closely mirrored the Court’s opinion.  

Congress retained the principle that a court’s denial of evidence to the defendant constituted reversible error, but stipulated that access to documents be limited to those related to the evidence actually presented at trial. Thus, the government eliminated the possibility of what Senate minority leader Everett M. Dirksen called “unrestrained fishing expeditions” into the FBI’s files and prevented the government from dropping cases against defendants where release of certain documents might be unfavorable to government interests.  

Two weeks after the *Jencks* ruling was announced, on June 17, 1957 (a day that would come to be known as “Red Monday”), the Court handed down four significant rulings against the government in anti-Communist prosecutions. In *Yates v. United States*, the Court returned to the Smith Act and significantly modified the earlier ruling in *Dennis*. Making a clear distinction between advocacy of action and advocacy of belief, the Court effectively gutted the Smith Act. In *Watkins v. United States*, the Court threw out a witness’s conviction for contempt of Congress, ruling that the House Un-American Activities Committee had erred by failing to indicate to the witness how the questions being asked related to legislative business. In a similar fashion, *Sweezy v. New Hampshire* struck down a New Hampshire law directing the state’s Attorney General to investigate the presence of “subversive organizations” and “subversive persons.” Though speculating that there did not exist “a state interest [that] would justify infringement” of the rights to political expression and association, the Court ruled on narrower grounds that the Attorney General, as an executive officer, could not validly carry out the information-gathering function of the

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168. *Id.* at 147.  
170. *Id.*  
172. *Id.*  
174. 354 U.S. at 321 (adding an additional requirement to the general endorsement of government action against aggressors attempting to indoctrinate citizens in *Dennis* that the indoctrination not be “remote from concrete action”).  
175. See Powe, *supra* note 173, at 94–95.  
178. *Id.* at 251.
James Reston saw the Court moving in a new direction, writing:

That the court is now playing a more powerful role on the most controversial issues of the day is generally assumed. It is not throwing out legislation passed by the Congress...but it is asserting that the Legislative and Executive Branches of the Government and the lower courts must be more sensitive to procedures that may affect a citizen’s liberties or good name.

The Cold War, to be sure, was far from over, and the nation was hardly willing to abandon its war on Communism and Communists, but the Court, again, appeared to be maintaining consistency with—and perhaps even slightly leading—public opinion. The Court’s actions in Jencks and on Red Monday did not appear to spill over into increased skepticism about the Eisenhower administration’s performance in its anti-Communist efforts. Indeed, on the “cleaning Communists out of government” benchmark which we have already discussed, only 16% of the public said that the administration was doing a poor job. This does not speak to whether Americans distinguished between the Court and other branches in their stances towards the Communist threat, of course, and this possibility deserves further examination. But it would be our conjecture at this point that the Court was not greatly damaged, and that given the passions involved, it had actually acted very shrewdly to wait as it had before weighing in against the conduct of the 1950s-era security and loyalty apparatus.

Was the Red Scare “wartime”? Epstein and her co-authors include the Berlin Blockade and the Cuban Missile Crisis as international crises that should be considered a broader category of wartime or crisis, but is it the case that the period between the Berlin Blockade and the Cuban Missile Crisis were ordinary or peaceful times? Kim Lane Scheppele makes clear that it is more appropriate to think of the Cold War as a far longer event, one lasting essentially from the fall of Berlin in April 1945 to the fall of the Berlin Wall in November 1989. The Cold War triggered the institution of a crisis government unlike any that had been experienced in earlier crises (the Civil War, World War I, the Great Depression and the World War II). Those “had been imagined to be of limited duration,” and the serious constitutional violations that might have taken place were tolerated by many in part thanks to the confidence

179. Id. at 252.
180. James Reston, Judiciary Seen as Setting Limits on Other Branches, N.Y. Times, June 18, 1957, at 1.
182. See Epstein et al., supra note 2, at 46.
183. Scheppele, supra note 36, at 1002, 1004-22.
184. Id. at 1015.
that they would eventually be "condemned as being excesses of a particular time, not affecting America's normal constitutional operation or its constitutional aspirations." Not so with the Cold War, which was America's first experience of a crisis that "promised an indefinite future of crises and a perpetual alteration of both separation of powers and individual rights," ushering in "an era of 'permanent emergency' in which the constitutional sacrifices to be made were not clearly temporary or reversible." While the Cold War was far from over, in many ways a corner had been turned in 1957, and the Court's decisions reflected and were consistent with that change.

**Figure 2: President Nixon Job Approval**

![Graph showing President Nixon's approval rating](image)

D. *New York Times v. United States / The Pentagon Papers Case*

Most casual readers think of the *Pentagon Papers* case\(^ {187}\) as a great victory for the freedom of the press.\(^ {188}\) And it was. But it was at least equally significant as a statement on the separation of powers and executive power in wartime. On June 13, 1971, the *New York Times*

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185. *Id.*
186. *Id.*
published what was to be the first in a series of articles that would include extensive excerpts from the multi-volume, secret history of the Vietnam War prepared by Pentagon researchers led by Daniel Ellsberg.\textsuperscript{189} The Nixon administration went directly to court to demand a restraining order to prevent further publication by the Times and the Washington Post which was also preparing its own series.\textsuperscript{190} The U.S. Supreme Court agreed to expedite review, and set the case for immediate oral argument to be held on Saturday, June 26.\textsuperscript{191} Just four days later, the Court handed down a six-to-three ruling denying the restraining order and allowing publication.\textsuperscript{192}

While this was, of course, an important free press case, it is equally a case about executive power in wartime. In 1971, the war in Vietnam was very much a full-scale military effort (more than 250,000 American troops were in uniform and deployed to the Vietnam theater at that point\textsuperscript{193}), and both the administration as well as the concurrence by Justice White and the dissent by Justice Blackmun focused in large part on the military costs and consequences of publication.\textsuperscript{194} The nine separate opinions in the case ranged from dissents by Chief Justice Burger,\textsuperscript{195} and Justices Harlan\textsuperscript{196} and Blackmun,\textsuperscript{197} who were concerned with the need to balance competing interests of free press and national security, to Justice Black’s ringing defense of a free press as an essential element—perhaps the essential element—to assuring national security.\textsuperscript{198} This was a case in which the Nixon administration asked the Court to trust its claim that release of these historical documents would do lasting and permanent damage to America’s national security in general, and to the security of its forces in the field in particular.\textsuperscript{199} That was a lot to ask for an administration that was rapidly losing popularity and credibility, particularly on any question having to do with the war in Vietnam.\textsuperscript{200}

President Nixon had ordered a secret bombing campaign on the

\textsuperscript{189} See The Pentagon Papers: The Defense Department History of United States Decisionmaking on Vietnam (Michael Gravel ed. 1971) [hereinafter The Pentagon Papers]; see also Rudenstine, supra note 188, at 63–65.

\textsuperscript{190} Rudenstine, supra note 188, at 103.

\textsuperscript{191} The Pentagon Papers, supra note 189, at 263.

\textsuperscript{192} Pentagon Papers, 403 U.S. at 713.

\textsuperscript{193} Brown, supra note 45.

\textsuperscript{194} See Rudenstine, supra note 188, at 266–72, 314–16, 319–20.

\textsuperscript{195} Pentagon Papers, 403 U.S. at 748 (Burger, C.J., dissenting).

\textsuperscript{196} Id. at 752 (Harlan, J., dissenting).

\textsuperscript{197} Id. at 759 (Blackmun, J., dissenting).

\textsuperscript{198} Id. at 914–21 (Black, J., concurring).


formally neutral Kingdom of Cambodia in 1969, and it would be the revelation of that bombing campaign that would spark the protest at Kent State University in Ohio on May 4, 1970. While Nixon condemned the shooting and killing of four protesting students by the Ohio National Guard, he made clear that “when dissent turns to violence it invites tragedy.” In May and early June 1971, the Gallup Poll found Nixon’s job approval rating testing new lows: After polling above 50% for nearly two years after his inauguration, Nixon fell to 40% in a poll conducted May 14-17 and 43% in another poll conducted June 4-7. A poll commissioned by Nixon himself and conducted on June 21, 1971, showed that within a small sample of approximately three hundred people who had heard about the Pentagon Papers controversy, half approved of publication even though three-quarters agreed that the press should withhold from publishing top secret government material “until the government decides publication will not harm national security.” Whatever animus he felt personally towards Daniel Ellsberg and the New York Times, Nixon could take comfort in the fact that less than 10% of the population felt that his Administration was most guilty of wrongdoing in “this whole situation of publishing the secret Pentagon study.” Gallup’s polling a few days later arrived at similar findings to the Nixon poll, finding that those who had heard about or read the articles supported publication by a 58–29% margin. The following month, the case was resolved, and a Harris Poll found that Americans agreed with the Court’s decision by a 43–23% margin.

It is conceivable that the Pentagon Papers case might have come down differently for a Franklin Roosevelt or Ronald Reagan at the peak of popularity, or in the midst of a war that enjoyed broad public support. Though it occurred during downward trends in Nixon’s popularity and a growing mistrust of the government, the Pentagon Papers case was not nearly the clear defeat for Nixon’s position that it would appear to be. This demonstrates the importance of examining not only who won and who lost the case, but closely studying the arguments offered by both

202. Id.
203. See Am. Presidency Project, Presidential Popularity Over Time, supra note 17.
205. Id.
206. Gallup Org., Gallup Poll (June 25–28, 1971), available at iPOLL Databank, supra note 15. The survey asked respondents: “In your opinion, did the newspapers do the right thing or the wrong thing in publishing these articles?” Id.
207. Louis Harris & Assoc., Harris Survey (July 1971), available at iPOLL Databank, supra note 15. In response to the question, “Do you agree or disagree with the decision of the U.S. Supreme Court” in Pentagon Papers, 43% of respondents agreed with the decision, 23% disagreed, and 34% were undecided. Id.
sides as well. It was a defeat for an unpopular President and a policy that had lost all credibility, but a victory in many ways for executive power more broadly.

Justice White, joined by Justice Stewart in concurrence, voted with the majority, but focused on "the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these." Indeed, as important as the freedom of the press was for this case, ultimately the case may have turned far more centrally on the lack of congressional authorization. Not only Justices White and Stewart, but even a stalwart liberal such as Justice Thurgood Marshall made clear that, in his view, the issue was simply one of a President seeking to end-run the legislature and asking the Court to do what Congress had refused to do. "[I]t is clear," Justice Marshall wrote, "that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and make the current activity of the newspapers unlawful." Citing Youngstown Sheet & Tube Co. v. Sawyer, Marshall wrote that "it is not for this Court to re-decide those issues—to overrule Congress." Would the Court have said the same to Franklin Roosevelt in 1942? Would the Court have said the same to Lincoln in 1862? Or even to Richard Nixon in January 1969?

E. United States v. Nixon / The Watergate Tapes Case

Shortly after his inauguration in January 1969, Nixon's popularity as President reached its second highest peak at about 65%. At the time of the Pentagon Papers decision, it had fallen to just over 40%. As troops began to return home, and with his stunning trip to the People's Republic of China, Nixon's poll numbers would rise again, reaching 66% at the time of his second inauguration. But shortly before July 24, 1974, the day the Supreme Court ordered Nixon to surrender the recordings he had made of Oval Office conversations concerning Watergate, the President's popularity had crashed to about 23%—close to historic lows for any President.

United States v. Nixon certainly is not ordinarily thought of as a war case, or even an emergency powers case, and yet, in many ways it

209. Id. at 740–48 (Marshall, J., concurring).
210. See id.
211. Id. at 745.
212. Id. at 746.
214. Id.
215. Id.
216. Id.
very much belongs in this study. The President unabashedly made extensive executive power claims, including assertions drawn from his constitutional role as commander-in-chief. In an opinion for a unanimous Court, Chief Justice Warren Burger noted that the President was not claiming that the tapes would reveal military or diplomatic secrets, but that he was making a broad claim for a generalized interest in confidentiality. Nevertheless, the Court made clear that a majority of the Justices saw a primary foundation for the constitutional privilege the President sought grounded in foreign affairs: "The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen," the Court ruled, "is too obvious to call for further treatment."

United States v. Nixon also bears our attention because it certainly suggests once again that we consider a counterfactual: imagine a similar case at the peak of Ronald Reagan or Franklin Roosevelt's popularity. Imagine such a case in the middle of the Civil War or World War II. Nixon lost this case by a vote of eight-to-zero (Justice Rehnquist, who had until recently been a part of the Nixon administration, did not participate), at the very nadir of his political popularity. And yet, he actually succeeded for the first time in securing from the Supreme Court a ruling that gave constitutional sanction to the concept of executive privilege in communications. The Court ruled that there is a "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion." "Certain powers and privileges," they ruled, "flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."

F. Dames & Moore v. Regan / The Iran Hostage Crisis Case

President Jimmy Carter's response to the seizure of American hostages in Iran in 1979 included freezing Iranian assets and convincing

218. See, e.g., Howard Ball, We Have a Duty: The Supreme Court and the Watergate Tapes Litigation 95-111 (1990).
220. Id. at 715.
221. Id. at 716.
222. Id. at 715.
223. Louis Henkin, Executive Privilege: Mr. Nixon Loses, but the Presidency Largely Prevails, 22 UCLA L. REV. 40 (1974); see also Ball, supra note 218, at 143–52.
225. Id. at 705–06 (footnote omitted).
the international community to do the same. These frozen assets became Carter's primary leverage in negotiations for the hostages' release. Although the impact of the freeze fell mostly on Iran and Iranians, it also pinched those who sold goods and provided services to Iran. This included the American International Group (AIG) and an engineering firm that had built nuclear power facilities in Iran named Dames & Moore International. Carter used an Executive Agreement to order the frozen assets placed in the control of an international tribunal in Algeria, which was charged with adjudicating disputes over these payments. In *American International Group v. Islamic Republic of Iran*, the Court of Appeals for the District of Columbia ruled that, although Carter had clear authority to freeze foreign assets under the International Emergency Economic Powers Act (IEEPA), he had no such authority—express or implied—to suspend the legal claims made by American nationals and American firms against the government of Iran. This issue would be decided by the Supreme Court in the 1981 case, *Dames & Moore v. Regan*.

Timing, of course, is critical here. Carter indeed signed the Executive Agreements, but it would not be until the moment that Ronald Reagan was sworn in as the 41st President of the United States on January 20, 1981 that the hostages would clear Iranian airspace, and their release would be complete. This also meant that the agreements would have to be enforced by the Reagan administration, and it fell to Treasury Secretary Donald Regan to defend the agreements and their constitutionality in the Supreme Court case which would be argued on June 24, 1981.

The Court handed down its decision on July 2, 1981 in an opinion authored by Justice Rehnquist, and joined by Chief Justice Burger, along with Justices Brennan, Stewart, White, Marshall, and Blackmun. Justices Stevens and Powell filed separate opinions, both of which

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227. *Id.*
236. *Id.* at 658.
concurrent in part. From a political perspective, it would have been disastrous for the Court to rule against the government. True, the hostages were free, but it would have made it incredibly difficult for the new President (the extraordinarily popular Ronald Reagan) or any other President to have the flexibility to negotiate for the release of American hostages in the future. One might well have imagined the Court embracing something akin to the political question doctrine here, but the Justices did not do so. Rehnquist went to great lengths to craft a far-reaching decision, which would fundamentally shift the default assumptions about how ambiguity in legislation might be read and interpreted.

In the Steel Seizure case, Justice Jackson largely constructed a default assumption that Presidents would need at least implicit and quite possibly explicit legislative authorization before asserting and exercising constitutionally ambiguous powers. This was echoed and reinforced loudly in the Pentagon Papers case. But here, Justice Rehnquist took a statute, (the IEEPA), which had explicitly been designed to limit the far broader delegations of authority to the President in the Act it replaced (the Trading with the Enemy Act) and turned it, instead, into an open-ended delegation of power to the President.

The IEEPA did delegate power to the executive, but far less than had been delegated in the earlier legislation. Indeed, IEEPA was meant to be a reduction in what was perceived to be too generous a delegation of power by Congress. Whereas in the Steel Seizure case the assumption was that the President needed explicit authorization to act with impunity, now the tables turned, and a President would be largely free to act unless and until Congress explicitly said no.

237. Id.
239. Id. at 1108.
245. Silverstein, Statutory Interpretation, supra note 244, at 485-86.
246. Id.
247. Rehnquist would build on this assertion and extend this change in the default assumption even more dramatically in Regan v. Wald, 468 U.S. 222 (1984), in which Justices Blackmun, Brennan, Marshall, and Powell would file a blistering dissent, arguing that the legislative intent was clear—executive power was meant to be reduced not expanded. Id. at 244 (Blackmun, J., dissenting). Even
To have struck down this incredibly delicate arrangement would have been disastrous and unthinkable—just as it would have been unthinkable for the Reagan administration to repudiate the agreement made by Carter—though one suspects the seizure and assignment of U.S. claims and assets to an international tribunal surely could not have sat well with the new Republican administration. Might the Court have ruled differently had the case come up in Carter’s last year in office, instead of in the first months of the vastly more popular Reagan? Might the decision have been different if the hostage crisis itself had not so dominated the American conversation?  

Was this a wartime decision? Was it even a crisis decision? If we insist on narrow, specific, and hard lines to define these terms, it is hard to say. But a quick glance at public opinion tells at least two stories: The American people thought it was a crisis, and the American people were supportive of their new President. The Court was, at the very least, taking a position entirely consistent with public opinion.

Figure 3: President Bush Job Approval

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248. The ABC television news program Nightline actually began as a nightly update on the hostage crisis, with the show’s title updated every evening to reflect the length of the crisis. The last broadcast, before the program was retitled “Nightline” was “America Held Hostage: Day 444.” See Encyclopedia of Television News 175–77 (Michael D. Murray ed., 1999).

249. See Am. Presidency Project, Presidential Popularity Over Time, supra note 17.

Faced with an unprecedented crisis in 2001, the Bush administration acted as it saw fit, as had other Presidents faced with immediate crises. But unlike many of its predecessors who had eventually turned to Congress for post-hoc authorization of their emergency decisions, the Bush administration called upon a team of young lawyers to craft and defend an aggressive theory of executive power designed not only to secure the President’s policy goals but, at least as importantly, to fundamentally reallocate constitutional power away from the legislature and judiciary and into the hands of the executive branch.

That the administration might have had high hopes for these arguments should not be surprising. Though Bush won the presidency in 2000 by the narrowest of Electoral College margins; his election was ultimately certified by a bitterly divided Supreme Court in Bush v. Gore. After 9/11, the Administration knew, as did everyone else, that the nation was clearly on a war footing. Few events more perfectly suited the term crisis than the attacks of September 11, 2001. Whatever doubts there had been about Bush, his legitimacy, or authority, disappeared in the smoke rising from New York City and Washington, D.C. His popularity soared to unprecedented heights, reaching 89% in Gallup polls conducted September 21-22 and October 11-14.

And indeed, politically and legally, the Bush administration was quite fond of justifying expansive presidential power by arguing that the events of 9/11 had changed everything. In a speech to a Joint Session of Congress less than two weeks after the attack, President Bush said that “[a]ll of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.” More accurate though far less dramatic (and perhaps less in keeping with the

250. Thomas Jefferson ordered naval forces to engage with the Barbary pirates in 1801 and reluctantly agreed to forgo a constitutional amendment, which he believed was needed before completing the Louisiana Purchase in 1803; James K. Polk ordered the army to march south from the Nueces River to the Rio Grande, asserting this to be the legitimate U.S.-Mexican border, and triggering the war with Mexico; Lincoln declined to summon Congress into session after the attack on Fort Sumter, calling up the militia, ordering a coastal embargo, and suspending habeas corpus; Theodore Roosevelt committed the United States to an agreement concerning debt payments in the Dominican Republic through an executive agreement; his cousin, Franklin Roosevelt agreed to a complex exchange of American destroyers for access to ports and military bases in a number of British possessions and territories. See Silverstein, supra note 35, at 45-62; Silverstein, supra note 242, at 882-83.

251. Silverstein, supra note 242, at 883. See generally Bruff, supra note 36; Goldsmith, supra note 36.


254. President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), supra note 5.
administration's broader objectives)\textsuperscript{255} would have been to say, "some things changed on 9/11, and time will tell just how much the presidency will need to change in response." Indeed, the Court's rulings certainly tracked with movements in public opinion. As public support for the war effort and for President Bush waned, the Court moved from its initial effort to find broad authorization for the exercise of executive power,\textsuperscript{256} to a direct challenge to the President's interpretation of the Geneva accords and assertion of independent authority to establish military commissions,\textsuperscript{257} to near outright hostility to the Executive's assertion (backed by legislation) that would have severely limited judicial jurisdiction in many Guantanamo and terrorism related cases.\textsuperscript{258}

It would not be until 2004 that the Supreme Court would decide to docket some of the many legal disputes arising from the President's policies concerning enemy combatants, military commissions, detentions at Guantanamo Bay, and the Executive's authority to ignore or suspend the Geneva Accords.\textsuperscript{259}

What is particularly striking about the relationship between public opinion and judicial decisions in the Bush years is that with each passing year after 2004, the President's popularity (and the popularity of his policies, as well as the broad agreement that the nation was indeed facing a continuing and unabated emergency threat) subsided.\textsuperscript{260} Bush's popularity stood at 47\%\textsuperscript{261} on the eve of the Court's first major ruling in \textit{Rasul v. Bush}, 37\%\textsuperscript{262} when the Court handed down the somewhat less cooperative ruling in \textit{Hamdan v. Rumsfeld}, and only 30\%\textsuperscript{263} support in 2008 when the Court delivered a stinging rebuke to the President in \textit{Boumediene v. Bush}.

These numbers offer a powerful illustration of the claims made in this study: All four cases take place in what can only be referred to as wartime. Yet within that long stretch of time, great variation is seen not only in the popularity of the President and his policies, but also in the attitude, tone, and focus of the Court's decisions. The Court, for example, had no problem approving of the detention of military combatants, American and foreign alike, nor was there any fundamental objection to the use of military commissions.\textsuperscript{264} The problem the Court had with upholding the

\textsuperscript{255} See \textit{Bruff}, supra note 36, at 118; \textit{Goldsmit}, supra note 36, at 102.
\textsuperscript{260} See supra p. 1486, fig.3.
\textsuperscript{262} Id. (displaying presidential approval ratings for June 23-25, 2006).
\textsuperscript{263} Id. (displaying presidential approval ratings for June 9-12, 2008).
\textsuperscript{264} See generally \textit{Hamdi}, 542 U.S. 507; \textit{Rasul}, 542 U.S. 466.
Bush administration's extravagant claims was that the power to do these things had nothing to do with Congress and was entirely derived from constitutional grants of executive power. As time moved on, however, the Court not only continued to insist on a congressional role, but began to ask (in oral argument and in judicial opinions) just how long an emergency could last. With the Bush administration cases, there is a striking correlation between the degree of deference and willingness to sanction administrative policy decisions and the level of the nation's popular support for the President and his policy choices. In the first cases in 2004, the Court bent over backwards to find congressional authorization in statutes such as the Authorizations for the Use of Military Force (AUMF) and the USA Patriot Act, even when these in no way explicitly spoke to the claims and policies being advanced by the Bush legal team. In short, the Court found a way to certify the constitutionality of the administration's policies without accepting the Bush administration's far broader, more novel, and more extravagant constitutional claims for unitary control and authority.

In 2004, in Hamdi v. Rumsfeld, Justice O'Connor went out of her way to avoid a discussion of the deeper constitutional claims advanced by the Bush administration. Ruling that the AUMF provided sufficient authority for the government to provide an extremely truncated procedure for determining whether or not Hamdi could be held as an illegal combatant in a military prison, the Court obviated any need to

265. See Hamdan v. Rumsfeld, 548 U.S. 557, 594 (2006); Hamdi, 542 U.S. at 507, 517. In his opinion for the Court in Boumediene v. Bush, 128 S. Ct. 2229, 2263 (2008), Justice Kennedy noted, "The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional." He added later in the opinion that:

In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. . . . [T]he costs of delay can no longer be borne by those who are held in custody.

Id. at 2275.

266. In Hamdi, Justice O'Connor clearly stated that the Court did not need to decide the question of executive power in the absence of congressional authorization, since the Court read the Authorization for the Use of Military Force to constitute adequate authorization. 542 U.S. at 517. In Hamdan, however, the Court made clear that explicit authorization by Congress would, indeed, be required for the use of military commissions. 548 U.S. at 586.


269. Hamdi, 542 U.S. at 516-17.

270. See id at 516.
address the more extensive constitutional argument advanced by the government that the executive had the exclusive power to seize and detain enemy combatants with or without congressional authorization. That was a discussion that could, and therefore would, be held for another day. Justice O'Connor wrote,

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.\[^{272}\]

The Court also was acutely aware of the dilemma of timing in this case. The post-9/11 conflicts introduced another significant question of temporality. Emergencies, by definition, are thought to be limited in duration. Traditionally, wars were thought to have clear starting points and to end with surrenders or negotiated settlements. But the wars against terrorism seemed to offer the prospect of eternal conflict. Hamdi, the Court noted, objected not to the "lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention."\[^{273}\]

Even the government conceded that "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement."\[^{274}\] The prospect that Hamdi raises, O'Connor wrote, "is therefore not farfetched."\[^{275}\]

The Court recognized, in 2004, the possibility that this might indeed be a very different sort of war.\[^{276}\] Under long-standing principles of international law and the law of war, O'Connor noted, it is assumed that enemy combatants could be held "for the duration of the relevant conflict."\[^{277}\] But, she added, "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."\[^{278}\] In 2004, however, she argued that this situation had not yet materialized.\[^{279}\]

The question of the indefinite nature of this war was one that troubled Justice Souter a good deal. During oral argument in *Hamdi v. Rumsfeld*, Justice Souter questioned what he perceived to be an

\[^{271}\] Id.
\[^{272}\] Id. at 516–17.
\[^{273}\] Id. at 520.
\[^{274}\] Id.
\[^{275}\] Id.
\[^{276}\] Id.
\[^{277}\] Id. at 521.
\[^{278}\] Id.
\[^{279}\] Id.
executive prerogative argument. Though he said he agreed that the 2002 AUMF certainly gave the President broad latitude—he was concerned about just how long that latitude might be justified.

"Is it not reasonable," Souter asked, "to at least consider whether that resolution needs, at this point, to be supplemented and made more specific to authorize what you are doing?" It may well be, Souter added, that the executive has power "in the early exigencies of an emergency. But that at some point in the indefinite future, the other political branch has got to act if that, if power is to continue." Solicitor General Clement's resistance made clear that the Bush legal strategy was not aimed primarily at accomplishing immediate and essential policy goals, but that its ultimate objective was to reset the constitutional allocation of power on a much more permanent basis. The Court in 2004 was not yet ready to confront the deeper constitutional claims, or the possibility that they were, in fact, no longer dealing with a conventional war that could be administered under conventional legal principles. The war was still widely popular, and the President, just months away from his 2004 reelection, retained the confidence of half of the American people.

In Hamdi, the Court went out of its way to avoid making any sort of definitive constitutional ruling, instead stating that Congress had provided sufficient statutory authority for the President to seize and detain American citizens as enemy combatants. But in Hamdan, the Court noted that military commissions required the explicit authorization of Congress and could not be established by the President exercising exclusively executive powers. The Court sent a similar set of signals in Rasul v. Bush, handed down the same day as Hamdi and involving non-Americans who had been seized and were being held as enemy combatants at the U.S. Naval Station at Guantanamo Bay, Cuba.

In Rasul, the Court ruled that twelve Kuwaitis and two Australian-nationals being held in Guantanamo were entitled to petition for habeas

282. Transcript of Oral Argument, supra note 280, at 34.
283. Id.
284. See Vladeck, supra note 281, at 88 & n.153.
286. Justice O'Connor, writing for the Court, held that "[w]e do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF." Hamdi, 542 U.S. at 517.
While Guantanamo Bay, Cuba, was not a part of the United States, the Court held, it was under the sovereign control of the United States and, therefore, subject to congressional statutes laying out the rules for habeas corpus review. Here the signal seemed clear: If the problem was a flawed statute, the easy answer was a new statute.

Once again, the Court raised no objections to the Administration's policy objective, but did raise an objection to the government's underlying assertion of executive power. Though the administration was loathe to accept any constraints on its legal discretion, the Detainee Treatment Act of 2005 was rushed through Congress.

The next year, the Court considered the case of Salim Ahmed Hamdan, a driver for Osama bin Laden, who was captured in Afghanistan and held at Guantanamo Bay, Cuba. He challenged the Administration's constitutional authority to try him with a military commission, adding that even if the commission were properly authorized by Congress, it would violate rules set out in Common Article Three of the Third Geneva Convention, which precludes the use of evidence to convict a prisoner unless the prisoner has access to that evidence to be used in presenting a defense. The Administration claimed that it had no need of congressional authorization, and, further, that the President alone had the authority to determine when and how the country would comply with international treaty obligations. In Hamdan v. Rumsfeld, the Supreme Court rejected the Administration's arguments in a five-to-three decision, ruling that the Geneva Accords were law, enforceable in the federal courts, and that the military commissions, as the Administration had deployed them in this case, violated the Uniform Code of Military Justice as well as the Geneva Accords.

289. Id. at 473.

290. Id. at 475, 593–94. The power to grant a writ of habeas corpus is codified at 28 U.S.C. § 2241 (2006).

291. "What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." Rasul, 542 U.S. at 485. The Court stated that the Executive could not impose these conditions independently and without ordinary judicial process. Id.


295. Id. at 571.


297. 548 U.S. at 567.
But again, on the question of military commissions the Court had essentially focused on the process and not the substantive policy. The problem was not the use of military commissions; the problem was that Congress had not authorized their use.\(^{298}\) Reaction was swift. John Yoo, of the DOJ, commented to the *New York Times* that the Court “is attempting to suppress creative thinking.”\(^{299}\) For members of Congress the message was clear—the President needs formally delegated power—and they promptly produced it. But the Military Commissions Act of 2006\(^{300}\) did more than simply authorize the use of military commissions. The Act also eliminated the few remaining avenues for military detainees to seek habeas petitions, explicitly rewriting existing law to block the use of the Geneva Accords as an avenue for habeas.\(^{301}\) Congress made clear that this new law not only would apply prospectively, but would close down these appeals in all cases pending at the time the Act was signed.\(^{302}\) It went further, explicitly asserting that the President alone “has the authority for the United States to interpret the meaning and application of the Geneva Conventions” and stripping the courts of any authority “to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”\(^{303}\)

Congress and the President, together, had now directly asserted constitutional authority that, if upheld, would explicitly strip the Court of its traditional jurisdiction.\(^{304}\) The constitutional issues that had been dodged and avoided were finally unavoidable. On December 5, 2007, the new Roberts Court heard oral argument in *Boumediene v. Bush*.\(^{305}\) The *New York Times* reported that the case would determine “whether the Supreme Court itself will continue to have a role in defining the balance [between individual liberty and national security in the post-9/11 era] or whether, as the administration first argued four years ago, the executive branch is to have the final word.”\(^{306}\)

The Court’s answer came in a blistering five-to-four ruling written by Justice Anthony Kennedy. The right to petition for a writ of habeas corpus is so central to the American constitutional system, the Court ruled, that there is but one way to suspend its application—by following

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298. Id. at 594.
301. Id.
302. Id.
303. Id. § 6(a)(3)(A) (codified at 18 U.S.C. § 2441); id. § 7(a) (codified at 28 U.S.C. § 2241(c)(1)).
305. Id.
the formal and explicit procedure required by the Suspension Clause.307 While the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 had explicitly stripped the federal courts of jurisdiction to hear habeas pleas coming out of Guantanamo, Congress had explicitly not “suspended” the “privilege of the writ of habeas corpus.”308 Absent that, Congress had no authority to strip the Court’s jurisdiction, nor to delegate those determinations to the executive.309 To hold that “the political branches have the power to switch the Constitution on or off at will,” Justice Kennedy wrote, “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.”310

Eight years after the first detainees were brought to Guantanamo Bay, the public may remain somewhat uninformed as to the legal and policy issues involved with the base.311 But though they may not grasp the details, their attitudes reflect agreement with the Supreme Court’s jurisprudence in cases arising from Guantanamo. Media accounts portray a public afraid that terrorists will be released, or that their trial in open court will uncover information that will make Americans less safe.312 This is undoubtedly accurate, but also incomplete. Americans, by a substantial margin, also want the United States to provide some sort of fair trial for detainees.313 In this element, the Supreme Court’s opinions in Hamdi, Hamdan, and Boumediene are quite consonant with public opinion.

After the Hamdan decision, a Los Angeles Times/Bloomberg Poll asked what sort of procedures the public favored for trying detainees.314 Here, only 23% (17% of Democrats, 33% of Republicans) said that detainees should have no rights.315 While Americans supported the government’s policy of holding suspected terrorists,316 a strong majority

307. U.S. Const. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
308. Boumediene, 128 S. Ct. at 2246.
309. Id. (emphasis omitted).
310. Id. at 2302.
311. A Pew Political Knowledge Survey in December 2008 found that only 76% of respondents could identify “Guantanamo Bay” as “the location of a US naval base.” Pew Research Ctr. for the People & the Press, Political Knowledge Survey (Dec. 2008), available at iPOLl Databank, supra note 15. In the multiple-choice question, 4% replied that it was “a new action film by Steven Spielberg.” Id.
313. See infra notes 320–21.
315. Id.
316. In a June 2006 poll, 57% of respondents supported and 37% opposed the federal government holding suspected terrorists without trial. ABC News/Wash. Post Poll (June 2006), available at iPOLl Databank, supra note 15.
(71%) voiced support for giving suspected terrorists either prisoner of war status or charging them with crimes, as opposed to the 25% who favored holding detainees “without charges indefinitely.” The Washington Post appears to have mentioned this result from its own commissioned poll only once, citing the result as a caveat to Republican bluster that the military commissions debate necessitated by the Hamdan ruling would provide the party with a winning political issue. As of early 2010, though the public opposes closing Guantanamo by about 60% to 30%, only 10% of the public favors indefinite detention for prisoners. The post-Boumediene question by ABC/Washington Post made an absolute hash of the case, casting the controversy between supporters, who say the decision “provides detainees with basic constitutional rights,” and critics, who say “only special military tribunals should be allowed, because hearings in open court could compromise terrorism investigations.” Sixty-one percent of those polled said that detainees “should not be able to challenge their detentions in the civilian court system.” The question, however, does not appear to go far enough to distinguish between the procedure at question in Boumediene (review tribunals for the determination of enemy combatant status) and military commissions for the prosecution of suspected terrorists. Indeed, in dissent Justice Scalia noted the apparent contradiction produced by the Court’s decision, noting that someone convicted and sentenced to death by a military commission had no access to the civilian courts, while someone who was merely detained would be able to make a

319. See ABC News/Opinion Dynamics Poll (Jan. 2010), available at iPOLL Databank, supra note 15 (showing that 33% of respondents answer “yes” and 58% answered “no” to the question: “Do you think detainees from the Guantanamo Bay military prison should be transferred to a federal prison facility in the United States?”).
320. Bloomberg Poll (Dec. 3–7, 2009), available at iPOLL Databank, supra note 15 (showing that 21% of respondents favored trying prisoners in U.S. courts, and 57% preferred trial in a military tribunal system).
321. ABC News/Wash. Post Poll (June 12–15, 2008), available at iPOLL Databank, supra note 15. The poll asked the following question:

The US (United States) Supreme Court has ruled that non-citizens suspected of terrorism who are being held in Guantanamo Bay, Cuba, should be allowed to challenge their detentions in the US civilian court system. Supporters of this ruling say it provides detainees with basic constitutional rights. Critics of the ruling say only special military tribunals should be allowed, because hearings in open court could compromise terrorism investigations. What's your view—do you think these detainees should or should not be able to challenge their detentions in the civilian court system?

Id.

322. Id.
The figures on public approval of indefinite detention are consistent and come from a fairly straightforward question. That they diverge so sharply from opinions about closing Guantanamo is most likely due to a simple assumption, which the Bush administration made no effort to dispel, that Guantanamo is comprised exclusively of hardened terrorists. There are difficult truths at the heart of the Guantanamo issue. First, many of the detainees are not terrorists and will not ever be convicted of anything, but are there because the United States is unable to find any place else for them to go. Second, incarceration in Guantanamo for years, may well radicalize those prisoners for whom there is no legal justification for continued detention, providing powerful incentives for them to take up arms against the United States. However, these truths seem unlikely to penetrate the public consciousness. This would seem to put the Court in a strange position. Issuing decisions that accord with the public’s wish that the detainees be tried also has the practical effect of setting people free (Rasul, Hamdi, Hamdan, and Boumediene have all been released from U.S. custody), and the Court may be seen as weakening the nation’s security regime while inviting criticism from the political right. Public opinion may have been somewhat divided in cases such as Korematsu or Truman’s Steel Seizure, and certainly there was division over the Vietnam War. But in none of these did the Court issue opinions that were in any way out of line with clear majority preferences: Americans were stridently anti-Japanese during World War II; they were not swayed by Truman’s claims about the steel strike; and they distrusted the Nixon administration’s insistence that the release of the Pentagon papers would put American troops at risk. The Court may have been in tune with public opinion about the abstract issue of due process, but not at all in line with public opinion about the practical effect of providing due process—that it might lead to the release of Guantanamo detainees. But if we step back and ask about the consonance of court rulings with the President’s public approval.

324. Id. at 2279 (Scalia, J., dissenting).
ratings, the consonance is again striking and consistent.

III. Timing Is Everything?

When we think about the anti-majoritarian problem, we typically have in mind judicial decisions that might overrule the will of the majority to protect individual or minority groups in the arena of individual rights and civil liberties: religion, speech, gun control, property ownership, and abortion. Where the Court is overturning the will of the majority, it is by definition ruling in ways that are adverse to public preferences and its rulings will not be in accord with public opinion. But the Supreme Court is also called upon to adjudicate disputes about the allocation and distribution of power, and these cases take on particular salience under the stress of war and emergency. These rules, Justice Douglas reminded us in his concurrence in the Steel Seizure case, must be enforced not only when we face a tyrannical president, but also when we are confronted with "a kindly President," who stretches the Constitution for ends and purposes with which we generally agree. But this is a hard task, made all the more difficult when the Court is, indeed, considering the popular actions of a popular president pursuing popular policies in a time of perceived threat and crisis.

While some recent studies have explored the Court's decisions in wartime cases, they have focused on civil rights and civil liberties cases, and they have done so with an insistence on splitting cases into two and only two categories: cases that arise during wars and crises and those that do not. In considering the role of public opinion and the Court, we have attempted to draw attention to the nuances of the relationship of public opinion and judicial decisions through and across the long run of wars and crises. We have attempted to open that black box, arguing that we must look carefully at cases shaped by wars and emergencies—even if, like Minersville School District v. Gobitis, they may not have been decided when the nation was formally at war. Perhaps more importantly, we argue that we must consider not simply whether the nation was at war, but at what stage of the conflict the case reached the Court. When we do so, we discover that the public's opinion of the President, the President's policies, and the credibility of the President's claims concerning war and emergencies, are indeed quite consonant with the Court's rulings. In short, the Court's rulings certainly are consistent with public opinion, even if neither driven by nor driving those changes. We

327. See supra note 33 and accompanying text.
329. See generally Howell, Power Without Persuasion, supra note 40; Clark, supra note 2; Epstein et al., supra note 2; Howell, Wartime Judgments, supra note 40.
330. 310 U.S. 586 (1940); see infra notes 343–51 and accompanying text.
do not believe that the Court is merely following that opinion, nor do we believe that the Court is generally leading public opinion. More work must be done before any sort of causal hypothesis might be drawn along these lines. But we do believe that this study illuminates the need to develop better measures not only of case rulings, but also of the arguments used to support those rulings. Careful attention should be paid to the circumstances and conditions of the nation, and of the nation's judges themselves, at the time these cases are being considered and decided.

*Korematsu v. United States*\(^3\) certainly seems a textbook illustration of our basic point. With a very popular President leading a war effort that was resoundingly supported by the public, it should come as no surprise that the Supreme Court would issue a decision quite consistent with that opinion.\(^3\) And yet, in many ways, *Korematsu* is surprising. As noted above, the war in the Pacific was clearly approaching the end-game: There was no longer a credible threat of Japanese invasion.\(^3\) Had the decision been made two years earlier, or just two or three months later, one might have expected a very different decision. And so *Korematsu* has a number of lessons to teach.

There has probably never been, and probably never again will be, a crisis that has so unified the United States as did the World War II.\(^3\) Justice Murphy did an end-run around statutory prohibitions to enlist in the armed forces.\(^3\) Justices signed up to speak on behalf of the war effort and to serve on boards reviewing major war policies.\(^3\) Justice Brynes resigned to join the Administration's war effort, and Justice Frankfurter spent a good deal of time off the bench drafting major war legislation.\(^3\) And yet, despite this fervor, despite the intense feelings by the public about Japan and Japanese-Americans, despite the President's own stunning levels of popular appeal, three Justices (Jackson, Roberts and Murphy) wrote dissenting opinions in *Korematsu*. Justice Murphy's dissent pulled no punches and accused the military, the Administration and the Court of complicity in an unconstitutional, racist policy that denied even the most basic provisions of due process.\(^3\) And so there are at least two more lessons to draw from the *Korematsu* experience. First,

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\(^3\) See Urofsky, *supra* note 88; see also *supra* notes 91-2 and accompanying text.

\(^3\) See *supra* notes 88-93 and accompanying text.

\(^3\) See Grossman, *supra* note 68, at 673; see also *supra* notes 89-90.

\(^3\) 323 U.S. 214, 233–35 (1944) (Murphy, J., dissenting).
the Court is a collection of human beings, very much a part of their time and their experience, and we should not assume that they can or will be able to overcome that experience and press back against public opinion. And yet, second, Justices are also leaders whose life-tenured positions should enable them to stand against the tide of public opinion, even in the midst of crisis.

Timing matters. In the excellent studies that have been done of the Court and crisis, emergency, and war, there has been a consistent insistence on splitting cases into two, and only two, groups: those that were decided during a war or crisis, and those that were not. Our objective here is a modest one—to demonstrate that judicial decisions may vary not simply along the dichotomy between war and peace, but within these categories as well. Consider the natural experiment of the Bush administration. Popular opinion about the President, his policies and his claims for power moved steadily down, as did the Court’s willingness to find a way to endorse policies of which they (like the public) grew increasingly skeptical as 2004 turned to 2006, and then 2008, as Hamdi and Rasul gave way to Hamdan and Boumediene.

And so, one problem we hope we have identified here is the need to look within an acknowledged period of war or crisis. But a second problem we hope to have demonstrated is the need to understand that crisis, emergency, and war cannot be defined by classic and formal legal moments. There was no declared beginning or formal end to the Cold War, which lasted more than forty years, and the War on Terror, which certainly started before September 11, 2001, seems unlikely ever to have a formal end point. But when thinking about judicial decisions in periods of war and crisis, even those wars with formal declarations and surrenders—such as the World War II—are far from easily cabined by those dates. Justice Frankfurter believed the war to have commenced years before Pearl Harbor, and his opinions certainly reflect that understanding.

This temporal problem is not something that is new by any means. In an unpublished work, Mary Dudziak points to a terrific example of this problem in the contrast between the two 1940s flag-salute cases—Minersville School District v. Gobitis (decided on June 3, 1940) and West Virginia v. Barnette (decided on June 14, 1943) offer a perfect

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339. See supra Part I.
340. See supra Part II.G.
341. See generally Grossman, supra note 68; Urofsky, supra note 88.
342. Mary L. Dudziak, Law, War, and the History of Time, 98 CAL. L. REV. (forthcoming 2010). This contrast was pointed out to the Authors by Mary Dudziak at a recent seminar in which she cited SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2005), containing an extensive discussion of this question.
343. 310 U.S. 586 (1940).
344. 319 U.S. 624 (1943).
illustration. Traditionally these cases are taught as an object lesson in how war matters. Gobitis, decided well before Pearl Harbor, was the peacetime case, where the Court insisted that a mandatory flag salute was perfectly constitutional,\(^345\) while Barnette, decided in the shadow of the Nazi destruction of Europe, at the peak of the war, was a question of government-compelled speech—something totalitarian regimes, and not constitutional republics, might do.\(^346\)

And yet, as Shawn Francis Peters makes clear, the Gobitis decision was every bit as much of a wartime decision as was Barnette, though one was handed down before Pearl Harbor and the other with American troops under fire in both the Atlantic and Pacific theaters.\(^347\) Gobitis, we must remember, was handed down just three weeks after the Nazis had invaded Belgium, Luxembourg, France, and the Netherlands.\(^348\) Indeed, some Supreme Court clerks were said to have come to derisively refer to the Frankfurter opinion in Gobitis as “Felix’s Fall-of-France Opinion.”\(^349\)

In a letter to Justice Harlan Fiske Stone on May 27, 1940, Frankfurter made clear that the war was a determining factor in his position on the case.\(^350\) Wartime circumstances, Frankfurter wrote, required the Court to make the delicate “adjustment between legislatively allowable pursuit of national security and the right to stand on individual idiosyncrasies.”\(^351\)

To understand the Gobitis decision, one must read it as a gloss on Frankfurter’s concern that the United States needed national unity and patriotism, and that these had to outweigh the religious-practice concerns of a few. Barnette, of course, was unquestionably influenced by the war and by public opinion.\(^352\) Who could seriously insist upon mandatory pledges where children were forced to recite statements of loyalty with their right arms raised in a stiff and formal salute—and all this in the midst of a war against fascism?

The Court may be neither following nor leading public opinion, but the Court’s opinions certainly do seem quite consistent with that opinion. This observation alone is, we believe, significant. Whether this suggests a causal relationship or not, it reminds us that we need to get beyond our tendency to insist on seeing Court rulings in simple binomial terms—who

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\(^345\) 310 U.S. at 598–600.
\(^346\) 319 U.S. at 641–42.
\(^347\) See Peters, supra note 342, at 48, 52–55, 69–70.
\(^348\) German forces invaded Belgium, Luxembourg, France, and the Netherlands on May 10, 1940; the Netherlands government surrendered on May 15, 1940; and Belgium surrendered on May 28, 1940. See Martin Gilbert, The Second World War: A Complete History 61–67, 77 (rev. ed. 2004). The decision in Gobitis was handed down on June 3, 1940—just eleven days before Nazi troops marched down the Champs Elysees in Paris on June 14, 1940. Id. at 94.
\(^349\) See Peters, supra note 342, at 46–60.
\(^350\) Id. at 55.
\(^351\) Id.
\(^352\) See id.
won and who lost. To understand the Court and its role in American politics and policy, we must also understand the more nuanced ways in which the Court influences even if it does not control policy outcomes. We need to understand the ways in which judicial opinions and arguments influence the other branches and the public, and how the Court, together with Congress and the Executive, shape, define, influence and constrain public policy and popular attitudes. We need to understand the arguments, the debates, and the subtle (and sometimes not so subtle) shifts in reasoning offered by the Justices, their arguments, their justifications, and their rationales. We also think this study powerfully supports the need to get beyond another binomial tendency to think of rulings in strictly defined categories: wartime and not wartime, for example. These are helpful for rigorous and parsimonious analysis, but they simply do not fit the reality of a Court (and a public) that moves slowly and incrementally into and out of the wartime and emergency mindset.

**Conclusion**

Is the Court following public opinion, or is it merely consonant with that opinion? This paper surely has not settled the controversy, but we hope it has complicated the discussion. In analyzing the relationship between public opinion and judicial decisions in war and times of crisis, it is not enough to simply score the case outcomes on the basis of which side won and which lost. We need to remember that under those black robes, there are nine individuals whose attitudes and preferences are shaped by their daily experiences as well as by their legal training and ideological or policy preferences. We hope this Article will encourage others to join us in developing a more rigorous means of understanding the arguments and contours of these decisions, properly set in their historical context.