THE BLANK CHECK: SUPREME COURT DECISION-MAKING IN NATIONAL SECURITY CLAIMS AND DURING WARTIME

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ABSTRACT

The consensus on war-time judicial making generally states that judges and justices should be more deferential in a time of war. This tendency to deference by the judges and justices is attributed to the perceived greater expertise of the executive branch when dealing with a crisis or emergency. National security claims, which can occur both in war-time and during times of peace, involve similar perceptions of crisis and unequal expertise. The general consensus in the literature also expects greater deference by the Supreme Court towards the government when claims of national security surface in a case. In this work, this project attempts to explore two questions: Does the context of war-time affect Supreme Court decision-making? And: are members of the Supreme Court deferential to national security claims brought by the government, either in peace-time or war-time? This dissertation uses the Spaeth database for Supreme Court votes, and sifts for those cases that involve national security claims. Using a probit model, this project analyzes Supreme Court voting behavior across significant wars in the 20th century and also, explores behavior when national security claims are brought before them. The results show no statistical likelihood of deference towards the government by the Supreme Court. Generally, there is statistically significant likelihood of the Supreme Court voting against the government in wartime cases. Similarly, national security claims invoke a statistically significant likelihood of Supreme Court voting against the government's arguments. This

project also analyzes specific cases from World War II onwards to the present, in order to shed some light on the overarching reasons for Supreme Court judicial decision-making for past decisions and exploring how these patterns might express themselves in future decisions.

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Introduction

This dissertation will explore two contextual conditions of war and national security and how these conditions affect judicial decision-making. The element of crisis and emergency is implicit during war; and the general consensus about wartime judicial making states that Supreme Court Justices should be more deferential to the government during these periods. Scholarly literature places great emphasis on how Justices and judges will change their behavioral norms and become more deferential to the government in the name of protecting the national interest. However, if the context of crisis and emergency is the element that matters most in deferential decision-making, then a similar effect should arise when the government presents "national security" claims. National security claims, like war, invoke the same sort of crisis and emergency elements; in essence, the government asks the Justices to be more deferential while the government combats a threat. National security claims are not bounded by the context of war: threats can occur at any time, and the government may bring national security issues before the Supreme Court in both peace and war-time. Hence, this dissertation asks: Does the emergent, crisis-invoking elements of wartime jurisprudence have any effect on judicial behavior? As a secondary question, will the same invocation of national security influence judicial decision-making in peacetime, if at all? We start with the beginning of the modern era of government – with America's entrance into World War II and eventual post-war victorious eminence.

On December 7th, 1941, the Japanese planes swooped down onto the naval base at Pearl Harbor and bombed the US Pacific Fleet, destroying the heart of the battleship complement and killing over 2400 US servicemen. Advised by military authorities of the potential of sabotage

and Japanese invasion of the mainland, President Franklin Roosevelt issued Executive Order 9066 in February 19, 1942, which designated certain parts of the West as military areas and allowed exclusion of any and all persons from these areas. In March 2, 1942, the military commander of the Western area, Lieutenant General DeWitt issued orders that prohibited general movement by persons of Japanese ancestry. Citing military necessity, and convinced that people of Japanese heritage might harbor treasonous predilections, on May 3, DeWitt ordered that all persons of Japanese descent, including American citizens were to report to specific areas and moved to "relocation centers." This order affected over 112,000 people.

Most people affected by the Order, complied with little complaint. The handful that resisted removal were promptly arrested by military authorities. The government lawyers prosecuting these cases were confident of their legal arguments. If nothing else, it was a time of war and even judges could be expected to react deferentially to military authority and expertise:

> As preliminary steps in the overall internment program, these [exclusion] orders imposed less drastic restrictions on the liberties of Japanese Americans, and would more likely appear to be genuinely related to emergency needs, than would detention for an indefinite period. Their basis in Executive Order 9066 were measures designed to provide an "immediate solution" to the dangers of espionage and sabotage convinced government lawyers, as one put it, that "no district court on the Coast would take upon itself the responsibility for upsetting military action at the present time."[1]

The government lawyers were proven right, at least in the case of Gordon Hirabayashi The district judge on the case, Judge Lloyd Black decided the case exclusively from the point of view of the potential threat, despite the fact that Hirabayashi himself was never considered to have engaged in any potential sabotage:

[1] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pg 144

> "It must not for an instant be forgotten," Black wrote, "that since Pearl Harbor last December we have been engaged in a total war with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy this nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth… Of vital importance in considering this question is the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrew masters of tricky concealment among any who resemble them. With the aid of any artifice or treachery they seek such human camouflage and with uncanny skill discover and take advantage of any disloyalty among their kind."[2]

Lloyd Black weighed the constitutional liberties of American citizens against the potential catastrophe of a hypothetical Japanese invasion force, complete with alleged sympathizers, and quietly deferred to the government point of view. It may be helpful to remind the reader of the historical context of the situation, that judges and justices' knowledge was limited solely to the information provided by the military and the executive branch. It may not surprise the reader that justices sitting on the Supreme Court reached a similar decision, after weighing the needs of the government against the potential infringement of individual constitutional rights:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it… Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute it judgment for theirs.[3]

[2] Irons, pg 155, quoting from *US v Hirabayashi*, 46 F. Supp. 657, 659, 661 (W.D. Wash. 1942).
[3] *Hirabayashi v US*, 320 US 81, 93 (1943)

The reader could gather that this instinctual deference to the executive branch might only be in operation during the "total war" of World War II. The reader may ask if this deference may be unique to the last great global war of the 20th century. Certainly, at least one Supreme Court jurist thought differently.

In 1988, Chief Justice Rehnquist wrote a book entitled "All the Laws but One: Civil Liberties in Wartime." The book's main thesis is that during times of war, the judiciary becomes more deferential to the executive branch. In wartime, the emphasis by the government is to shift towards order and implicitly, in response the judiciary will practice more restraint and will be more likely to defer to the judgment of the executive branch. Rehnquist's main point notes that there is a "traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the Latin maxim: *Inter arma silent leges*: In time of war the laws are silent."[4] Although the Justices are still the ultimate interpreters of the Constitution, Rehnquist's central proposition is that war raises the amount of leeway the executive branch may enjoy and a correlative amount of deference that the judiciary will show.

Rehnquist's analysis echoes the statements made by Justices who served in a different eras, and different wars, but carry the same sentiment. Writing for a unanimous opinion, Justice Oliver Wendell Holmes found that war changes the rules and expectations for civil society – even as far back as World War I:

> When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[5]

[4] William Rehnquist, *All the Laws but One* (New York: Alfred A. Knopf, 1988) pp 205
[5] *Schenck v US*, 249 U.S. 47, 52 (1919)

Different eras may bring different men and women to the bench of the Supreme Court, but the experience of war brings similar expectations of changing rules. In peacetime, the traditional view of the judiciary is one where judges interpret law in a fashion that is independent of the other two branches. The traditional view espouses the responsibility and duty of the judiciary to be a voice separate from the political branches; in Justice Marshall's words, "it is emphatically the province and duty of the judicial department to say what the law is."[6]

Rehnquist's argument is that judicial deference appears to be the norm in wartime. Judicial deference is here defined to be when judges have the ability to make an independent judgment but acquiesce to the conclusions of a non-judicial decision-maker. The conclusion therefore is that judges are more willing to defer to other authorities in times of war.[7] Rehnquist's central theorem does not say that judges will abdicate their responsibilities. Rather, Rehnquist's analysis holds that judges will practice self-restraint and defer to the judgment of others. Other justices seem to agree; even in dissent, Justice Murphy stated in *Korematsu v US* that:

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.[8]

Here then is the central idea behind Rehnquist's concept: judicial deference during wartime changes the expectations of separation of power. Rehnquist's theory echoes the common

[6] *Marbury v Madison*, 5 US 137, 177 (1803)
[7] Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 Texas Law Review 777, 780 (2008). "At its core, deference is the ceding of one power in favor of another."
[8] *Korematsu v US,* 323, U.S. 214, 233-234 (1944)

understanding of what happens in wartime: in war, the laws may be entirely silent, because judges may find it hard to speak out against the government.

Rehnquist's point of view is not restricted to purely war-time cases; the Supreme Court has recognized some pressure to agree with the executive branch where the case touches upon national security and defense, acknowledging the "volatile nature of problems confronting the Executive in foreign policy and national defense" and noting that such areas are "rarely proper subjects for judicial intervention."[9] In addition, where the Court has afforded deference in military or national security affairs, the Supreme Court has often done so with an explanation of the greater expertise held by the executive branch – or its own lack of competence in those areas.[10] Military matters – or at least matters involving military judgments and procedures involving military affairs – are often accorded the highest deference: "[I]t is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping, and control of a military force are essentially military judgments, subject *always* to civilian control…"[11]

But there are limitations; the reader might expect that in a government predicted on separation of powers, judges and justices are expected to exercise their own judgment. After all, judges are expected to be impartial guardians of the Constitution, as "bulwarks of a limited Constitution against legislative encroachments" and protecting against the possible infringements

[9] *Haig v Agee*, 453 US 280, 291-292 (1981)
[10] See *US v Curtiss-Wright*, 299 US 304 (1936) (holding that the executive branch has vested power to conduct foreign affairs and national security matters) ;see also *Brown v Glines*, 444 US 348 (1980) (a First Amendment speech case where speech may be restricted if likely to interfere with military matters on a base); See Greer v Spock, 424 US 828 (1976) (ruling that First Amendment right for political speeches and leaflet distribution may be restricted on military bases)
[11] *Rostker v Goldberg*, 453 US 57, 65-66 (1981) (ruling that draft registration of only males, but excluding females does not violate 5th amendment equal protection clause)

by the other branches.[12] The mere invocation of war or national security claims cannot, by itself be dispositive; the Court noted that "the phrase 'war power' cannot be invoked as any exercise of congressional power which can be brought within its ambit. [E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[13] If the reason for the Court's existence is to provide judgment and guidance on the constitutionality of governmental actions, automatic deference to another branch would be unreasoning and unreasonable; Justice Brennan writes:

> [D]eference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality… Further, clearly definable criteria for decision may be available. In such a case, the political question barrier falls away: "[A] Court is not at liberty to shut its eyes to an obvious mistake… [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.[14]

Deference by the Court involves judgment between the constitutional rights of the individual against the governmental needs to protect the larger society. The reader might suspect that this application might be weighted towards the government, especially where the case involves claims of national security during a time of war. Such conditions arose most famously during the legal challenges presented by foreign detainees captured and held on the US Naval Base in Guantanamo Bay in Cuba, collectively known as the Guantanamo Bay cases.

The background facts of the cases involving foreign detainees held at Guantanamo Bay are summarized briefly here. On the morning of September 11, 2001, a terrorist network called

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[12] Alexander Hamilton, *Federalist No.78*
[13] *US v Robel*, 389 US 258, 263-264 (1967)
[14] *Baker v Carr*, 369 US 186 (1962) – the central holding of Baker involves the political question doctrine which states that in certain subject areas, the other branches of government are more competent to make such decisions and the Court should allow such decisions to stand without judicial interference.

al Qaeda shattered the calm above the skies of Manhattan. Their plan was to hijack commercial airliners and dive into the World Trade Towers. Approximately, 3000 people died in those attacks. Congress responded by authorizing the use of force. On September 20, 2001, the President announced a "War on Terror" and declared his intention to reach into Afghanistan and act against al Qaeda. The United States and her allies invaded Afghanistan on October 7, 2001. Along the way, opposing forces were captured; the United States put most of them in the naval base in Guantanamo Bay, labeling them "enemy combatants." The United States held to the legal theory that such "enemy combatants" could be held indefinitely, without any formal charges or proceedings or access to counsel – until the US government determined otherwise.[15] By March 2003, the War on Terror had expanded to include conflict in Iraq. Approval for how the government was handling both wars was generally high at the beginning of 2004.[16] The Bush administration kicked off 2004 in a re-election year on a platform based partly on American continuity in those wars; President Bush had in effect staked his re-election as a referendum on the War on Terror.[17]

On the last Monday in the month of June in 2004, the Supreme Court was ready to hand down rulings involving the "War on Terror": most notably, there were three cases that tied into indefinite detention of "enemy combatants" – a term used by the Bush administration for any

[15] *Hamdi v Rumsfeld*, 542 US 507 (2004).
[16] Gallup Poll. January 2-5, 2004. "Do you approve or disapprove of the war the U.S. has handled the situation with Iraq since major fighting ended in April 2003?" Approve at 60 percent, Disapprove at 38 percent. "Do you approve or disapprove of the US' decision to go to war with Iraq in March 2003" Approve at 63 percent, disapprove at 35 percent. From: www. Gallup.com/poll/1633/Iraq.aspx#4
[17] David Kirkpatrick, *New York Times*, August 24, 2004. "On national security, the draft platform repeatedly refers to the terrorist attacks of Sept. 11, 2001, and commends the president for his "steadfast resolve" in the aftermath. It describes Mr. Bush's foreign policy as "marked by a determination to challenge new threats, not ignore them, or simply wait for future tragedy -- and by a renewed commitment to building a hopeful future in hopeless places, instead of allowing troubled regions to remain in despair and explode in violence."

person who was declared an enemy but would be afforded none of the traditional rights afforded to prisoners of war. In each case, the administration had taken a strong position that the executive branch's decision was the equivalent of a battlefield decision, and that during a time of war, the Justices should defer to the Commander-in-Chief's judgment involving such matters.

In *Hamdi v Rumsfeld*, the Justices took on a petition from Yaser Hamdi, a US-born "enemy combatant." Hamdi's father appealed the indefinite definition of his son and the habeas corpus petition was argued and eventually, the Supreme Court accepted the writ of certiorari. In an answering brief before the Justices, the Bush administration's argued that the Justices should defer to the Executive branch and turn down the habeas corpus petition. The administration's lawyers argued that indefinite detainment was a purely Executive branch power because it was an offshoot of prosecution of war, which by itself is a core Commander-in-Chief power. The Solicitor General argued that where such cases involve "national security and defense," then this is the kind of case that is "most clearly marked for judicial deference."[18] If the Court chooses to intervene, the Solicitor General argued the Justices' may "unnecessarily [jeopardize] compelling national security interests."[19] In other words, if they ruled against the administration, the Justices would not only be violating the separation of powers. The Supreme Court would be interfering with the conduct of war and most gravely, creating a terrible risk to the national security. The nation is at war, the Bush administration argued, and the courts would do well to acquiesce to the greater good by staying silent.

This was not an argument that neither Chief Justice Rehnquist, Justice O'Connor was prepared to accept. Where the Bush administration's position was predicated on the Executive

[18] Brief for Respondents-Appellants on Behalf of the United States, *Hamdi v Rumsfeld*, No. 02-6895, pp 10.
[19] Brief for Respondents-Appellants on Behalf of the United States, *Hamdi v Rumsfeld*, No. 02-6895, pp 12

branch's war powers, Rehnquist joined Justice O'Connor's majority opinion which declared that "a state of war is not a blank check for the president when it comes to the rights of the nation's citizens."[20] In effect, Justice O'Connor was stating that in fact, laws were not supposed to be silent – even in a time of war.

Even in dissent, Justice Scalia – well known for his conservative views – displayed a deep suspicion of the government's demand for judicial deference. Scalia laid out the case that the Framers had a very distinctive and distrustful view of the military authority. Scalia particularly noted that the Founders sought to constrain unlimited ability to detain prisoners.[21] Even where the Constitution allows for the suspension of right to habeas corpus, it is meant to be limited to the exigencies of war. In other words, Scalia essentially agreed with O'Connor's statement that war by itself is not a "blank check" for government action:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges.* Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[22]

Most interestingly, Scalia explained the rationale for the phrase "inter arma silent leges" – he noted that, in war time, there is a generalized tendency to give up rights to those institutions that are meant to protect the nation. Quoting the Federalist Papers, Scalia noted that it was a

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[20] *Hamdi v Rumsfeld*, 542 US 507, 536 (2004)
[21] *Hamdi v Rumsfeld*, 542 US 507, 568 (2004) (Scalia, J., dissenting). "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain."
[22] *Hamdi v Rumsfeld*, 542 US 507, 578 (2004) (Scalia, J., dissenting).

balancing act between liberty and safety, one that the Republic had been struggling with since its inception:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free."

In other words, judges and justices defer to the Executive branch because of the exigencies of war and they do so willingly and strategically. War matters, impliedly, because it changes the rules and expectations for how the judiciary is supposed to behave.

This leads to two distinctive points of view of judicial behavior in time of war. Justice O'Connor's assertion that war is not "a blank check" implies that the judiciary – and specifically the Supreme Court should not and does not give up its traditional role in the separation of powers, as a check against overweening executive power. O'Connor's view would show no special deference to the executive branch in a time of war. Justice Rehnquist's work repeating the Roman proverb that "in times of war, laws are silent" captures a widely held notion that the judiciary will strive to protect and to support the executive branch in a time of war. Rehnquist's view would show special deference to the executive branch in a time of war, relative to peacetime.

At the core of the expectation of greater deference is the idea that the exigency and immediacy of war compels judicial deference. In Scalia's dissent above, he alludes to that same fear of destruction, of a primordial attempt at self-defense. In war, the nation unites and judges are expected to side with the executive branch in part due to the visceral fear of threat to one's

nation and by extension, one's family and safety. In a time of war, national security is clearly at stake – the threat to the safety and well-being of citizens is transparent and well-understood. War, as understood in this work, encompasses those significant events that might affect judicial behavior. As such, not all wars are created equal and certainly not every case that comes before the Supreme Court would qualify. Those cases that would best fit these criteria would be those cases where the government invokes a national security claim, either implicitly or otherwise. National security claims do not necessarily occur only in war-time. In war time, national security and the exigency of war share a vital commonality – the threat to a nation's peace. Yet even in times of peace, there may be threats to the nation's security. The government may invoke claims of national security when appearing before the Court without the context of war. National security claims in times of peace share all of the conditions listed above; the possible difference is that the threat posed to the well-being of the nation may be harder to establish by the government in peace-time as opposed to a large-scale or long-standing war such as World War II, Korean War, the Vietnam Conflict or the Afghan war.

The major question that this dissertation seeks to explore is whether judges and justices react to this call for judicial deference in the context of war and when national security in invoked. Judges and justices may feel compelled to defer to the military and the executive branch during a time of war if the case involves a matter of national security. Presumptively war generates deference where judges and justices substitute the judgment of the perceived experts in a war-related matter. The effect may be weaker in peacetime, but should still influence judicial behavior. This study proposes that national security matters even in peacetime. These claims, both in war and peace, should invoke the same arguments about the perception of threat, as well

as whether the competency of the government is relevant to the threat, and whether governmental actions were reasonable and necessary to ameliorate those threats.

To that end, chapter 2 discusses the relevant literature, touching upon judicial decision-making in general, and specifically in crisis contexts. Chapter 2 will present some of the research in the field. Additionally, chapter 2 will present some of philosophical underpinnings of judicial decision-making in a separation of powers system and outline scholarship on the structural and logical constructs that undergird judicial decision-making in a normal context as well as an emergent situation such as war.

Chapters 3 will present methodology and results theoretical for a statistical analysis of the Supreme Court cases included in this work. The modern era of American government is traditionally presented at or near World War II. Starting with the outbreak of World War II, this section will present statistical analysis of cases that involve national security claims.

Chapter 4 will present the framework for an analysis of Supreme Court decision-making under the context of war and where the government invokes claims of national security. Chapters 5 through 8 are more in-depth analysis, based around specific clusters of cases.

Chapter 5 will focus specifically upon Japanese internment cases. Chapter 6 will explore the Red Scare and communist association cases. Chapter 7 will explore Cold War cases, generally involving executive branch security agencies. Finally, chapter 8 will explore the Supreme Court's approach to national security claims within the Guantanamo Bay cases.

Accompanying the statistical analysis will be a qualitative look at the data set of Supreme Court decisions from 1941 to the present. Where a quantitative view of decision-making can shed light upon the trends and patterns of judicial decision-making, the qualitative analysis

presents a complementary view of what the Supreme Court Justices' reasoning. Analysis of individual cases as well as the clusters of cases will demonstrate the continuing evolution of Supreme Court jurisprudence on issues involving war and those involving national security.

This work seeks to explore if there is a difference in judicial decision-making during the conditions of war, and where matters of national security are invoked. In the 21st century, the judicial branch can be expected to engage in ever increasingly complex issues involving national security. It may prove helpful to understand if there are any patterns in judicial decision-making in these areas and if there are any potential patterns of behavior that may stretch into the foreseeable future. In essence, this work seeks to discover if there a "blank check" involving judicial deference during a time or war and in matters involving national security. Any answers may be able to provide insight into how the Supreme Court operates in the past, in the present and potentially, in future cases as well.

Chapter 1: Literature Review

War and Peace

This dissertation tests whether judicial deference to the Executive branch is greater during times of war than during peace. In peacetime, the Judiciary portray themselves as impartial custodians of the Constitution whose self-defined role is interpreting the Constitution. This is a point emphasized succinctly by Justice Marshall's statement that "it is emphatically the province and duty of the judicial department to say what the law is."[23] However, the Court has generally declined to interfere with the Executive's actions in those matters that are clearly military affairs and that – at first glance – fall squarely within the rubric of national defense and security in wartime. [24] In peacetime, the Court's role in such matters is one where the Justices will be attentive to the greater expertise of the Executive branch, but still retain an independent judgment on matters before them. [25] Thus, this dissertation will test the idea that the level of deference of the Court depends upon the context that surrounds the case before the Court because the branches of American government will trade flexibility in the system for security in the face of threat.

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[23] *Marbury v Madison*, 5 US 137, 177 (1803)

[24] *Department of the Navy v Egan,* 484 US 518, 530 (1988) (noting that the Navy should have the ability to decide security clearances as it touches upon the Navy's clear competency in the matter, and as it involves national security matters and as a military and foreign affairs matter, the Executive branch has greater competency*); Dennis v US,* 341, US 493 (1951) (noting that Smith Act was constitutional even though it criminalizes membership in the Communist Party because the Act was meant to protect against the Communist threat to national security); *US v Reynolds*, 345 US 1 (1953) (noting that since the government can invoke state secrets privilege to refuse to produce documents if a court has determined that there a reasonable danger that national security would be threatened and implying a greater deference to the military where it pertains to technical military data)

[25] *US v Nixon*, 418 US 683 (1974) (noting that the Court will grant "utmost deference to Presidential acts in the performance of an Article II function" but that where the government's claim of national security does not appear reasonably to implicate military or diplomatic secrets then the Executive's generalized assertion of privilege cannot be sustained)

War raises the stakes for failure and changes the normal routine of society. By extension, the normal expectations of how government should operate also change. The Supreme Court is no exception. During a war, the Supreme Court is popularly thought to cede its independence where it pertains to matters involving the war and national security, while the Executive branch expands its power. Clinton Rossiter wrote that the exigencies of war create "Two Constitutions" in which judicial interpretation of the Constitution at war is substantially different and more deferential to the government's position than when the nation is at peace. [26] The reasoning for greater deference is linked to national self-protection: In a military emergency, or when the nation's security may be at stake, the traditional model of a judiciary overriding the other branches might actually interfere with the work of those tasked with national survival.[27] Writing for the majority, Justice Black took a similar view:

> Measures of defense had to be taken on the basis that anything could happen [during war]. The relation of the Constitution of the United States to such a [emergency] situation is important. Of course, the Constitution is not put aside. It was written by a generation fresh from war. The people established a more perfect union, in part, so that they might the better defend themselves from military attack. In doing so, they centralized far more military power and responsibility in the Chief Executive than previously had been done. The Constitution was built for rough as well as smooth roads. In time of war, the nation simply changes gears and takes the harder going under the same power.[28]

The context of war can change the Justices' own expectations of their expertise relative to the Executive branch. A war underscores the Supreme Court's generalist legal competence, whereas the Executive appears to be the one branch most suited to act with speed, resources, expertise

[26] Clinton Rossiter, *The Supreme Court and the Commander-in-Chief* (Ithaca, NY: Cornell University Press, 1976)
[27] Harold J. Krent, *Presidential Powers* (New York: New York University Press, 2005) see pp 111-123
[28] *Duncan v Kahanamoku* 327 US 304, 342 (1946)

and flexibility to deal with matter of national security. Eric Posner and Adrian Vermeule write that:

> The essential feature of the emergency is that national security is threatened; because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security: it is natural, inevitable, and desirable for power to flow to this branch of government. Congress rationally acquiesces; courts rationally defer.[29]

Justice Jackson echoed this sentiment during the height of the Second World War:

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.[30]

More recently, Justice O'Connor wrote that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."[31] Chief Justice Rehnquist seems to suggest that the Court may decide legal cases while taking extra-legal concerns into account – in this case, with an eye towards how the nation is doing during a war:

> It also appears that a majority of the Court at the time of the Hirabayashi decision in June 1943 was unwilling to say that one detained in a relocation center would be entitle to release upon a finding of loyalty. It was not until a year and a half later that the Court came around to this view in Endo, when the United States' fortunes of war were vastly improved. The traditional unwillingness of courts to decide

[29] Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford; New York: Oxford University Press, 2007). Pp 4
[30] *Korematsu v US* 323, U.S. 214, 233-234 (1944)
[31] *Hamdi v Rumsfeld* , 542 US 507, 531 (2004)

> constitutional questions unnecessarily also illustrates in a rough way the Latin maxim Inter arma silent leges: In time of war the laws are silent[32]

Scholars Eric Posner and Adrian Vermeule write more succinctly:

> The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness.[33]

To put it simply, the Supreme Court is likely to defer to the Executive branch in time of war because of a dual perception that the Justices lack expertise in matters involving war and because the Executive branch is more capable of handling such emergencies.

Judgment in a Time of War

One of the earliest theories about judicial decision-making is that the courts operate to protect against the vagaries of human emotion. Writing in Federalist 78, Alexander Hamilton argued for a lofty, dispassionate, detached judiciary, operating as "bulwarks of a limited Constitution." Hamilton's distinctive approach viewed the federal judges as protective of rights and guard against the erosion of freedoms during crisis. Their very independence would allow some immunity to the fads and passions of the common man, and ameliorate the behavior of representatives in government who might embrace them. As Hamilton puts it:

> But it is now it is not with a view to the infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating

[32] William Rehnquist, *All the Laws but One* (New York: Alfred A. Knopf, 1988) pp 205
[33] Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford; New York: Oxford University Press, 2007). Pp 16

> the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.[34]

Academic research has evolved from this detached view of the judiciary. Contemporary analysis indicates that judicial decision-making during wartime is influenced by extra-legal factors that are rooted in emotional appeals as patriotic citizenry. Legal scholar Lee Epstein and her cohorts contend that the Justices are part of the citizenry. In times of stress and crisis, Justices may react to present a united front to outsiders and fall into line with the Executive branch because divisions would present a vulnerable front to one's enemies.[35] Other scholars have joined this point of view, noting judges will clamp down on liberties and defer to the professed need by the Executive for greater deference by the courts.[36] Michael Genovese has noted members of the Court are beholden to the same vicissitudes of public fervor that surround moments of national emergency. Genovese writes that:

> The nine Supreme Court Justices who interpret the Constitution are stepped and trained in the law. But they respond to humans situations; they are, in Mr. Justice Frankfurter's words, "Men … not disembodied spirits, they respond to human emotions …" "The great tides and currents which engulf the rest of mankind," in Mr. Justice Cardozo's beautiful and telling words, "do not turn aside in their course and pass the judges idly by."[37]

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[34] Alexander Hamilton, *Federalist No. 78.*
[35] Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases.* New York University Law Review, Vol 80 (April 2005), see pp 3
[36] William C. Banks and M.E Bowman, *Executive Authority for National Security Surveillance*, American University Law Review, Vol 50 (2000), pg 2-10
[37] Michael A. Genovese, *The Supreme Court, the Constitution and Presidential Power*. (Lanham, MD: University Press of America, 1980)., pp 53

Christopher May argues that the judges sometimes empathize greatly with the administration's actions, to the point where they may abdicate their own judgment in favor of the Executive branch:

> Also militating against judicial intervention in a period of crisis is the fact, noted by Clinton Rossiter, that "the Court, too, likes to win wars." Learned Hand saw this phenomenon at work in the World War I sedition cases, commenting that "their Ineffabilities, the Nine Elder Statesmen have not shown themselves wholly immune from the 'herd instinct.' Justice Robert Jackson likewise recognized that the Constitution in wartime "is interpreted by judges under the influence of the same passions and pressures" that affect their countrymen. At such times courts may hesitate to become involved. The concern here is not that an order might be ignored but rather that it would be obeyed, to the possible detriment of the war effort.[38]

Supreme Court Justices may view this deference to the executive branch as a necessary and patriotic act. Suspending their independent judgment, Justices may see deference as an obligation towards the national defense:

> [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[39]

Some justices pragmatically and publically acknowledge that judges can be affected by public opinion. Chief Justice Rehnquist noted that:

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[38] Christopher May, *In the Name of War: Judicial Review and the War Powers Since 1918.* (Cambridge, MA: Harvard University Press, 1989). Pp 257, citing Clinton Rossiter, *The Supreme Court and the Commander in Chief*, pp 91 (expanded ed. Ithaca, 1976); Learned Hand to Zechariah Chafee, Jr., Jan 2, 1921 in Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 Stanford Law Review 719, 770 (1975); Woods v Cloyd W. Miller Co., 333 US 138, 146 (1948) Jackson, J. concurring

[39] *Korematsu v US*, 323 US 219-220.

> Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs … Judges need not and do not "tremble before public opinion" in the same way that elected officials may, but it would be remarkable indeed if they were not influenced by [them]… [40]

Individual justices and judges can be affected by mainstream public views, but the institution of the Court itself is influenced by the justices' interpretation of public opinion. Barry Friedman writes that in matters of public opinion, the Court does not stray so far ahead or behind the public opinion. Friedman writes, "history shows … not that Supreme Court decisions always are in line with popular opinion but rather they come into line with one another over time."[41] Friedman theorizes that the public gives the Court some leeway, but members of the Supreme Court are well aware of how much their opinions deviate from the mainstream and adjust their rulings from time to time. In essence, Friedman argues that the Court and public opinion act to correct each other and thus preserve the legitimacy and function of the Supreme Court.

In the short term, the Court can be affected by exigencies and emotive appeals – especially those generated by war and crisis. Academic research points to the Court's propensity to defer to the institution of the President during a time of crisis, also known as the rally-around-the-flag phenomenon, first described by John Mueller. He discovered that there is an early surge of popularity for the Chief Executive as people identify the President as a symbol of unity during war, which incidentally gives the President a lot of influence in domestic politics. Mueller also noted that a long-drawn out war has a corresponding effect on presidential popularity, which

[40] William H. Rehnquist. The *Supreme Court: How It Was, How It Is.* (New York: Morrow, 1987). Pp 768-769
[41] Barry Friedman, *The Will of the People: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009). Pp 11

decreases his influence and power.[42] Mueller's findings suggest that the president's approval ratings decrease over time, the longer the country is at war. If the president's influence seems to increase with the rally-around-the-flag phenomenon during war, Mueller's findings suggest that the more unpopular the war, the more likely it is that the president's influence should decrease. Other studies of the presidential influence appear to confirm this "rally around the flag phenomenon.[43] Where the president enjoys great popularity due to this rally effect, the Supreme Court is unlikely to defy the Chief Executive. Christopher May explains:

> Moreover, courts are likely to think twice before challenging the commander in chief at a time when he enjoys the enthusiastic, if not hysterical support of the country. To confront the president in the midst of a national crisis could result in long-term damage to judicial prestige. Federal judges have no real ability to enforce their judgments and must depend on either voluntary compliance or the resources of the executive branch. As Tocqueville observed, "Their power is enormous, but it is the power of public opinion. For this reason, he said, judges "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off.[44]

Deference to the president may occur during wartime, but not all wars would create that feeling of exigency. Since the Supreme Court is court of last resort for federal constitutional questions, most cases take time to go through the lower appeals courts and even then, most cases never reach their docket. With the practice of the writ of certiorari, the Justices can self-select specific

[42] John E. Mueller. *War, Presidents and Public Opinion*. (New York: John Wiley and Sons, Inc, 1973)
[43] See Hetherington, Marc J. and Michael Nelson. 2003. "Anatomy of a Rally Effect: George W. Bush and the War on Terrorism" *PS: Political Science and Politics* (36) 1. Pgs. 37-42. Or see O'Neal, John R. and Anna Lillian Bryan. 1995. "The Rally 'Round the Flag Effect in U.S. Foreign Policy Crisis, 1950-1985" *Political Behavior* (17) 4. Pgs. 379-401.
[44] Christopher May, *In the Name of War: Judicial Review and the War Powers Since 1918.* (Cambridge, MA: Harvard University Press, 1989). Pp 256

cases. For a war to influence judicial decision-making at the highest court of the land would require a significant conflict that would have far-reaching cultural and societal effect.

That being said, not all wars are created equal. Some have had more of an effect upon society. By one official account, the United States has been involved in over 125 instances of armed conflict since 1789. Only five wars were officially declared and sanctioned by Congress.[45] Most American engagements in the modern era simply did not have far-reaching societal impact and subsequently, may not have significant impact on Supreme Court decision-making. As Eric Posner and Adrian Vermeule note:

> [E]mergencies have a half-life and will decay over time, both because the emotional responses produced by the emergency decay, and because the government rationally updates its beliefs as new information is acquired; if no new attacks occur, the government will downgrade its threat assessment, and judges will worry less and less about the harms of blocking emergency measures. As time elapses from the beginning of the emergency, and as enemy attacks or other catastrophic harms dwindle away or stop altogether, judges will defer less.[46]

Hence, more attention has focused on a few, significant wars and national crisis – because of the likelihood that such emergencies can affect judicial behavior. Lee Epstein's work focuses upon specific wars that capture the public attention and remain salient for the entire society – and by extension, affect the judgment of members of the Supreme Court.[47]

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[45] Joan Biskupic, and Elder Witt. *Guide to the Supreme Court*. (Washington DC: Congressional Quarterly, 1997). Pp 195, citing specifically the US Dept of State, *Research Project 806A* (August 1967), "Armed Actions Taken by the United States Without a Declaration of War, 1798-1967"

[46] Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford; New York: Oxford University Press, 2007). See footnote 7, Pp 42

[47] Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal, "The Supreme Court during Crisis: How War Affects only Non-War Cases" in *80 N.Y.U.Law Rev. 1* (April, 2005)

This dissertation looks to specific, major wars that have had cultural and social impact. These wars should be significant enough to influence Supreme Court judicial decision-making. To find out which wars may qualify, we turn towards the study of wars in international relations, specifically in the database of the Correlates of War. The Correlates of War (COW) datasets housed at the Penn State University. COW delineates any war in which the United States has sustained one thousand battle deaths or more as "significant war."[48] Within the United States, a war that brings such a large loss of life would almost certainly have a wide-ranging cultural and societal impact. Additionally, this threshold would eliminate the small conflicts and engagements of the 20th century. Using this measure as a baseline, this dissertation will focus upon these wars: World War 2, the Korean War, the Vietnam War, and the current war in Afghanistan as "significant wars" in this study.[49] This dissertation posits that these wars have been and continue to be cultural touchstones, and are good candidates for testing if judicial decision-making was influenced towards greater judicial deference.

The Government's Position and Deference

Judicial deference is sometimes called "judicial restraint." Defined in many ways, the most common definition can be summed up in this fashion: "Judicial restraint implies that justices should defer to elected officials as much as possible within the bounds established by the

[48]Diehl, Paul, current director. *Correlates of War Project*. http://www.correlatesofwar.org. Penn State University. Correlates of War datasets involve data about history of wars and conflict among states, and focus upon causes of warfare.

[49] John W. Chambers, II, editor-in-chief, *The Oxford Companion to American Military History*. (Oxford: Oxford University Press, 1999). For battle deaths in Iraq and Afghanistan: PDF Document of Casualties at http://www.defense.gov/NEWS/casualty.pdf. Provided by the website of the US Department of Defense. Current through April 7, 2013.

Constitution."[50] In this case, judicial deference is measured against how often the Supreme Court is willing to agree with the government's position. The clearest indicator of the government's position is when the United States is named party in the case. Where the US Government is a party, the office of the Solicitor General is usually present, as the Solicitor General argues virtually all of those cases.

The Solicitor General enjoys a strong institutional relationship with the Supreme Court and is sometimes given the nickname as the "Tenth Justice." As the government's official lawyer, the Solicitor General records the most official appearances before the Supreme Court and not coincidentally, this experience leads to their greater success before the Court.[51] As the government's primary attorney before the Supreme Court, the office of the Solicitor General guards its credibility jealously, and in fact, will bring only those cases where the office believes that certiorari will be granted and that the government's position will be sustained.[52] The Solicitor General is so respected and influential that recent scholarship has even demonstrated that even Justices thought to be ideologically opposed will follow recommendations of the Solicitor General.[53] Academic research confirms the institutional advantages of the Solicitor General, which in turn, help explain the greater likelihood of a government "win" before the Supreme Court.

National Security in War and Peace

[50]Michael Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics and the Decisions Justices Make* (Princeton, NJ: Princeton University Press, 2011), pp 9
[51] Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law*. (New York: Knopf, 1987).
[52] Rebecca Salokar, *The Solicitor General: the Politics of Law*. (Philadelphia: Temple University Press, 1992) pp 18
[53] Ryan Black and Ryan Owens, *The Solicitor General and the US Supreme Court: Executive Branch Influence and Judicial Decision*. (Cambridge, UK: Cambridge University Press, 2012)

Claims of national security during war might give the government leeway, but national security in peacetime should find the Court a more skeptical audience. National security claims are defined as those cases where the government is making a claim that involves the defense of the nation in some way. National security is, admittedly, a vague concept and is treated with greater precision in the next chapter. Briefly, national security can be defined as "those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression."[54] Chapter 4 delineates the methodology of determining what constitutes a "national security" claim.

In national security claims, the government justifies its actions by claiming they were necessary to block or ameliorate a threat or potential threat to the nation's interests. The Supreme Court is expected to weigh the individual's constitutional rights against the government's need to protect the nation's interests. In wartime, national security interests coincide perfectly in those cases where the government asks for deference in its pursuit of self-defense. In peacetime, national security interests are less clearly defined, but generally involve some element of defending the national interest. The government will occasionally strive for an expansive view of what constitutes national security, which this dissertation will explore in later chapters.

The major difference in national security claims during a time of peace is that the "threat" may not be as transparently clear as it is during a time of war. This is important since the justification of the government's actions depends, on some level, on the perception of the threat. A "threat" during wartime is usually trivial for the government to prove; enemies in a time of

[54] *Cole v Young*, 351 US 536, 544 (1956)

war are usually a matter of public record - for example, the Japanese in World War II and Al Qaeda during the Afghan war. A "threat" during a time of peace may not garner the same judicial deference as during war-time. Partly this is because, judges might require more proof of lethality or imminent danger and partly because, "national security" as defined by the US government during a time of peace, can be fairly abstract, and involve hypothetical possibilities that may never occur.[55] In wartime, claims of national security and war-related matters are usually presented as closely linked, if not interchangeable concepts. Additionally, the government enjoys another advantage: the assessment of the threat. One might expect that judges and justices would have little or no security expertise, and as such, part of a claim of national security by the government still rests upon the executive branch's assessment of the threat, which is based on the executive branch's presumed greater expertise and information. Threat may be abstract at times, but the government is presumed to know which threats are actual, rather than simply speculative. The lack of expertise is something that judges and justices seem to be acutely aware of – a fact that supports Aaron Wildavsky's model of interbranch interaction.

In 1966, Wildavsky noted that the president was most successful in foreign affairs but greatly hindered in domestic matters by Congress. In his work, he noted that this difference was a matter of an institutional advantage. For him, the advantage and disparate results were so great that there were in effect, two different presidencies. In this article, Wildavsky argued that:

[55] US NATO Military Terminology Group (2010). "Dictionary of Military and Associated Terms", 2001 (Amended 31 July 2010.) Pentagon, Washington: Joint Chiefs of Staff, US Department of Defense, pp 361. Retrieved from: http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. "[National security is] a collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by: a. a military or defense advantage over any foreign nation or group of nations; b. a favorable foreign relations position; or c. a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert." Last accessed April 8, 2013.

> The United States has one President, but it has two presidencies; one presidency is for domestic affairs, the other is concerned with defense and foreign policy…. Presidents have had much greater success in controlling the nation's defense and foreign policies than in dominating its domestic policies."[56]

Wildavsky contended that this greater level of success in foreign affairs stems from two factors: that presidents are better equipped to handle external policies, and that Congress is self-aware of this expertise and defers to the executive branch on such matters. In the domestic arena, however, that the president experiences an entirely different situation. Here, the Congress flexes its institutional muscles, and the president encounter far less success. Wildavsky called this model, the "Two Presidencies" model. Wildavsky's model also can explain the relationship between the judiciary and the executive in foreign affairs as well.

National security is, as the Supreme Court noted in *Cole v Young*, a matter that involves a "foreign" threat. The Two Presidencies model explains why the Supreme Court might be more deferential towards the executive branch in matters of national security. Wildavsky's arguments of interbranch deference depend upon an awareness of the executive branch's greater expertise and competence in foreign affairs and more precisely, the acceptance of such expertise by other branches of government. Wildavsky's theory best explains the Court's majority opinion in *in US v Curtiss-Wright Export Corporation.* Here, the Supreme Court held that the area of international relations was one reserved almost exclusively for the President. The Court found that the President is the primary representative of the nation's voice abroad and must be accorded some deference on that basis. Justice Sutherland, writing for majority, opined that the President has the

[56]Aaron Wildavsky, "The Two Presidencies" pp 448, in ed. Aaron Wildavsky, *Perspectives on the Presidency* (Boston: Little, Brown and Company, 1975).

> "… [V]ery delicate, plenary and exclusive power … as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[57]

The Court partly explained that the President is far better suited than Congress with such matters, but also implied that matters which were mostly political in nature were outside Supreme Court purview.[58] In later opinions, the Supreme Court has found a direct connection between foreign affairs and national security.[59] In fact, some scholars have held that there is such great judicial deference, that even the mere claim of "national security" by itself may lead to a greater instinctual deference by judges:

> Some courts have understood this tradition [of judicial deference] to require that they refrain from examining either the legality or the constitutionality of any presidential actions or laws enacted by Congress so long as they are wrapped in the banners of foreign policy or national security. One federal appeals judge has scornfully called this the "thaumaturgic invocation" of a foreign-affairs "talisman."[60]

Although war may evoke greater deference, the context of major war may not be enough to justify all governmental actions. Greater expertise and the sense of threat may give the

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[57] *United States v Curtiss-Wright Export Corporation,* 299 U.S. 304, 320 (1936)
[58] *United States v Curtiss-Wright Export Corporation,* 299 U.S. 304, 322 (1936)
[59]For a sampling, see *Chicago and Southern Air Lines v Waterman S.S. Corp*., 333 US 103 (1948) (holding that the President's decisions on foreign air transportation is a political matter beyond the ability of the Court to adjudicate); *United States v Belmont*, 301 US 324 (1937) (holding that the President has the power to conduct foreign relations without consent of the Senate, and the external powers of the US may exercised without regard as to state statutes); *United States v Pink*, 315 US 203 (1942) (holding that US treaties and the decision of the Executive branch in external matters can override state laws); *Baker v Carr*, 369 U.S. 186 (1962) (noting that certain types of cases, such as those that involve foreign conduct fall into the category of political questions and are outside the competent of the Court), *Harisiades v Shaughnessy* 342 US 580 (1952) (noting that alien cases are linked to conduct of foreign relations and the war power and that such matters are largely immune from judicial interference); *Dames & Moore v Regan*, 453 US 654 (1981) (holding that Executive Orders terminating legal judgments, proceedings and attachments against the government of Iran as part of hostage negotiations to be constitutional even where not authorized by statute as this authority derives from broad presidential power in foreign relations).
[60]Thomas M. Franck, "Courts and Foreign Policy" in *Foreign Policy*, No. 83 (Summer, 1991), pp 73

government more leeway, but there are limits to this deference. The reader may be able to see the incentive for government to expand the definition of a "threat" and extend the flexibility to ameliorate the "national security" threat. Such actions may be taken in good faith, but nevertheless, there are limits to how much deference the Supreme Court will exhibit, even in a time of war.

An example is the majority opinion rendered in *Youngstown Sheet v Sawyer*. In this case, President Truman attempted to nationalize the steel industry in order to prevent a strike that he claimed would endanger steel production and by extension, weapon production. Such a strike, Truman claimed, would jeopardize national security while the country was engaged in the Korean War. The Court disagreed noting that:

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[61]

One reoccurring issue is that the Court appears to be judging the merit of the national security claim without stating explicitly what that standard may be. Further chapters in this work attempt to explicate exactly what those standards are, and how the Supreme Court applies them. Briefly, the Court looks to answer if the government's actions were reasonable by looking at these two factors:

[61] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 587 (1952)

1. Threat or perception of threat.
2. Competence or expertise of government in dealing with threat.

None of these factors are dispositive by themselves, but the Court weighs "threat" and "competency" with greater weight when deciding upon the constitutionality of government actions.

In those cases where the Supreme Court shows defiance in time of war, one might conclude that the government has not fulfilled the expectations and assumptions of the members of the Court. Members of the Supreme Court appear to rely on some internalized set of understandings. Generally, the Court only states when the government's position has not reached those standards necessary to protect the "national security." War – or a least a significant war – should lower the barriers for these standards. After all, in a significant war, "threat" is usually obvious and the executive branch, especially the military, generally is seen as the expert in matters relating to national defense. Reasonableness of government action should be easiest to infer where the government acts to protect the national interest in times of war.

Hence, the consensus view amongst scholars appears to be that the Court will be more likely to defer in wartime because of the executive branch's perceived greater expertise and ability to act with dispatch. Where the government claims national security as a rationale in peacetime, this hypothesis states that there is less of an immediate visible threat and less of a perceived need for the Executive's greater expertise. Therefore, the Court may be less likely to find reasonableness in the government's actions.

In order to test this claim, this dissertation will measure whether deference is greater for national security claims versus non-national security claims in peacetime. This dissertation will

also test whether national security is treated more deferentially in wartime versus peacetime. Taken together, these hypotheses will test how the Court reacts to the exigencies of war, and where the limits of deference may be found in both war and peace.

Theories of Judicial Decision-Making

In the study of judicial behavior, academic scholarship has evolved markedly from the early days of the legal model. The legal model is one where judges are viewed as dispassionate actors who weigh legal arguments and precedents and make decisions based upon the dictates and doctrines of law.[62] The legal model has the distinction of being taught to generations of lawyers and to some degree, this training and perspective colors the way judges make their decisions. Put simply, the legal model posits that judges reach their decisions based upon precedent and training. [63] The legal model's great strength is its simplicity and the fact that judges do often think of themselves as reaching decisions by weighing precedents. As Lawrence Baum notes:

> One pervasive characteristic of judges' situations is that decisions are framed in legal terms. Lawyers' arguments for their positions typically are arguments about the state of the law. Judges themselves talk and write about their choices primarily in legal terms, not only in opinions but in their communications with each other during the decision process. This placement of decisions in a legal context can have a powerful effect on judges' choices, giving greater weight to their interest in legal accuracy and clarity.[64]

[62]See Joseph Kearney and Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court", *University of Pennsylvania Law Review*, Vol 148, No 3 (Jan 2000) pp 748
[63]Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000), see especially pp 63-64
[64]Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000), pp 63-64

Related to this model is the concept of "stare decisis" – meaning, "let the decision stand." In its simplest form, stare decisis provides that precedents provide the premise for decisions made by judges. Overruling precedents should be a rare event and the exception rather than the rule. An outcome of stare decisis is that judges view precedents as long-lasting and influential and will attempt to apply the legal reasoning from these precedents even in present cases. In theory, this provides an appearance of stability and lends legitimacy and credibility to current judicial decisions.[65] The practice of stare decisis is meant to present the act of judicial decision-making as one that is impartial, and largely impervious to the personal preferences of the judge.

The legal and stare decisis models provide a certain clarity for how the lawyers and judges describe the legal process. The degree to which this norm is upheld and passed onwards by generations of legal practitioners provides a certain consistent set of behavioral norms and as such, the legal model retains explanatory power.[66] As Ronald Kahn notes, "members of the Supreme Court believe that they are required to act in accordance with particular institutional and legal expectations and responsibilities" which leads to a decision-making process based on precedent and legal principles.[67] Any given Supreme Court opinion may override precedents, but the existence of the precedents limits the parameters for future disputes. Justices expect

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[65] Derigan Silver, "Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*", Communication Law and Policy*, Vol 15 (Spring 2010) pp 136

[66] Joseph Kearney and Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court", *University of Pennsylvania Law Review*, Vol 148, No 3 (Jan 2000) pp 748. The authors note that the legal model is at least partly explanatory of Supreme Court behavior as the Court is more likely to be persuaded by amicus briefs from the most experienced parties who also present consistently high quality legal arguments; Tracey George and Lee Epstein. "On the Nature of Supreme Court Decision Making." *American Political Science Review* Vol 86 (1992) pg. 32, finding that Supreme Court decides death penalty cases while incorporating the legal model and also factors in extralegal factors. Legal models do better at the beginning of cases, but extralegal models work better later on.

[67] Ronald Kahn, "Interpretive Norms and Supreme Court Decision Making: The Rehnquist Court on Privacy and Religion," in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999), pp 175

precedents to matter, and so opinions formulated in the present can represent the ammunition for argument by parties in future controversies. Thus, the content of opinions can and does influence the direction of future cases.[68]

The legal model assumes value neutrality to all precedents and that judges will examine each precedent and find the one that best fits the current case. If stare decisis and the value of precedents hold such a strong influence on judges and Justices, then very few litigants would see the value of appealing a lower court's decision as appellate courts would see no reason to overturn existing precedents.[69] The model assumes that each judge will act consistently. Once a decision has been made, a judge will feel compelled to follow that decision in future cases – even if he or she is personally does not agree with the reasoning. At the very least, these precedents reduce the range of decisions in future opinions.

Spaeth and Segal's research indicates that this premise of precedent-influence may not be true at the Supreme Court level. Using a variety of parameters, including measuring across time and comparing against landmark and ordinary cases, Spaeth and Segal measured the votes of each Supreme Court Justice who served in the Rehnquist Court and found that stare decisis was not a likely constraint on judicial decision-making. If the justices found the principle of supporting a previous Court decision to be a compelling desire, one would expect that these justices to vote to preserve previous precedents. Spaeth and Segal find no evidence for this

[68]See Thomas Hansford and James F. Spriggs II, *The Politics of Precedent on the US Supreme Court* (Princeton, NJ: Princeton University Press, 2006)
[69] Linda Greenhouse, "Precedent for Lower Courts: Tyrant or Teacher", *New York Times*, January 29, 1988 at A12. (Circuit Court judges discussing how precedent does not dissuade litigants from appealing lower court rulings.)

behavior.[70] Instead, Spaeth and Segal find that justices would rather vote consistently with their own preferences. As Segal and Spaeth note: "The justices are rarely influenced by stare decisis."[71]

Other scholars agree with the justices exhibit some flexibility with precedents. Erwin Chemerinsky argues that the Supreme Court do not view precedents as a hinderance to a preferred result and may bend the legal rationale behind "stare decisis" to the breaking point. Chemerinsky writes that "the Court writes its opinions to make them seem consistent with prior decisions, even when they are not."[72] Chemerinsky's core point is that judges and justices attempt to claim the credibility of following the law even whilst avoiding previous precedents completely:

> All of this illustrates the key point concerning the powerful role of precedent in constitutional opinions. Even when [precedents] are overruled, the Court works hard to justify why its new approach is actually consistent with long-standing decisions. A significant portion of almost every Supreme Court opinion is about how the decisions fit within, and flow from, the earlier cases.[73]

The legal system encourages and expects judges to choose one precedent over another. In the extensive body of decisions and precedents developed by the Supreme Court, there are often precedents and arguments for both sides in any case. Competent lawyers are expected to present

[70] Jeffery Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited,* (Cambridge, UK: Cambridge Unversity Press, 2002). Pp 76-85
[71] Jeffery Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited,* (Cambridge, UK: Cambridge Unversity Press, 2002). Pp 298
[72] Erwin Chemerinsky, "The Rhetoric of Constitutional Law", *Michigan Law Review*, Vol. 100 (August 2002) pp 2015
[73] Erwin Chemerinsky, "The Rhetoric of Constitutional Law", *Michigan Law Review*, Vol. 100 (August 2002) pp 2019

any and all available precedents that may even be remotely relevant to the case at hand. [74] Judges can be said to follow precedents, but the legal model does not provide a predictive model for their behavior.

Current academic research focuses on the constraints on judicial decision-making. These constraints can largely be categorized into internal and external varieties. Research on internal constraints largely centers on institutional restraints upon judicial decision-making. The legal model and precedent-centered behavior of "stare decisis" may be categorized as influences by "internal constraints" which derived from legal normative claims. External constraints focus mainly upon from forces originating outside of legal institutions. Examples include strategic concerns involving the other two branches of government, and influence of public opinion. We first turn to the contemporary leading theory on "internal constraints" – namely, that of the attitudinal model.

Attitudinal Model

The attitudinal model argues that judges have ideological preferences that they will attempt to fulfill when they decide cases. In other words, a conservative justice will vote his ideological preference and vote in a fashion that fits the conservative spectrum. Similarly, a liberal justice will vote in a manner that is consistent with a liberal outcome. In this model, precedents are chosen or discarded according to a judge's desire for a particular outcome. The attitudinal model recasts the outcome of a case at the Supreme Court level as an aggregation of

[74] Jeffery Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge Unversity Press, 2002). Pp 77

each Justice's preferences, despite the existence of stare decisis. [75] Kearny and Thomas Merrill put it succinctly: "This model [attitudinal model] posits that judges have fixed ideological preferences, and that case outcomes are a product of summing of the preferences of the participating judges, with legal norms serving only to rationalize outcomes after the fact."[76]

The model explains that justices will choose to follow those precedents that best fit their own personal preferences. Personal preferences are correlated with subject matter that can map to a political spectrum. Thus, the attitudinal model is at its best when dealing with cases that encompass strongly ideological issues like civil rights or death penalty cases. Due to this predictive and explanatory power, the attitudinal model is the dominant template for the study of judicial behavior, with some scholars nothing that "[w]ithout question, the attitudinal model has dominated the study of judicial choice and stands unchallenged as the best representation of voting on the merits in the nation's highest court."[77]

This model, however, focuses upon individual Justices and their preferences. It is silent on the possibility of influences beyond self-directed preferences such as strategic concerns about other political branches. [78] The attitudinal model is ultimately a very reductionist model. The model sacrifices depth for clarify as it often oversimplifies a very complex set of motivations for judicial decision-making and reduces it solely to policy preferences. Some critics note that

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[75]Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press 2002), see pp 110-114

[76] Joseph Kearney and Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court", *University of Pennsylvania Law Review*, Vol 148, No. 3 (Jan 2003) pp 748

[77] Melinda Gann Hall & Paul Brace, "Justices' Responses to Case Facts" *American Politics Quarterly*, Vol. 24 (1989), pp 237-238

[78]Forrest Maltzman, James Spriggs II and Paul Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Judicial Decision Making" in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999), pp 49: "Whereas the attitudinal approach emphasizes the unconstrained nature of judicial decision-making, the strategic approach suggest that justices take into account the constraints that may exist."

judges may make decisions based upon other factors than just policy preferences – and that internal conceptions about how the judge interacts with the rule of law may have a greater impact than Spaeth and Segal surmise.[79]

The attitudinal model works very well to explain and even predict behavior in certain contexts. A common criticism from scholars is that Justices may vote their preferences sincerely, but each Supreme Court Justice is only one of nine, and to affect their preferences into the outcome, there has to be some consideration and awareness of how the other justices may vote. Individual policy preferences aside, an individual Justice cannot single-handedly enact his or her preferences into law. In order to enact their policy preferences into law, justices usually have to join a majority opinion. Explanations of judicial-decision making may be complemented by how the judges and justices view another internal constraint; namely that of the strategic needs of voting in a field of nine.

Strategic Model

The strategic model, which was pioneered by Walter Murphy, focuses upon a broader view of the judicial decision-making process. The internal variant of the model looks at Justices acting as individuals attempting to further their goals by working with and anticipating what their peers might do. This perspective has Justices bargaining, anticipating, lobbying, and persuading each other on the merits of the case in an effort to secure a majority for the opinion and thereby, cement their preferences into the outcome.[80] As an example, this variant focuses on justices

[79] Howard Gillman, "What's Law Got to Do With it: Judicial Behaviorialists Test the "Legal Model" of Judicial Decision Making*", Law and Social Inquiry*, Vol 26 (Spring 2001) pp 485-496
[80]Lee Epstein and Jack Knight. *The Choices Justices Make* (Washington DC: CQ Press, 1998)

forming coalitions with each other to achieve a particular result, and assesses how they react to institutional constraints, such as the Rule of Four in the certiorari process.[81] In this field of research, the internal variant focuses upon factors that affect each Justice individually and singly as he attempts to navigate his ideological preferences against the shoals of institutional needs and procedures while at the same time dealing with the preferences of his brethren.

The strategic model also explores external issues facing the institution as a whole, embedded as it is within a political system.[82] Murphy writes that where a Justice may harbor ideological goals, he may choose to act when his "objectives would be threatened by programs currently being considered seriously in the legislative or executive branches of government. To cope with either eventuality, a Justice would have open to him a broad range of strategic or at least tactical alternatives."[83] Maltzman et al (1999) define strategic behavior as

> Interdependent behavior with justices' choices shaped, at least in part, by the preferences and likely actions of other relevant actors…. It is important to note that while we see strategic justices as responding to the anticipated response of others, strategic justices will not necessarily act insincerely. If the political context favors the justice's preferred course of action, a strategic justice's behavior will be the same as it would be without constraints."[84]

In short, Justices vote with an awareness of the institutional constraints both inside and outside the Supreme Court, and work towards emplacing their ideological preferences while attempting to navigate these obstacles.

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[81]H.W. Perry Jr, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press 1991)
[82]Walter Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964)
[83]Walter Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964) pp 156.
[84]Forrest Maltzman, James Spriggs II and Paul Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Judicial Decision Making" in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999), pp 47

The external variant has an inter-branch perspective, focusing upon the institution of Supreme Court acting as one unit. This field of study looks at how the Court acts and reacts to other political actors within the system while deciding cases. Lawrence Baum writes:

> The predominant view in this body of work is that justices regularly take the other branches into account when they set the Court's doctrines on statutory issues, voting strategically to minimize the chances that their decisions will be overridden. If the interpretation of a statute that the justices most prefer is likely to elicit reversal by Congress and the president, they will compromise by adopting the interpretation closest to their preferences that could be predicted to withstand reversal.[85]

Put simply, this version of the strategic model posits that Justices anticipate the actions of other branches of government; this variant is sometimes called the "separation of powers" model.[86] Scholars explain judicial deference in the separation of powers model as a consciously taken action that Justices take to protect their institution and conceivably the place of the Supreme Court in government itself:

> Conceptually, deference to other institutions should not be treated as a form of law-oriented behavior. Rather, this type of judicial restraint is best understood as a particular kind of policy-oriented behavior, one based on concern for the structure of government power rather than substantive policy goals. In this respect it is similar to positions on other structural issues such as federalism and the balance between congressional and presidential power.[87]

Spiller and Gely (1990) note that "the behavior of the Court can be understood as that of a self-interested, politically-motivated actor, the justices' calculus differs from that of members of Congress… The ability of other political actors to take actions to reverse the Supreme Court

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[85] Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000) pp 119
[86] Forrest Maltzman, James Spriggs II and Paul Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Judicial Decision Making" in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999) pp 49.
[87] Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000) pp 59.

decisions is what constraints the scope and power of the Court."[88] Maltzman et al (1999) and Baum (1997) both note that the multiple layers of legislative constraints create a level of uncertainty regarding Congressional effectiveness at countering Supreme Court decision-making. Since the legislative process itself is fraught with such great uncertainty, critics of this model charge a Justice may not need to know nor care what Congress may be thinking since Congress cannot effectively counter Supreme Court decision-making.[89]

Research on the separation-of-powers model tends to focus on major constitutional cases involving inter-branch clashes. There is some evidence that justices anticipate the consequences of presidential and congressional reaction.[90] One scholar even argues that retrospective perspective of previous administration's actions (and the Court's reaction to them) inform the current Court. Mark Tushnet argues the justices experience "social learning" based on the claims and actions by the executive branch in past emergencies in cases before the Supreme Court. Tushnet defines "social learning," as when a political organization learns from its own

[88]Pablo Spiller and Rafael Gely, "A Rational Choice Theory of Supreme Court Statutory Decisions: Applications to the 'State Farm' and 'Grove City Cases' *Journal of Law, Economics, & Organization*, Vol. 6, No. 2 (Autumn, 1990), pp. 263-300, Pp 265

[89]Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000) pp 96-97; Brian Sala and James Spriggs, "Designing tests of the Supreme Court and the Separation of Powers" *Political Research Quarterly*, No.2 Jun (2004), 197-208 (finding that no evidence for separation of powers model for anticipating legislative reaction but evidence for attitudinal model)

[9090] Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2000) pp 122 Forrest Maltzman, James Spriggs II and Paul Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Judicial Decision Making" in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999) pp. 51. See Pablo Spiller and Rafael Gely, "Congressional Control or Judicial independence: the determinants of US Supreme Court labor-relations decisions, 1949-1988" *The RAND Journal of Economics*, Vol. 23, No. 4 (Winter, 1992), pp. 463-492 (finding evidence that rejects the legal model, while supporting the attitudinal model that Courts make decisions based on their ideology. However, they also find evidence that Justices vote their preferences while taking into account constraints imposed by Congress); Pablo Spiller and Rafael Gely, "A Rational Choice Theory of Supreme Court Statutory Decisions: Applications to the 'State Farm' and 'Grove City Cases' *Journal of Law, Economics, & Organization*, Vol. 6, No. 2 (Autumn, 1990), pp. 263-300

mistakes as a part of its institutional memory.[91] In the throes of an emergency such as a war, members of the Supreme Court may be amenable to accepting claims of necessity by governmental actors. Subsequent justices may come to the conclusion that the acceptance of the executive branch's policy position, tinged with the patina of crisis, were not based on sound legal foundations – especially where governmental claims were later found to be exaggerated. Decisions by the Court are enshrined in precedents, which are argued before successive Courts. In general, the use of precedents encourages Courts to look backwards, particularly encouraging a review past decisions and their outcomes.[92] A decision made by the Supreme Court motivated by cries of emergency, when seen in the cold light of historical reflection, may not be as justifiable. When a new case arises, one might expect that lawyers will argue precedents and outcomes in the least favorable light. The use of previous precedents serves as a historical lesson and a reminder, which in turn leads to greater skepticism and wariness of governmental cries of emergency in current cases. In this way, Tushnet's social learning in the judicial context, is essentially the Supreme Court's institutional memory. As Tushnet writes:

> Knowing that government officials in the past have exaggerated threats to national security or taken actions that were ineffective with respect to the threats that there actually were, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats have decreased.[93]

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[91] Mark Tushnet, "Defending Korematsu? Reflections on Civil Liberties in Wartime" in Mark Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press: Durham, NC., 2005) see pp 124-140

[92] Mark Tushnet, "Defending Korematsu? Reflections on Civil Liberties in Wartime" in Mark Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press: Durham, NC., 2005) see pp 125

[93] Mark Tushnet, "Defending Korematsu? Reflections on Civil Liberties in Wartime" in Mark Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press: Durham, NC., 2005) pp 126

With respect to the decision in *Korematsu v US*, at least one Justice was predicting negative effects within his contemporaneous opinion. Justice Jackson worried at the time of the case that the decision was a "loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[94] Over the passage of time, the legal community has come to agree Justice Jackson's admonition of the result. On November 10, 1983, Judge Marilyn Hall Patel issued a writ of "coram nobis" setting aside Fred Korematsu's 40 year old conviction. "Coram nobis" is a legal action where a judge reverses aside an erroneous civil or criminal judgment, for the purposes of fixing a fundamental error by a previous court where there is no other remedy available. As Judge Patel writes:

> Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[95]

Bob Woodward writes on this phenomenon of Supreme Court Justices being influenced by their memory of exaggerated executive branch claims. One at least occasion, Justice Stewart's decision was based on his judgment of the President Nixon's claims about the Vietnam War. Woodward writes of Justice Potter Stewart's decision-making process during the Pentagon Papers case:

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[94] Korematsu v US 323, U.S. 214, at 246 (J. Jackson, dissenting)
[95] *Korematsu v United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984)

> [Justice] Stewart would not accept the government's claim of national security on its face. The government had lied too much about the war already. At the same time, Stewart wanted to make sure that nothing in the papers was so sensitive that disclosure might result in deaths. It was difficult. A lot rested on the Court's decision, and he was possibly the swing vote. Contrary to his normal practice, he sought little advice from his clerks. "You're only the clerks," he said gently, "and I will have to decide for myself."[96]

In other words, Supreme Court Justices can decide cases on information beyond that presented in the case. Members of the Court do not operate in a vacuum after all. The use of precedents and the adversarial nature of the process act as reminders of that past Court decisions. Built into each previous precedent and decision about national security claims is a collective record of previous separation of powers arrangements in war and peace, one that is unearthed again and again as similar situations arise. Social learning may help explain the behavior of the Court when faced with demands for greater deference by the Executive branch in times of emergency.

Strategic models involving the judicial-presidential relationship are framed by the fragile nature of the Supreme Court's power upon executive branch and what motivates the Supreme Court to test this power. Alexander Hamilton argued forcefully and famously that the Supreme Court is the "least dangerous" branch because the Court "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[97] The Supreme Court must depend upon the president and the multi-headed federal law enforcement for execution of for most of its decisions. Where the executive branch is a participant, the clear conflict of interest necessarily

[96] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979) pp 141
[97] Alexander Hamilton, *Federalist No. 78*.

means that the Supreme Court has no direct way to enforce its will in any confrontation with the executive branch. Theodore Sorenson sums it up deftly:

> A more likely motivation [to avoid conflict with the president] is institutional self-interest, a desire on the part of the courts to avoid a showdown with the President for fear that he will ignore their orders and thereby weaken the unique standing of the judiciary. (In other words, "he's got the Army, Navy, and Air Force, and all we have is the Clerk of the Court.")[98]

At the heart of the dilemma of the Supreme Court is that although they may decide the constitutionality of cases and actions of other branches, there is a built-in conflict of interest where the Executive branch may be a party or has exhibited a strong interest counter to the Court's position. The power that the High Court has over its sister branches is largely based on a normative call to constitutional order. Overuse of such power creates the possibility of backlash. As C. Herman Pritchett notes:

> There is a tendency to forget the extent to which the Supreme Court's supremacy is grounded in psychological rather than legal foundations. Its function is extremely limited – to decide "cases" and "controversies" – and even its jurisdiction to do that can be largely taken away by Congress. It lacks power to executive its commands, and must rely upon the executive for their enforcement …. Dependent as it is, the Supreme Court enjoys the privilege of becoming unrepresentative only at its peril, for methods of retaliation are readily available should the representative branches o the government have cause to resort to them.[99]

An alternative explanation for judicial deference may not be a pure calculation of self-preservation. The Supreme Court may see themselves as generalists with competence in many matters. However, as generalists, they may defer to other actors who have greater relevant

[98]Theodore Sorenson, *Watchmen in the Night* (Cambridge: MIT Press, 1975) pp 128
[99]C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: The Macmillan Company, 1948) p 21

expertise.[100] Within the strategic model, Justices may defer to the Executive Branch in those situations where they feel the president is more competent to act. There is evidence that the Supreme Court actively weighs and judges its own expertise when deciding whether or not to defer to the executive branch.[101] Judicial authority may seem to be undercut by its institutional place in government, but its authority stems from a far less tangible source. Consensus in the literature appears to be that the Supreme Court enjoys and employs the respect and popularity of the public.

This public opinion model depends upon concept that the Court has influence via its high regard amongst the public. This may be explained through the Court's association with the process of constitutional law. An analog of this effect can be seen in the work pioneered by Richard Neustadt. Although Neustadt writes primarily about presidential-Congressional relations, the underlying concept is that the power of the president is mostly informal, and that is linked to the confidence of the people. Political actors who ignore a popular president run a risk,

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[100] *Chevron v Natural Resources Defense Council*, 467 US 837, 838 (1984). "Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference." This case is one of the most cited in legal texts, as it now stands for the default doctrine on how judges and Justices handle the needs of the administrative state. It is so linked to a particular kind of deference, that scholars and jurists alike use the phrase "Chevron Deference" when analyzing administrative agency decisions.

[101] The Court's opinion in Baker v Carr outlined when the Court might defer to other branches when they have a greater competence and declare a "political question" to be extant:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [Baker v Carr 369 US 186, 217 (1962)]

for they may voted out of office or punished in some other way by the public.[102] Michael Genovese writes about the institutional limits of exercising the power of the Court. In essence, the political actors may just call the Court's bluff:

> Traditional scholarship suggests that the courts can make all the decisions they wish, but if no one enforces those decisions, the court may end up losing both power and prestige. Courts realize that they are skating on very thin ice, and the weight of a President could make that ice collapse. Thus the courts exercise their powers against a president very sparingly and cautiously.[103]

Some scholars have argued that this prestige stems from a reservoir of goodwill and admiration from the general public. They argue that the psychological basis of the admiration for the Supreme Court comes from respect for the Constitution. In the public mind, the abstract ideals of the Constitution have become fused with the institution of the Supreme Court itself.[104] As Glendon Schubert writes:

> There can be little doubt that the people of the United States respect, above all other public officers, their judges – or at least those judges who sit on appellate courts; and most of the time their veneration for the Supreme Court of the United State, is akin to worship of the Constitution itself.[105]

Schubert may see the Court as a passive receptor of public respect for the Constitution, but Keith Whittington offers a more active theory – that in fact, the Court actively seeks to cloak itself in that patina of legitimacy. As he puts it:

> Judicial supremacy largely consists of the ability of the Supreme Court to erase the distinction between its own opinions interpreting the Constitution and the actual Constitution itself. The Court claims the

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[102]Richard Neustadt, *Presidential Power and Modern Presidents: the politics of leadership from Roosevelt to Reagan* (New York: Free Press, 1990)
[103] Michael A. Genovese, *The Supreme Court, the Constitution and Presidential Power*. (Lanham, MD: University Press of America, 1980) pp 56
[104]Patrick Ewick and Susan Sibley, *The Common Place of Law: stories from everyday life*. (Chicago: University of Chicago Press, 1998)
[105]Glendon Schubert, *The Presidency in the Courts* (Minneapolis: University of Minnesota Press, 1957) pp 4

> authority not only to look into the meaning of the Constitution as a guide to the justices' own actions, but also, and more importantly to say what the Constitution means, for themselves, and for everyone else.[106]

Barry Friedman argues that the Supreme Court is popular because its opinions track and eventually dovetail with the mainstream's attitudes. Friedman argues that the Supreme Court is most successful where its opinions predict shifts in public opinion. When the public rejects their opinions in a persistent fashion, the Court will reverse itself. As Friedman notes, "[w]hat history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*.[emphasis from original quote]"[107] Friedman argues that the Court is a legitimizing and popular institution mainly because the Court and public opinion feedback upon each other.

The Court is sometimes seen as interchangeable with the impartial construct of the law. Mingled with the patina of US Constitution itself, the Court may come to share the same aura of legitimacy. As a symbol by itself of protecting the legitimacy of constitutional rights, the public may be excused for its belief that the Justices will protect the integrity the system by the exercise of protecting and preserving the separation of powers between the branches. As David Rohde writes

> Chief among our symbols are the Constitution and the Supreme Court. They are symbols … of an ancient sureness, of timelessness, of a comforting stability. But though the reality in which these symbols are

[106]Keith Whittington, *Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court and Constitutional Leadership in US History* (Princeton: Princeton University Press, 2007), xi
[107] Barry Friedman, *The Will of the People: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution*(New York: Farrar, Straus and Giroux, 2009), pp 382

> rooted is itself a myth, the myth itself to be believed must be plausible. And it is the fact of separation of powers that provides a measure of plausibility.[108]

The Supreme Court, as the self-proclaimed guardian of the Constitution, is so closely identified with the Constitution that the public often confuses respect for the Constitution with the Court itself.

Members of the Court are aware of that their authority rests upon a bedrock of public goodwill; Justice Frankfurter writing in dissent in *Baker v Carr*, notes that "[t]the Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction."[109] Caldeira (1986) reports that public opinion, as a whole, for the Supreme Court is shallow but positive, and that where the Court acts against the law-making majorities such as the President and Congress, there is a concomitant cost in popularity for the Supreme Court.[110] Mishler and Sheehan (1996) find that some members of the Court seem to be affected by public opinion and vote accordingly; they also report that scholars have a broad consensus that the Supreme Court is receptive to public opinion.[111] Other scholars note that the Court is actually quite politically sensitive to the public, because other political actors are sensitive to the public mood and the Court responds strategically to the elected branches. Robert Dahl writes that "the policy views dominant on the court are never for long out of line with the policy views dominant among the lawmaking majorities of the US." Dahl noted that over time, those personnel changes on the Court are reflective of the executive and the legislative branches.

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[108]David W. Rohde, and Harold Spaeth, *Supreme Court Decision Making* (San Francisco: W.H. Freeman, 1976) pp 7

[109] *Baker v Carr*, 369 US 186, 267 (1962)

[110]Gregory Caldeira, "Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court" *American Political Science Review*, Vol 80. No. 4 (Dec. 1986) pp 1209-1226

[111] William Mishler and Reginald Sheehan. "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytical Perspective" *The Journal of Politics*, Vol. 58, No. 1 (Feb., 1996), pp. 169-200

These branches, in turn mirror the public which elects them.[112] Court that stray far afield from what mainstream may discover that the residual goodwill cannot affect social change by fiat, especially in the face of public dissension.[113] Although public opinion has some place in judicial decision-making, its place and net effect are somewhat unclear.

Public opinion is a double-edged sword when used as a lens to understand judicial behavior. Since the Supreme Court was created by design as a body insulated from the people, the effect of public opinion on judicial behavior resists easy modeling. However, members of the Court however do seem to take into consideration how the institution of the Supreme Court appears to the public and other political actors. If nothing else, if the Court appears to be inconsistent in its opinions, this would weaken their credibility and concomitantly their effectiveness.[114] Regardless of what effect public opinion has on judicial decision-making, the consensus appears to be that there is some effect, although scholars continue to argue what that effect may be.

Anecdotally, Justices appear to be sensitive as to how their decisions may affect the public and how they may be received in kind.[115] Implicitly, Justices seek to avoid a situation where their opinions are ignored and the credibility of the institution undermined. Even if the

[112] Robert Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law*, Vol 6, No. 2 (1957) pp 279-295

[113]Gerald Rosenberg, *The Hollow Hope: Can Courts bring about Social Change?* (Chicago: University of Chicago, 1991). Rosenberg argues that social change can happen where the Court has political allies who then work to enforce and educate the public, but cannot by itself affect change by legal fiat.

[114] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979) pp 44. During the conference debate about the delays in desegregating public schools, Justice Black threatened dissent if the Court did not support immediate desegregation. "There was a moment of stunned silence. A dissent by Black, a giant of the Court, a historic figure, would make it look as if the Court was in retreat. It would give new hope to the South's "never" faction."

[115] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979). See pp 95-112, where Woodward describes the Justices' deliberations of desegregation, busing and other affiliated matters while calculating actions and reactions by President Nixon, state and school boards and more diffusely, the public at large.

Justices vote with their hearts, the Justices do not make their decisions in a complete political vacuum. On its face, the strategic model appears to solve this dilemma, by explicitly building external and internal influences into judicial decision-making. Strategic models assume that political actors act on the basis of their predictions of how other actors in the system will behave. Power is linked to the perception of which actor has the greatest support within the system, which in turns means which actor or institution is held in higher regard by the public. Public opinion, may indirectly affect the possible strategic thinking of the individual Supreme Court Justice, even one that is primarily motivated by voting in his own ideological preferences.

Ideology

Much of the academic work on presidential nominations focuses upon the idea that Supreme Court Justices are selected on the basis that they represent a proxy of the sitting president's policy preferences. The nomination process is a strategic decision, since the nominee, once confirmed upon the bench of the Supreme Court may outlast the nominating president's administration by decades. Presidents tend to choose nominees to reflect their own ideological preferences. Because their judicial decisions can have long term impact, presidents choose their nominees in order to minimize the uncertainty of future conduct of these potential Supreme Court Justices.[116] A president decides upon nominee from the body of work in his or her life up until that point, including their political, academic or work history. All things being equal, party identification represents the most basic informational cue for the policy preferences

[116]See Christine Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Judges from Herbert Hoover through George W. Bush.* (Charlottesville: University of Virginia Press, 2007). For a discussion of presidential expectations and nomination as a test of presidential power, see David Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominee* (Chicago: University of Chicago Press, 1999).

by the individual voter. Presidents are no different in seeking strategic cues for how potential Justices might vote. In those situations, presidents may also rely upon partisan identification as informative shorthand for what the nominee's ideological positions may be and how the nominee might vote in future opinions on the bench. Partisan identification, however, is a blunt tool to decipher judicial behavior over time. Scholars have created more insightful metrics to track and predict judicial behavior according to ideology.

One such attempt by Jeffrey Segal and Albert Cover focused on creating a continuum of "liberal" to "conservative" ratings for Supreme Court Justices. To do so, Segal and Cover measured how "liberal" or "conservative" members of the Court actually are, by reference to the aggregate opinions of newspaper columnists. Justices' subsequent votes were coded as "liberal" and "conservative." These measures were compared against the newspaper values. Segal and Cover found strong correlation between the perceived newspaper scores and the actual votes in economic and civil liberties areas.[117] This seems to strengthen the idea that ideology matters in how justices will vote at least in certain contexts, and gives weight to the careful nomination by presidents.

Andrew Martin and Kevin Quinn created a more sophisticated model, using actual judicial votes. Martin-Quinn scores track whether a Justice voted to affirm or reverse in individual cases. Then Martin and Quinn rely on a formula to create a predicted pattern of votes. The model then compares this generated vote patterns against real life behavior and allows for adjustment as more data is available. The Martin-Quinn model appears to be 75 to 80 percent accurate in describing actual behavior over a large set of judicial votes. Based on that result,

[117] Jeffrey Segal and Albert Cover. "Ideological Values and the Votes of US Supreme Court Justices," *American Political Science Review*, Vol 83, No. 2 pp 557-565 (1989)

Martin and Quinn expect that this model should also be similarly accurate in predicting future behavior. The Martin-Quinn model improves predictions as it collects more data, making it a very useful tool for examining the ideological basis of votes for Supreme Court Justices.[118]

Using the Martin-Quinn scores, Lee Epstein, Andrew Martin, Kevin Quinn and Jeffrey Segal set out to see if ideological scores of justices remain stable over time. These scholars set out to discover if justices vote consistently according to their ideology over time. Their results show ideological preferences of justices shifts over time. Justices can and often do change their policy preferences.[119] Justices' ideological preferences are not set in stone. They evolve over time, and can eventually move towards different parts of the liberal-conservative spectrum.

Martin-Quinn scores, while influential, are not without its detractors. Critics of Martin Quinn argue that its dependence on vote data means that if there is a greater infusion of votes towards one end of the spectrum, it can alter the scores. In other words, if there is "a rapid increase of conservative votes" it might cause the Supreme Court to look like it was nearing "its conservative peak in a time when it was handing down decidedly liberal opinions [in the 1970s]."[120] Martin-Quinn scores can swing towards one end of the spectrum if there are new personnel on the Supreme Court – making it seem like the Court is more ideological in one direction than their majority opinions might suggest.

Michael Bailey's work proposes an ingenious and elegant way to fix this problem. Instead of depending solely on votes to affix where the votes may lie on the ideological

[118] Ward Farnsworth. "The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift" *Northwestern University Law Review,* Vol 101, No. 4:1891-1904 (April 2007)
[119] Lee Epstein, Andrew D. Martin, Kevin Quinn, Jeffrey Segal. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review*, Vol 101, No.4: 1483-1542 (April 2007)
[120] Michael Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics and the Decisions Justices Make* (Princeton, NJ: Princeton University Press, 2011) pp 26-27

spectrum, Bailey's preference estimates create measurements that span across institutions, specifically the Congress and the Presidency.[121] Bailey's work depends on finding fixed reference points in other two branches of government. Members of Congress have well-developed measurements of how "liberal" or "conservative" based on their votes and their speeches. By looking at where these Members voted – and in some cases, referencing questions presented to the Supreme Court – Bailey's ideal points can comparable positions on the liberal-conservative spectrum for cases before the Supreme Court. Bailey also uses data from presidential speeches and other notable public appearances to create a set of presidential preference points. By matching the justices' votes against these cut points derived from Members' votes and presidential preferences, Bailey can calibrate where Supreme Court Justices might lie on the liberal-conservative spectrum. In this manner, Bailey's work avoids the susceptibility of Martin-Quinn scores to rapid change.

Bailey's ideal points work extremely well for gauging how "liberal" or "conservative" justices' votes, but implicitly, it works best when Members and the President have expressed their own preferences. This favors landmark or popular cases. Most cases in this study are not landmark cases nor seem to have claimed popular attention, let alone that of members of Congress. The biggest advantage that Martin-Quinn scores has over Bailey ideal points, at least for this study, is that Martin Quinn scores stretch back all to 1937, whereas Bailey ideal points only go back to 1950. The use of Bailey ideal points would make the analysis more robust, but since this study includes World War II, the use of Martin-Quinn scores provides more utility.

[121] Michael A. Bailey, "Comparable Preference Estimates Across Time and Institutions for the Court, Congress and Presidency" in *American Journal of Political Science*, Vol 61. No 3. July 2007, pp 433-448

This dissertation tests for ideology of the entire institution of the Court across an entire term using the Spaeth database. The Spaeth database consisted judicial votes, primarily listed for October "terms" not years. Ideology, as used by this study, is presented as a way to gauge if the preferences of the Court as a whole might outweigh or influence judicial voting in the context of war and if national security claims has any particular effect. This study does not depend upon Congressional tendencies and treats the government's participation as a named party as a signal from the executive branch. The appearance of the government as a party before a case is treated as a proxy of the executive branch's desires. Martin-Quinn scores present a measure of how "ideological" the entire Court is, for any given year as an aggregate of all the votes in that year. Martin-Quinn scores are also linked to the start dates of the Supreme Court October terms, avoiding the compression of multiple Court terms into one "term." This summary score, while inelegant, gives a rough guide of how "liberal" or "conservative" the Court was a whole. Using Martin-Quinn scores as a rough measure allows this study to the opinions in a context of war or national security claims, while avoiding the problem of co-mingled Supreme Court terms. In addition, this study should shed some light on whether ideological voting tendencies surface whenever war or national security claims arise.

Quantitative findings

In general, quantitative findings in this area confirm that there is deference by the Courts in the Two Presidencies model. Testing the Two Presidencies model, Ducat and Dudley (1989) explore whether federal district judges voted strategically, impliedly motivated by doctrine and an eye towards career advancement. Their study involved federal district court decisions

involving presidential power from 1949 to 1984. Ducat and Dudley find that presidential approval ratings and whether a president nominated the judge have a significant effect on deference. They find evidence of deference to the president on foreign affairs, but that "in that area of domestic policymaking, judges recognize and apply clear rules that limit presidential discretion."[122] Ducat and Dudley suggest that the Two Presidencies doctrine outlined in *US v Curtiss-Wright* create a presumption of deference towards the Chief Executive in foreign affairs but "in domestic affairs, federal district judges can and do constrain the executive, particularly when the president falls form public favor."[123] Building upon Ducat and Dudley's work, Yates and Whitford use a similar model while exploring the Supreme Court and find significant evidence that the Justices are more likely to defer if the case revolves around foreign affairs. In domestic matters, Yates and Whitford find evidence that presidential approval ratings and justices' ideology matter when looking at judicial deference to the executive branch.[124] In a 2002 update, Yates reports a statistically significant finding that the existence of military matters or foreign affairs makes it more likely that the Supreme Court will defer to the executive branch.[125] King and Meernik set out to disprove the "axiomatic belief" – as they put it – that the Supreme Court will defer to the president in foreign affairs. King and Meernik collected data from 1789 to 1996 where issues of foreign policy are at the forefront and where the president is a participant or his proxies have shown an interest. They report that in 107 of 347 cases, the

[122] Craig Ducat and Robert Dudley, "Federal District Judges and Presidential Power During the Postwar Era" *The Journal of Politics* Vol 51 No 1 (Feb 1989) pp 98-118, 115
[123] Craig Ducat and Robert Dudley, "Federal District Judges and Presidential Power During the Postwar Era" *The Journal of Politics* Vol 51 No 1 (Feb 1989) pp 116
[124] Jeff Yates and Andrew Whitford, "Presidential Power and the United States Supreme Court" *Political Research Quarterly,* Vol 51. No. 2 (June 1998) pp 539-550
[125] See Jeff Yates, *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court* (New York: State University of New York, 2002)

Supreme Court upheld a challenge against executive branch. King and Meernik also demonstrate that in the area of civil liberties – a domestic matter – the president is least likely to win.[126] This work demonstrates that judicial deference in foreign affairs is substantial, but not inevitable – and where one aspect of domestic affairs is concerned, the Court acts as a check against the executive. Arguably, then the Two Presidencies model might explain why "national security" matters may be treated differently during peacetime.

Studies of the "Two Constitutions" model are more focused on the qualitative side. Lee Epstein notes that most qualitative studies are focused on self-selected singular cases. Epstein's principal criticism about qualitative cases is that case selection for such cases may be biased. Epstein argues that the extrapolation of a particular principle from a case study of a single case for an entire class of cases may be flawed. Epstein's solution is to mix both quantitative research with qualitative case analysis, supplementing statistical analysis with nuanced explanation of the results. [127] Qualitative studies appear most often in law journals, these studies tend towards single cases or a small number of cases. They are usually based on or are by influenced major, landmark precedents such the celebrated case of *Youngstown Sheet and Tube v Sawyer*, which is usually held up as the Supreme Court created limitation on presidential war powers.[128] Systematic quantitative studies are fewer; in an early attempt to use quantitative methods (by using a database created by Glendon Schubert of presidential orders and proclamations that the

[126] Kimi King and James Meernik, "The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy" *Political Research Quarterly*, Vol 52, No. 4 (Dec. 1999) pp 801-824
[127] Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal, "The Supreme Court during Crisis: How War Affects only Non-War Cases" in 80 *New York University Law Review* 1 (April, 2005), pp 37-41
[128] *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952)

Court invalidated) Michael Genovese found support for the two presidencies model, with the Court more likely to rule against the president.[129]

Quantitative analysis of Supreme Court behavior is dominated by the availability of the Supreme Court Database, collected and published by Harold Spaeth.[130] This database attempts to classify every single vote by a Supreme Court Justice; as of this writing, the earliest available date is from October 1946 until the present. The ostensible goal of the database is to record all judicial votes. At least one large scale attempt has used the Spaeth database to discover if war or crisis has an effect on judicial votes. Lee Epstein et al attempted a vast systematic study of Supreme Court decision-making during "crisis" times. Epstein's work defines "crisis" as including some major wars, but also mixes in international events that induce a distinct "rally-round-the-flag" phenomenon, such as the Cuban Missile Crisis and the Iran Hostage situation.[131] Epstein and company defined "war-related" cases broadly, including wartime draft cases, protest cases, military takings, courts martial, citizenship even the wartime price control statutes. Epstein et al tested for pairs of cases with commonalities, in order to test the effect of the "crisis." This methodology mixes long term wars, such as World War II, the Korean, Vietnam and first Gulf War, along with international crisis such as the Berlin Blockade, the Cuban Missile Crisis and the Iran-Hostage crisis. Epstein then measures judicial behavior with the known start and end dates for each war and each crisis. Epstein's methodology was to generate an algorithm

[129] Michael A. Genovese, *The Supreme Court, the Constitution and Presidential Power*. (Lanham, MD: University Press of America, 1980). There may be some problems with Genovese's model. Schubert's cases were selected on the basis of Executive orders or proclamations that were overturned, coming out to 38. Genovese adds 31, by using a computer search of "Cases decided against the president" using the Lexis database. The number of cases he ends up with is only 69, and Genovese uses a *percentage* of cases "won" by the President as his unit of analysis. One might argue that the qualitative parts of this work have more value than the quantitative analysis provided.
[130] The Supreme Court database, supported by National Science Foundation and housed at: http://scdb.wustl.edu
[131] Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal, "The Supreme Court during Crisis: How War Affects only Non-War Cases" in 80 *New York University Law Review* 1 (April, 2005), pp 37-41

that would separate out a virtual statistical "fingerprint" to control for the existence of war and crisis, with matching cases from peacetime. This method is known as "nonparametric matching."

Epstein et al found that all things being equal, crises did not have a statistically significant effect on judicial decision-making. In an unusual finding, Epstein and her collaborators found that in wartime, the Court decided cases more conservatively. Even where the subject matter of the case was not war-related, the Court acted to restrict civil liberties. Epstein et al also found that deference to the federal government is less likely during war than in peace time, but explain this effect may be due to the small number of matching cases. Additionally the Epstein study note that it may be possible that "the more uniform and enthusiastic its support [from the public], the more likely the justices would be to defer to the government."

Epstein's work is most comprehensive study about judicial behavior in war-time and during crisis to date but it is not without its critics. Gordon Silverstein and John Hanley point out the potential flaw of Epstein and her co-authors look specifically at civil liberties as if it is a monolithic subject. As Silversten and Hanley point out that:

> Civil liberty 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 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 a few. The larger question … incorporates the Court's inclinations towards religious minorities, antiwar protestors, and the like."[132]

In other words, Epstein and her co-authors' dependence upon Spaeth's categories embedded in the variables incorporates a lot of noise from other elements. Not every case, even within civil liberties, is a fungible with each other. Justices can have disparate opinions about the 1st amendment, for instance that are distinct from the 14th amendment due process rights, yet both are treated as if they are fundamentally the same in Spaeth's category of "civil liberties."

There are other issues with such simplistic use of categories; Epstein's "war-related" variables is, by the author's admission, somewhat arbitrary. For example, Epstein's study seems to treat wartime price control statutes as "war-related" but in the legal context, military takings comes closer to question of the "Takings" clause of the Constitution. More problematically, the Court may simply view these cases under the usual "takings" jurisprudence, which has a very well-defined jurisprudence that does not have any built-in assumption of greater expertise for the government.

This study borrows partly from Epstein's methodology, using the start and end dates to measure behavior during major wars. Instead of non-parametric matching, this work compares for judicial behavior in the absence of war against the presence of such wars. Additionally, in order to capture whether the Supreme Court really does view certain cases differently, this work creates a variable called "national security claims" as a category gleaned from majority opinions of all the cases in the Spaeth database. The next chapter provides an explication of the category

[132] Gordon Silverstein and John Hanley, "The Supreme Court and Public Opinion in Time of War and Crisis", *Hastings Law Journal*, Vol 61 (2010) Pp 1463

of "national security claims" and provides an explanation of how one might measure the context of war and "national security claims" on judicial decision-making.

Chapter 2: Quantitative Methodology and Results

This part of the dissertation attempts to answer two major questions. The first is: Does the context of significant war invoke deference towards the government? In other words, all things being equal (which means that all other variables outside of those being tested are held constant and unchanged), does the Supreme Court side with the government in all cases that come before it, during a time of war. The second is: Does a national security claim invoke deference towards the government? In other words, with everything else being equal, does the Supreme Court side with the government when such national security claims are brought before it?

Much has been written that in a post 9/11 world, the balance of power has shifted from individual civil liberty towards greater governmental control. So in is Rehnquist correct when he writes, "in a time of war, the laws are silent"? Or is O'Connor's view more representative of the Court's behavior – that the Supreme Court can resist the logic of expanding presidential power and act as a natural check against the executive branch? If deference is defined as substituting the views of another in place of one's own judgment, then one might hypothesize that the Rehnquist view would have Supreme Court be deferential in a time of war.

Built into Rehnquist's view is that the Court should defer only where the stakes are great enough that balance has to shift away from freedom towards order. To be sure, the United States has engaged in many conflicts over its existence, but only a very few might fit that assumption. If the nation is at war, especially a far-reaching war that also touches and concerns the interests of the individual citizen back at home, then this type of war taps into primary emotion. War is destruction, but that is not the sum total of what it stands for. War is not just an expansively violent act of destruction, but a state of mind – at least for the average citizen back home.

Conflicts can happen anywhere, and in modern American history, US troops have engaged in conflict usually far away from the homeland, girded by two protective seas. But this dissertation looks at those types of wars that can affect the home front, that reach the hearts and minds of the ordinary citizen. War may be a context, for the civilians back home, but is it enough of a context that it affects the legal decision-making process of the citizens who happen to be Justices?

In most cases, when the US engages in conflict, the actual battles happen far away, far removed from quotidian, mundane world of the everyday. But everyday life still occurs - war may claim lives and spill American blood and treasure, but at home, the trains still run, people go to work, babies get born, lives still happen. War, as John Mueller has so astutely pointed, creates a state of mind, a kind of patriotic context – public opinion rises to a crescendo, rallying around the public symbols of American unity. It may not surprise the reader that the public figure that bears out such support is the Commander-in-Chief, the President of the United States. Presidential approval polls taken by Gallup both before and after initiation of conflict bears out John Mueller's findings. Similar boosts in presidential approval occur for Presidents in the wars studied in this dissertation.

Presidential Approval Ratings from Gallup Polls[133]

War	President	Ratings pre-conflict	Date of Poll	Ratings post-initiation	Date of Poll
World War II	Roosevelt	70	9/17/1941	83	1/23/1942
Korean War	Truman	36	6/4/1950	45	7/7/1950
Vietnam War	Johnson	68	11/20/1964	69	3/16/1965
Afghan War	G.W. Bush	51	9/7/2001	89	10/11/2001

Source: Gallup Poll at http://www.gallup.com/poll/124922/presidential-approval-center.aspx

The American public understandably rises to support the President. People, not just Americans, turn inwards and identify with the group against a common threat – and there is no greater expression of threat than in a war of survival. But does this mean that everyone is affected by this rallying effect? Does this mean that Mueller's also affects Supreme Court Justices rally around the flag phenomenon, and hence defer to the perceived necessities of the situation?

At the heart of Rehnquist's work is the assumption that there is a necessity for the government to act that must override the usual constitutional precautions. That necessity is based on an emergency or threat to the societal order of the United States. Thus, Rehnquist's position is that justices must allow the government to do what is necessary, else the government and the nation itself be put in jeopardy. In order words, the security of the nation is imperiled, and this is most evident in a time of war. In effect, war is the protection of security of nation using hostilities. The only difference is that national security claims can also happen in a time of peace.

[133]Gallup poll ratings are rated as "Approve/Don't Approve/Unsure." Here, positive Approval ratings are reported. President Lyndon Johnson's pre-conflict Gallup ratings are calculated from November 20, 1964 because this represents the closest Gallup poll taken after the Gulf of Tonkin Resolution on August 7, 1964. This dissertation treats the Gulf of Tonkin resolution as the start of the Vietnam War, which should mean a July 1965 poll would be more appropriate. Such a poll exists for July 1964, but this rating is inflated by the presidential convention and presidential election of that war; November 20 represents the numbers immediately after election and closest to the Gulf of Tonkin resolution. Post-initiation for LBJ is considered March 8, 1965 when ground troops were officially dispatched to South Vietnam.

This leads to another interesting question: Does the context of national security claims affect Supreme Court decision-making? If the Rehnquist worldview is that there must be some re-balancing of freedoms in the face of threat, then claims of national security should fit into this same category. Certainly, national security interests can be hard to define; the very vagueness of what constitutes a threat is often defined in the eye of the beholder – in this case, the government itself. We do have some guideposts to help us in this question. The Supreme Court itself has defined national security as "those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression."[134] Admittedly, this can be a wide-ranging definition, mostly because the definition hinges upon further assumptions of what constitutes "subversion" and "aggression." National security claims usually start with a government action, which is challenged by an individual on the basis of a constitutional right. The government – or more accurately, the executive branch's justification usually involves an argument for necessity of said action to combat a particular threat. The government agencies that often undertook such actions are often perceived to have great expertise in national security matters. As a result, the government argues that the government's actions were reasonable in the light of the threat, and said actions are justified by the institutional competence of the government agency in question.

The reader may agree that it is not a controversial matter for the executive branch to claim expertise in dealing with threats from external sources. But where executive branch brings a claim of national security, there is usually a powerful implied claim of expertise and experience as well. Such a claim may have a powerful effect on the members of the Supreme Court – who

[134] *Cole v Young*, 351 US 536, 544 (1956)

admittedly are legal experts but usually not versed in foreign affairs and external threats. This logic is the basis behind Aaron Wildavsky's view of the natural inclination for the Supreme Court to accept the executive branch's judgment in lieu of its own. In other words, national security matters would seem to invoke Supreme Court deference. But the question remains: does the context of national security actually change Supreme Court decision-making? Does a national security claim invoke more Supreme Court deference than in other situations?

Variables

The Dependent variable of "Supreme Court Deference"

In order to answer these questions, one has to look at the actual behavior of the Justices – in this case, we would have to look at their particular voting behavior in cases before them. Fortunately, a database exists of Supreme Court behavior; namely the "Supreme Court Database" originally started by Harold Spaeth and funded by the National Science Foundation. It is the most complete and definitive database that deals with judicial decision-making at the Supreme Court level. In this part of the dissertation, we ask if there is "Supreme Court deference." Strictly speaking, this concept is based upon an assumption based upon separation of powers, which itself was first championed by Hamilton. This assumption holds that the Court's natural role is to be a check against both the executive and legislative branches as well as a guardian of constitutional rights against governmental interests. As a result, the Court should normatively be disinclined to agree with the executive branch when the executive branch action is weighed against individual civil liberties. As defined here, "deference" in this work is measure by whether the Supreme Court verdict agrees with the government's position. Briefly,

"deference" is defined as 1, where the Supreme Court's majority opinion favors the government's argument. Conversely, "deference" is defined as 0, when the majority opinion runs against the government's argument. The models below test whether specific independent variables contribute positively or negatively as "Deference" marches from 0 to 1. In other words, the models described below test whether specific independent variables help influence, either in a negative or positive fashion Supreme Court decision-making.

"Supreme Court deference" here is a measurement of voting behavior, where agreement with the government is considered "deference" – it is a blunt measure, to be sure, and there may be some dispute as to whether "agreement with the government" is the same as "substituting the judgment of the government for its own." Based upon the structure of the database, this variable of "deference" can allow for comparisons of behavior across different contexts and with different variables.

The reader may note that Supreme Court decisions are not always clear cut in their effect. Even for those decisions that achieve a majority of the Justices, the opinions themselves may agree with certain sections of the winning party's claims but deny other parts of the claim. This is even more problematic when an opinion is only joined by a plurality of Justices – it is even theoretically possible for every Justice to write his or her opinion and join no others. The Spaeth database has a solution. One of its many variables looks at the disposition of the case opinion and determines which party has "won." Impliedly, this variable accounts for majority and plurality opinions to determine which party is favored by the decision. The database also allows identification of whether the federal government or one its executive branch officials is a named and direct party in the case. These two variables allow analysis of whether the Supreme Court's

opinion agreed or disagreed with the government within the opinion. Thus, the independent variable of "Supreme Court deference" or "Deference" for short is either 1 (for Supreme Court favors government's position) or 0 (for Supreme Court disfavors the government's position.)

This project codes US government as a party where the United States or one of its executive branch officials is a named party as a defendant or plaintiff. This signifies the direct participation by the executive branch in the case and by extension, as a named party, the executive branch's position and arguments are to be decided by the Supreme Court. The Solicitor General and other executive branch members, such as the Attorney General and other heads of executive branch departments are often named as parties in Spaeth's database and represent the federal government when named as a direct party. The reader may note that government policy may not necessarily be the same as the government position – although the two are closely related. Policy may not be the same as the government position – but for obvious reasons, the government's position generally does not stray too far from the policy preferences emanating from the White house.

Some State Governments, which make national security claims, are grouped in the identification as "government party." In these uncommon cases, National Security claims by a State hinge upon the internal or external threat to both the United States as a whole as well as the individual State. All of these state claims are based upon statutes or regulations fashioned after Federal statutes that explicitly deal with "national security" and the Supreme Court treats these State claims about national security in the same fashion as if they were brought by the Federal government. Hence, where a State brings a national security claim, it is coded as "1" in Government party. There are 39 cases out of 223 national security claims cases (about 18

percent of all cases). They become even less frequent after the 1956 decision in *Pennsylvania v Nelson* that national security claims brought by individual states were pre-empted by the Supremacy clause of the Constitution.[135]

Explanatory Variables of Wartime cases and National Security claims cases

The explanatory variables are: "WarCourt" and "NatSec." Briefly, WarCourt encapsulates all the cases and decisions taken by the Supreme Court during a time of significant war. WarCourt represents cases and decisions in wartime. "NatSec" represents those cases where national security is either claimed by the government or is discussed as part of the Supreme Court majority opinion. Natsec represents those cases and decisions taken when national security claims arise. The reader should note that although WarCourt and NatSec can overlap, they differ in that WarCourt is a more generalized variable that covers every type of case that occurs in a time of significant war, whereas NatSec covers national security claims in both peace and wartime. Additionally, WarCourt captures those cases that happen in a major, significant war.

Significant Wars

The Spaeth database does not cover every case every decided by the Supreme Court. At the time of this writing, the earliest case covered by the database runs from the October 1946 term. The database lacks coverage of the largest war in the 20th century – that of World War II.

[135] *Pennsylvania v Nelson*, 350 US 497 (1956).

In order to capture this data, all cases from the start of October 1941 term until the end of the October term of 1945, ending in June of 1946 was coded by hand.

The decision to include World War II has a theoretical basis – namely, that certain conflicts are "significant wars" and have a greater effect on society and by implication, influence Supreme Court decision-making. Including World War II – the largest war of the 20th century – would fit the mold of a significant war. Although the United States has engaged in many and multiple acts of conflict, very few have lasted for any significant period, and even fewer have entailed a great engagement by ordinary citizens. Of those conflicts, several have reached the status of a significant war - a war that touches every level of society, one that creates a common sense of threat, one that displaces the ordinary expectations. This is a type of war that reaches into every stratum of society and which that impinges upon the consciousness of individual citizens.

In order to define "significant war", we turn to the database maintained by the University of Michigan at the "Correlates of War" website.[136] Containing data meant to study the conditions that are associated with the outbreak of war, this project seeks to borrow their definition of "significant war." In this case, "significant war" is defined as those wars in which the United States has experienced at least 1000 battle-deaths. The reason for the use of the 1000 death threshold is to capture the concept of a war that goes beyond the low-level conflicts and is capable of changing the power dynamic in society and between the branches. It is an arbitrary number, but 1000 battle-deaths should allow for a high probability of American awareness and civilian engagement of the ramifications of the conflict. There is also an assumption that a war

[136] www.correlatesofwar.org

involving 1000 battle-deaths should be covered heavily by the media and the conflict will have last long enough to affect population at large and eventually these effects would affect Supreme Court decision-making.

According to this 1000 battle-death threshold, the candidates for "significant war" are World War II, the Korean War, the Vietnam War, and the wars in Afghanistan and Iraq (the last two wars overlap and they are treated as one war for the purposes of this work). Thus significant wars include cases determined by the start date and end date of wars and aggregated into a variable called "WarCourt." The reader may also question whether specific wars have distinct effects separate from the aggregated "wartime cases." In order to answer that specific sub-question, individual wars, including World War II, Korean War, Vietnam War and the Afghan war are also collected by their start and end dates and tested in the model.

This work defines "WarCourt" as significant wars, and codes for start and end dates of wars. There is some discussion about the actual start and end dates of some of these wars. The solution is to derive the actual start date of a major war from a consensus of cross-references across various encyclopedias, historical texts and other sources. For the purposes of this dissertation after consultation with the major texts, the dates picked for the major wars are:

World War II	Start: December 8, 1941 (Formal US declaration of war) End: September 2, 1945 (Formal surrender by Japan)
Korean War	Start: July 5, 1950 (Battle of Osan – first engagement of US forces against North Korean army) End: July 27, 1953 (Armistice Agreement)
Vietnam War	Start: August 5, 1964 (Gulf of Tonkin Resolution) End: April 29, 1975 (Fall of Saigon)
Iraq/Afghanistan	Start: October 7, 2001 (Operation Enduring Freedom) End: June 2010

The second Iraq War overlaps the Afghanistan War. Although the 2nd Iraq War does qualify as a "significant war" by itself on the basis of battlefield deaths, by the time of this writing, the US has declared the end of hostilities in the 2ndIraq War. Military activity, however, continues in the Afghan War. For the purposes of this study, then, the Afghan War stands for both significant wars, since the Afghan conflict began before the 2nd Iraq War and remains an active war. The end date for the current war in Afghanistan is unknown as of this date, but for the purposes of this research will end at the last available date for a Supreme Court decision in June of 2010.

National Security Claims cases

We turn now to national security and whether the context of national security cases affects Supreme Court decision-making. In order to answer this question, one must collect those cases that involve "national security". Unfortunately the Spaeth database has no "national security" variable. To code for "national security claims," this project bases such claims primarily from the Supreme Court's definition from *Cole v Young*: "[T]hose activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression." From this starting point, the definition was further refined.

This dissertation codes "national security claim" as 1 where the government claims a position where the government claims an explicit or implicit threat to its national interests and where the interest is tied to physical well being of the country. This project also codes "national security claim" as 1 if the Supreme Court discusses national security claims as a part of its

majority opinion. This mention should not be trivial but should be part of the legal reasoning either accepting or rejecting the government's claim.

There are several methods used to determine if "national security" claims are present. First is a list of phrases within the official opinion and the second is a closer content analysis. The list of phrases includes but are not exclusively limited to:

- "National security"
- "National defense"
- "Terrorism"
- "Theatre of war"
- "Battlefield"
- "Violent overthrow of the government"
- "Imminent threat"
- "Espionage"
- "Spying"
- "Military decision"
- "Prosecution of war"
- "Internal security"

In order to avoid false positives, this work will also use a content analysis of the opinion published by the Supreme Court to discover if a claim of "national security" is implied or explicitly stated. In other words, this dissertation will use both the list of phrases as well as a closer reading of the Court's reasoning to establish if a "national security" claim was involved in the opinion.

In a content analysis of evaluating whether national security is a factor within a case, one or more of the following criteria must exist:

- The Supreme Court, in its majority opinion, explicitly mentions or discusses national security or any term that touches upon national security as a factor in its decision. An example of such as a decision based upon whether the Communist Party was dedicated to the "overthrow of the government of the United States." This also occurs when one or more parties in the case explicitly argue about the existence of the national security interests of the United States.
- The Supreme Court bases its decision upon a doctrine that explicitly focuses upon national security. An example would be state secrets doctrine, delineated in *US v Reynolds* in 1953, which is built around the protection of secrets that would otherwise harm the position of the United States within the international community.
- The Supreme Court makes a decision on the legality of a governmental action or law, where the governmental action or law itself addresses national security. An example would be National Relations Board Act, which required affidavits from labor union officials that they were not members of any "subversive organization" dedicated to the overthrow of the government.
- However, if the governmental law or action which address national security is meant to be temporary or short-term in nature (see Price Control Acts during World War II), then an additional element is required: The Supreme Court also has to discuss national security as a justification for allowing such an action. This is to insure that routine

administrative law decisions that may touch and concern economic issues, but do not necessarily have any national security claims, are introduced into the sample.

Where a case may involve a judgment call as to whether it involves national security, the practice was to be conservative and rule out cases rather than include them. This yielded 223 cases of national security out of 9082 total observed cases.

Control Variables

The control variables are: "LowerCourt", "MQmed", "PresApp", Dum1941…2010", "NameWar", "NatSecWar","PresAppWar," "PressAppNS",

"Lower Court" represents a variable that incorporates the nature of the process upon which Supreme Court cases are built. For the most part, "Lower Court" represents reversal of a lower court decision. As the reader may be aware, the votes by the Supreme Court are predicated on cases that arrive before them. The Supreme Court's docket is determined by appellate and original jurisdiction.[137] Original jurisdiction is exceedingly rare, amounting chiefly to those cases involving ambassadors, diplomats or suits between individual States. Appellate jurisdiction is the source of the vast majority of all cases, usually involving a writ of certiorari. Such cases are usually accepted only when they have exhausted all other remedies through the lower courts and involve a constitutional issue. As such, there is a structural edifice of lower

[137]*US Constitution*. Article 3, Section 2. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

court decision-making that informs Supreme Court votes. In this case, a "lower court" variable, adapted from the Spaeth database is used to reflect this procedural gateway.

Appellate jurisdiction is optional and proactive; in this case, that means that four of the servicing Justices must vote to grant a writ of certiorari or "cert" before a case may be allowed on the docket. A denial of a cert costs nothing; by default, an appeal is rejected if at least 4 Justices cannot reach a consensus to grant cert. The process of granting alone means that the Court is unlikely to expend effort to granting a cert simply to agree with a lower court. As such, the mere act of granting a cert usually means that the Lower Court's decision will be overturned. The lower court variable is calculated using a variable in Spaeth database called "Lower Court disposition" which has several categories. For the purposes of this study, the categories have been condensed into 0 for reversing Lower Court decision and 1 for agreeing with the Lower Court. 281 observations were removed from this study because it was not clear what the ultimate disposition was. These include Spaeth's variables that indicated "affirmed in part and reversed in part" and "unusual disposition."

"MQMed" actually stands for "Martin Quinn Median Scores." Implied within the questions asked by this part of the dissertation is that ideology may matter. After all, a pro-government stance is most often treated as "conservative" and some Courts have reputations of being "conservative" (such as the Court presided over by Chief Justice Rehnquist). In order to control for the affect of ideology, this project uses the Martin Quinn median scores.[138] Developed by Andrew Martin and Kevin Quinn, these scores create ideological measurements of every Justice from 1937 to the present. Discussed in a previous chapter, and only covered here

[138] Martin Quinn Scores available from: mqscores.wustl.edu

briefly, Martin-Quinn scores are based upon mathematical formulae that are matched against actual Supreme Court voting behavior. Based upon those, the Martin-Quinn scores are arrayed on a line, where Justices are placed in a liberal-conservative spectrum. Martin-Quinn scores are based upon the assumption that every vote by every Justice is either "liberal" or "conservative." Every case is treated equally the same in the mathematical formula and scored according to perception of whether the vote was "liberal"or "conservative." The Martin Quinn median score gives us the "median Justice" score. This score, rated from negative (for liberal) to positive (for conservative) which gives a rough approximation of how "liberal" or "conservative" the entire Supreme Court was as a whole. Although Martin-Quinn has detractors, it represents a measurement of ideology of a given Court for any given year going back to 1937. As such, the Martin Quinn median score allows control of ideology within the question itself.

"PresApp" stands for the average of presidential approval ratings during the time that the Supreme Court is in session starting from October and usually ending in June of the next year. One of the implied questions is whether the justices act strategically and avoid direct conflict with the president. This separation of powers model dovetails with the idea that the rally-around-the-flag phenomenon creates popular support for the president's position during the initial stages of the war. There are many other factors that can influence presidential approval ratings, so this variable is a somewhat imprecise tool. However, presidential public approval ratings can provide a window into whether justices also employ strategic considerations during a context of war and when deliberating national security claims. The most well known source of presidential approval polls are those conducted by Gallup organization. This study uses the collected Gallup polls stored in the Public Opinion Archives website of the Roper Center,

operated at the University of Connecticut.[139] For the purposes of this study, Gallup poll reports are averaged for the months that the Supreme Court is in session, usually about 9 months. For example, the October 1953 term would comprise the average of Gallup poll taken from October 1953 until June 1954. Special exceptions are made first term incoming presidents who are sworn into office in January. In those cases, the Gallup poll ratings are taken at the start of the president's official swearing in, and end in June of that year.[140]

"Dum1941… 2010" is derived from the Spaeth database called "Term." "Term" is defined within the Supreme Court database as the start date of the Supreme Court term in October of that year. This allows determination of which cases are appropriate to be included in "WarCourt." However, "Term" by itself is only a string marker containing the word "1942" but not its numerical value. A dummy variable is used to collect information inside Term. The dating of Terms at times creates some irregularities in counting time; since the Supreme Court

[139]The Roper Center for Public Opinion Research housed at http://www.ropercenter.uconn.edu/

[140]Gallup's presidential approval ratings questions as if respondents approve or disapprove of the job the president has been doing. These questions have been asked since 1937, and the frequency of such questions asked stabilizes in the year 1953, when the approval ratings questions were asked roughly once a month or more. The reader might ask if a "war approval" rating would be more appropriate: for instance, respondents approve or disapprove of a particular war. I did not use a measure for popularity of the war because of a lack of data and because Gallup's questions about war vary so greatly that it makes the data hard to use. For data, Gallup does not appear to have asked questions about the popularity of wars until after Vietnam War. Ask for the questions asked, Gallup asks a series of questions and attempts to compiles the results from month to month. There is no one question that helps pin down how popular or unpopular a war might be. The following is just a sample of the questions asked for respondents.
"Thinking now about US military action in Afghanistan that began in October 2001, do you think that the US made a mistake in sending military forces to Afghanistan or not?"
"In general, how would you say things are going for the US in Afghanistan? [very well, moderately well, moderately badly or very badly]"
"How worried are you that withdrawing US troops from Afghanistan too quickly will make Afghanistan a safe haven for terrorists plotting attacks against the US – very worried, somewhat worried, not too worried or not worried at all"
Without one stable question that tracks popularity or approval of all the wars in this study, this study turned presidential approval ratings as a proxy for how the public might feel about the war. Questions taken from the Gallup web site and specifically from: http://www.gallup.com/poll/116233/Afghanistan.aspx.

starts its term in October and ends in June, the Dum1941 would be defined as starting in October 1941 and ending in June 1942.

Hence, certain events appear to be set in different dates but are actually folded inside the dummy terms. For example, World War II is defined as "Dum1941" because the actual declaration of war began in December 1941, but end date of the war, in August of 1945, would correspond to "Dum1944" but not "Dum1945." The decision to code in this manner derives from the October term start date in 1944, which runs until June of 1945. Hence, the Japanese surrender in WWII would only be known to the Justices starting in the October 1945 term. Accordingly, Dum1945 representing the October 1945, would only start in October of 1945. Similar adjustments are made for the time periods of World War II, Korean War, and Vietnam War. The current Afghan Conflict has no end date, but for the purposes of this study, the end date for this war is designated 2010 for the last available data at the start of this project. The reader should note that for every "Term" date, there is a corresponding Dum variable; for example, "Term" of 1941 would have "Dum1941" and Term of 1942 would have Dum1942 and so on, until Dum2010.

In the same vein, "NameWar" is a variable that looks at specific wars in the list above. This variable helps to investigate if there are specific effects within the four significant wars above and to help understand if there are any overall patterns of behavior or whether some judicial behavior is related to the context of a specific war. In this study, "NameWar" is broken down into "WWII", "KoreanWar", "VietnamWar," "AfghanWar" respectively.

"PresAppWar", "PresAppNS", "NatSecWar" are interaction variables designed to explore if the combination of two variables has an independently synergistic effect. Interaction

variables are designed to see if there is an influence on the dependent variable, and are tested at the same time as their "parent" variables. For instance, "PresAppWar" multiplies the effect of Wartime cases and Presidential Approval Ratings to discover if this particular variable contributes to the movement of the dependent variable Deference. If PresAppWar is found to be statistically significant, it tells us that there is some positive or negative contribution to the movement of the decision-making process of the Justices, independent of the presidential approval ratings and wartime context. Similarly, PresAppNS tests to see if presidential approval ratings influence decision-making in national security claims. "NatSecWar" represents the interaction of the two explanatory variables of "National Security Claims" and "WarCourt." This variable tests the significance of national security claims in a time of war.

Having dispensed with the explanation of the variables in this study, we now move upon the models that incorporate them.

Models

The questions above ask how the context of a significant war and national security might affect behavior. The model used to discover the answer delves deeply into the Spaeth database and looks like this:

$$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 4 Presidential\ Approval\ Ratings + error\ term$$

Holding everything else equal (which means holding all other variables not in the model are unchanged and constant), this probit model analyzes the dependent variable of Deference, and how it is affected by independent variables such as the existence of National Security claims, the

context of a significant War, the possible ideological affect as reflected by the Martin Quinn median score and the structural appellate process by which most cases end up on the docket."Deference" is the dependent variable and moves from 0 (meaning no agreement with the government position) to 1 (meaning the judicial decision favors the government's position). The dependent of Deference variable is dichotomous, so a probit model was utilized.

This model also tests if justices react strategically to the executive branch, using presidential approval ratings as a proxy. As noted above, John Mueller's work delineates the effect of war upon public opinion. Specifically, Mueller noted that the public rallies around the president during the initial stages of a war, but that support for war – and implicitly, the president – decreases as the war drags on. The idea is that justices may not buck the trend of public opinion. Additionally, the model tests whether justices defer to the executive branch, in a conscious application of separation of powers strategies in order to avoid direct conflict with a popular president.

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The next three models hone in on interaction variables and their influence on Supreme Court decision making as represented by "Deference". For example, the reader may note that national security claims can and do arise during a time of war – in fact, one might instinctively expect such claims to occur with greater frequency during wartime. In order to tease out if there are such effects on the Supreme Court, this model uses interaction variables that include the independent variable of National Security claims and the independent variable of Wartime cases, which gives rise to the next model.

$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 4 Presidential\ Approval\ Ratings + \beta 5 (National\ Security\ Claims * Wartime\ cases) + error\ term$

Similarly, interaction variables for Presidential Approval Ratings and Wartime as well as Presidential Approval Ratings and National Security are also tested.

$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 5 Presidential\ Approval\ Ratings + \beta 6 (Presidential\ Approval\ Ratings * Wartime\ cases) + error\ term$

$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 5 Presidential\ Approval\ Ratings + \beta 6 (Presidential\ Approval\ Ratings * National\ Security\ Claims) + error\ term$

We now have our models that may help answer the two basic questions of whether the context of national security claims and wartime might affect Supreme Court judicial making. The next section turns towards hypotheses for how these models might answer these questions.

Hypotheses

The first question asks: Does the context of war influence Supreme Court decision-making into deferential, pro-government voting behavior?

Hypothesis 1: With everything else being equal, during times of war, Supreme Court decision-making should be in a pro-government, deferential manner. The Wartime Cases coefficient should have a positive sign.

In brief, I expect that the Justices are and will be influenced to vote in a pro-government fashion. This hypothesis embodies judicial votes in all cases where the US government or its proxies are a

party. I expect this to be true, for a myriad of reasons and not all of them easily disentangled. It could be partly due to the patriotic instinct captured by John Mueller's rally-around-the-flag phenomenon; or it could be an acknowledgement of the greater expertise of the executive branch in matters involving war. It could be something as complex as a risk/benefit analysis where the Justices calculate that a pro-government decision may be better than the alternative is possible injury and harm to civilians back home. I expect that the Justices will be more likely to vote in a pro-government fashion in a time of war.

The second question asks: Does the context of national security claims influence Supreme Court decision-making into deferential, pro-government voting behavior?

Hypothesis 2: With everything else being equal, when government brings up a national security claim, Supreme Court decision-making should be in a pro-government, deferential manner. The National Security claims variable coefficient should have a positive sign.

The reader should note that whereas Hypothesis 1 deals with all wartime cases where the government is a party, including national security cases that may come before the Supreme Court, this particular hypothesis looks only at those cases that involve national security claims. These claims can occur in both peace and wartime. The principle reason why I expect that the Supreme Court should vote in a pro-government fashion is that the executive branch is commonly perceived to have greater expertise in matters involving foreign affairs and identification of those threats that may jeopardize the national security. Members of the Supreme Court are learned, highly experienced experts – but experts in matters of the law and constitutional interpretation. I would expect that this perception of greater expertise should tilt

the balance in the decision-making process towards the executive branch. In times of war, this effect should be enhanced, for all the same reasons briefly considered above. I expect that the Justices will vote in a pro-government, deferential fashion when a national security claim exists in a case before the Justices.

Findings

Probit was run on the database using the models discussed above. After combing through all cases from the start of October 1941 term to the end of the last data set from the October 2010, there were 223 cases that are reported to be National Security. A list is provided in the Appendix. Results and further analysis of national security cases will be covered in Chapter 4 and beyond. The Spaeth database used in this study includes cases up to the June of 2010 and hence, includes 9083 observations. Because of the way that Deference is coded, only participation by government as a party is relevant to the study. This yields 3502 cases from the database which are used for the following models.

We now turn to some descriptive findings to give a context to the statistical results.

Table 1: Total Government Appearances before the Court

GovtParty	Number of Cases	Percent
No	5579	61.44%
Yes	3502	38.56%
Total	9082	100%

As we can see, the government often appears as a party before the Supreme Court – to the tune of 38.6 percent. Broadly speaking the executive branch appears a lot before the Justices and presumably gets a lot of practice arguing for the government's position.

Table 2: Government Wins and Losses Across All Cases

Case Disposition	# of Cases	Percent
Unfavorable	1263	36.07%
Favorable	2239	63.93%
Total	3502	100%

All that practice makes perfect; across the entire universe of cases where the government is a party from 1941 until 2010, the government achieves a favorable disposition nearly 64 percent of the time. Although the database does not state if the Solicitor General actively presents each case, one can safely assume that he or members of his office were involved in some manner in the vast majority of all these cases. As a general pattern, without worrying about wartime or national security cases, the government is very successful in getting its own way before the Supreme Court.

Table 3: Number of National Security Cases and Wartime Cases

Context of cases	# of cases	% of total cases
National Security	223	2.45%
Wartime	3170	34.89%
Govt Party in Wartime	1372	15.11%
Total cases	9082	

National security cases comprise only a tiny fraction of the total number of cases, 2.45 percent. National security cases are exceptional, extraordinary situations. Very few such classified claims have managed to rise through the appellate levels. All constitutional cases are not easy. If they were, there would not be enough of a debate to rise to the Supreme Court. As well, the secretive nature of national security claims makes these types of cases rarer than your typical constitutional challenge.

The number of Wartime cases represents nearly 35 percent of all cases; this roughly corresponds to the percentage of October terms that the country has been in a significant war, 26 out of 69 years – or about 37.7 percent. The nation has been at war a lot, with the Vietnam War being the lengthiest – although at the time of this writing, the Afghan War is threatening to overcome that lead.

Note that the government participation in the total number of cases is not the same as the total number of cases arising under the context of wartime. The government surfaces as a party in 1372 of 3170, or roughly 43.3 percent of all wartime cases.

Table 4: Government Win Rates

Type of Cases	Govt Win	Total	Percent Win
All Govt Party	2239	3502	63.93%
Peacetime	1385	2129	65.05%
Wartime	854	1372	62.20%
National Security	93	223	41.70%

Now we get to the government's success rates in invoking Supreme Court deference. Generally speaking across all time periods, the government achieves a favorable disposition 63.93 percent in its cases. This is reflected in the first column entitled "All Govt Party." In peacetime, the government wins 65 percent of its cases. When one narrows cases to times of war, the government's success rate declines to 62.20 percent. The simple counting percentage shows that while the government shows a slight decline in win rate, even in a time of war, it is not substantial.

When it comes to national security claims, the government achieves fewer successes. The government wins only 41.70 percent of the time. Using simple counting numbers, at first glance, the government is less successful in invoking Supreme Court judicial deference in national security matters.

The next table breaks down the government participation and win rate during the significant wars covered in this study.

Table 5: Government Win Rate in different Wars

	Govt Party	Govt Wins	Percent win
WWII	341	222	65.12%
Korean War	175	105	60.00%
Vietnam War	616	386	62.66%
Afghan War	241	141	58.50%
Totals	1373	854	62.60%

As we can see, the government's success rate in individual wars is mostly consistent. There are some fluctuations, across significant wars, but the gains and drops are not particularly

dramatic. Government, by percentage win, can be considered quite successful and consistently so across the significant wars in this study.

The simple counting numbers gives us a sense of where the votes are and the winning percentage of the government. Government rate and percentage success represent the repetition and credibility that enjoyed by a continuing repeat player before the Supreme Court. Such numbers give a sense of the relative success enjoyed by government officials. Contrary to expectations, the context of war does not grant any huge boost to the success rate enjoyed by the government. Similarly, the success rate by government in national security claims is quite a large drop to 41 percent. With these descriptive findings in mind, we turn next to the statistical findings from the probit models.

Probit Results

In order to refresh the memory of the reader, the two questions presented above are these:

- Does the context of war influence Supreme Court decision-making into deferential, pro-government voting behavior?
- Does the context of national security claims influence Supreme Court decision-making into deferential, pro-government voting behavior?

In order to answer the first question, I start by running a probit regression on the first model. The first model looks to see if the dependent variable, Deference, is affected by the independent variables of "National Security Claim" and "Wartime Cases" as well as the Martin Quinn median and the structural variable of "Lower Court."

$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 5 Presidential\ Approval\ Ratings + error\ term$

The following is the result of the probit regression.

Table 6: Main Model

VARIABLES	**Deference**	Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1
National Security Cases	-0.268*** (0.0975)	
Wartime Cases	-0.110** (0.0465)	
Lower Court disposition	-0.181*** (0.0397)	
Martin Quinn Median Scores	0.0248 (0.0471)	
Presidential Approval Ratings	-0.000678 (0.00169)	
Constant	0.523*** (0.11)	
Observations	3,502	

According to these results in this model, several variables are statistically significant beyond the 99 percent confidence level: namely, National Security Cases and Lower Court disposition. Wartime cases are also significant beyond the 95 percent level. Surprisingly, all of these variables have a negative sign on their coefficient. These findings suggest that the Supreme Court is statistically likely to find against the government in national security cases. These results indicate that the Court is statistically likely to find against the government in wartime cases. In addition, the Court is statistically likely to overturn the lower court decision.

What these results mean is that, contrary to what Chief Justice Rehnquist might contend, the Court is more statistically likely to rule against the executive branch even in war time. Similarly, where there is a national security claim, the Court is also statistically likely to rule against the executive branch.

The next model was run on the interaction variable for National Security cases during Wartime. The following is the result of the probit regression for this model.

Table 7: National Security in Wartime interaction variable

VARIABLES	**Deference**	Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1
National Security Cases	-0.262** (0.127)	
Wartime Cases	-0.109** (0.0479)	
Lower Court disposition	-0.181*** (0.0397)	
Martin Quinn Median Scores	0.0249 (0.0471)	
Presidential Approval Ratings	-0.000686 (0.00169)	
National Security Cases in Wartime	-0.0161 (0.198)	
Constant	0.523*** (0.11)	
Observations	3,502	

This finding shows that, all things being equal, the interaction variable that captures those National Security claims argued during Wartime (NatSecWar) is not statistically significant. As in Table 1, National Security Cases and Wartime Cases are statistically significant beyond the 95 percent level. The Lower Court variable is also significant, beyond the 99 percent level. The Lower Court variable shows a negative coefficient, which means that, all things being equal, the

Supreme Court is statistically likely overturn a lower court decision. This result reflects the process by which most cases make their way to the Supreme Court. If a case is brought up from the lower appeals court, Supreme Court rules call for four Justices to agree to grant certiorari in order to hear a case. If the Court does not grant cert, the lower court decision stands. A grant of certiorari requires four justices' consent, and there is only a finite amount of time and attention available for the docket on any given term. One can see why it is more likely that when granted certiorari, the Justices are likely to overturn an existing lower court decision.

Now we turn to a model that explores interaction variables of presidential approval ratings. As noted previously, the strategic concept of judicial decision-making holds that justices will vote in a fashion that takes into account the perceived support that other political actors may have. Presidential approval ratings reflect a theory that the justices also respond, to some degree, to public opinion. The reader may recall that the findings of Table 6 did not show any statistically significance for Presidential Approval Ratings.

However, presidential approval ratings during wartime may influence some degree of extra-legal consideration in Supreme Court decision-making. In order to do so, we turn once again to interaction variables. The interaction variable reflects how presidential approval ratings might affect the outcome of wartime cases. The following is a probit regression with the dependent variable of Deference, and independent variables of lower court, national security claims cases, Martin Quinn median scores, presidential approval ratings variable and the interaction variable of Presidential Approval Ratings in a wartime cases (PresAppWar).

Pr(Deference) = Φ+ β1*National Security Claim* + β2*War time Cases* + β3*Martin-Quinn Median* + β4*LowerCourt* + β5*Presidential Approval Ratings* + β6*(Presidential Approval Ratings * Wartime cases)* + *error term*

The following table is the results of a probit regression.

Table 8: Presidential Approval Ratings during Wartime Cases

VARIABLES	**Deference**	Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1
National Security Cases	-0.254*** (0.0977)	
Wartime Cases	-0.622*** (0.192)	
Lower Court disposition	-0.167*** (0.0401)	
Martin Quinn Median Scores	0.0339 (0.0472)	
Presidential Approval Ratings	-0.00525** (0.00237)	
Presidential Approval Ratings during Wartime Cases	0.00892*** (0.00324)	
Constant	0.771*** -0.143	
Observations	3,502	

The results indicate that there is statistical significance for the interaction variable of Presidential Approval and Wartime cases, beyond a 99 percent confidence level with a positive coefficient. In addition, the Wartime cases variable also becomes statistically significant beyond the 99 percent confidence level, with a negative coefficient. This suggests that the members of the Supreme Court do think strategically and respond to the perceived strength (as measured by popularity) of a president in wartime cases. The negative coefficient on wartime cases suggests, however, that Supreme Court Justices are less likely to defer in wartime cases. Taken together, a

reasonable interpretation would mirror John Mueller's findings about presidential popularity during the initial stages of a war and the later decrease of presidential popularity as the war continues. In other words, Supreme Court Justices are affected by the rally-around-the flag phenomenon, and are likely to defer to a popular president, especially at the start of a war. However, as Mueller indicates, if the war drags on and popularity of the president plummets, the Supreme Court reverts to an anti-government, skeptical voting pattern.

This next model tests another interaction variable, namely that of Presidential Approval Ratings in National Security cases. In this model, we look at whether Supreme Court Justices take strategic considerations of the president's approval ratings into account when making decisions about national security claims brought by the government. As such, this model look at how the dependent variable of Deference is influenced by the independent variables of Lower Court, wartime cases, Martin-Quinn Median scores, presidential approval ratings and the interaction effects of Presidential approval ratings on National Security Claims cases (PresAppNS).

$$Pr(Deference) = \Phi + \beta 1 National\ Security\ Claim + \beta 2 War\ time\ Cases + \beta 3 Martin\text{-}Quinn\ Median + \beta 4 LowerCourt + \beta 5 Presidential\ Approval\ Ratings + \beta 6 (Presidential\ Approval\ Ratings * National\ Security\ Claims) + error\ term$$

The following table is a result of the probit regression.

Table 4: Presidential Approval Ratings during National Security Cases

VARIABLES	**Deference**	Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1
National Security Cases	0.341 (0.399)	
Wartime Cases	-0.115** (0.0466)	
Lower Court disposition	-0.182*** (0.0397)	
Martin Quinn Median Scores	0.0224 (0.0471)	
Presidential Approval Ratings	-2.97E-05 (0.00174)	
Presidential Approval Ratings during National Security Cases	-0.0105 (0.00667)	
Constant	0.488*** (0.112)	
Observations	3,502	

These findings show the lack of statistical significance of the interaction variable of Presidential approval ratings and National security cases. The results also suggest that Supreme Court decision-making in a national security claim is not influenced by strategic considerations like the president's popularity.

Discussion

These findings allow for an in-depth discussion of the first Hypothesis.

Hypothesis 1: With everything else being equal, during times of war, Supreme Court decision-making should be in a pro-government, deferential manner. The coefficient should have a positive sign.

If the question asked is whether the context of war changes Supreme Court decision-making to be more deferential and more pro-government, these findings suggest that the answer is "No, the context of war does not influence Supreme Court voting in a deferential, pro-government fashion." Thus, Hypothesis 1, as a prescriptive hypothesis, fails to make the grade. The context of significant wars cannot help predict Supreme Court behavior. The wartime variable is statistically significant and with a negative coefficient, which not only disconfirms the hypothesis, but also produces a counter-intuitive result. The results suggest that the Supreme Court is statistically likely to vote against the government.

The finding that the context of war does not invoke greater deference goes against expectations, especially in the light of the old Latin saying espoused by Chief Justice Rehnquist. In the general context, the phrase that "in war, laws are silent" simply is not borne out by this study even in significant wars like World War II, Korean Conflict, Vietnam War and the current Afghan Conflict.

The findings also show that presidential approval ratings generally do not have statistical significance. This undercuts the idea that public opinion has some effect on Supreme Court behavior, at least when the government is a party. However, the findings also suggest that presidential approval ratings are a factor in judicial decision-making in the context of wartime cases. These findings also support John Mueller's findings, which suggest that the Justices mirror the general public reaction initially in a time of war and become increasingly skeptical towards the president as the war continues on.

These findings suggest several things. The context of war, by itself, does create a statistically significant likelihood that justices will not vote for the government. This result

aligns with the general sense of the Court being a check against the other institutions. Even during a time of war, the Court takes its responsibilities seriously.

One possible explanation for this result is that the model considers all the cases that may come before the Supreme Court where the government is a party. Most cases that come before the Court are not war-related and are mostly domestic in nature. For every landmark case directly involving the military or matters touching upon national security, there are hundreds of others that deal with mundane or arcane matters such as civil litigation or administrative law. Supreme Court jurisprudence is not monolithic. Subject matters are wildly divergent, with centuries of legal development and accretion of precedents leading to distinctively different doctrines. This finding seems to suggest the Supreme Court feels no special pressure to be deferential to the government during wartime for anything that does not directly impact the war. In effect, this particular result reflects the idea that the Supreme Court remains an independent entity inside and outside war.

This interpretation sees some support in the simple counting numbers of government success rate. The reader should be reminded of the results in Table 4 where the government achieves a win success rate of 62.2 percent during the context of all significant wars. Compare this with the overall success rate in all cases of 63.93 percent. Government does not achieve any substantial boost in invoking deference during wartime.

Another possible explanation for the consistent skepticism of the Court may have something to do with "social learning," a concept championed by Mark Tushnet, which explains that Justices learn from past cases. If precedents are nothing more than results from past cases, and precedents are argued before Justices in each and every case, then intemperate claims by

previous administrations are preserved in the record. Any deference granted by the Justices may have dubious historical outcomes. Supreme Court decisions are easily researched and in an adversarial system, lawyers would argue and dispute these previous outcomes as part of the current case. In any case, the exact reason for this behavior can be unpacked as a matter for future research.

Now that we have dispensed with all the findings detailing the context of war, we can turn to Hypothesis 2 and explore the effect of national security on Supreme Court judicial decision-making.

Hypothesis 2: With everything else being equal, when the government brings up a national security claim, Supreme Court decision-making should be in a pro-government, deferential manner. The coefficient should have a positive sign.

The question asked is whether the context of national claims influences Supreme Court decision-making to be more deferential and more pro government in voting behavior. These findings suggest that the answer is "No, national security claims do not influence Supreme Court voting in a deferential, pro-government fashion." The reader should recall that the national security variable was statistically significant beyond the 99 percent confidence level and the coefficient sign is in the negative. The results indicate that the Supreme Court is statistically likely to vote against the government in cases with national security claims. This is, once again, a counterintuitive result. Like the wartime variable, this finding suggests that even in a national security case, the Court performs as a check against the executive branch.

This finding suggests that the Court takes its responsibilities seriously. Even in a case that invokes the potential threat to the safety of the nation, the Court scrutinizes the

government's case carefully. Justices may at times defer to the perceived greater expertise of the Executive in matters involving foreign affairs and national security but will not do so unthinkingly. Justices may give credence to the expertise of the government, but are able to make decisions using their own judgment.

This finding shows that a claim of national security will not automatically gain a victory for the government's position. It explains why over the course of 70 years and 223 cases involving national security claims, the government is successful less than half the time – or 41.7 percent of the time. This lower percentage result correlates well with the statistical findings. Recall that the national security win rate is still lower than the overall win rate by government in all cases of 63.93 percent. It is not clear, however, why national security should invoke such a large decrease in win percentage.

National security claims before the Justices motivate a different kind of calculus, one that involves the possibility of the Justices' own lack of competence in the issue at hand. Generally, the Justices still perform their normative role as a constitutional check against the other branches. National security claims may invoke a specter of threat towards the nation, and the urge to follow the executive branch's request may be quite difficult to resist in certain cases. The results, however, indicate that the Justices are capable of resisting such claims and generally do not vote in a deferential matter in national security cases.

Summary

The key findings here are that the context of war generally produces a greater statistical likelihood of the Supreme Court voting against the government. This seems to be

counterintuitive and undercuts the idea that the country is tolerant of a different set of rules in wartime. Additionally, the results also support the John Mueller's findings that the Court will respond with deference to greater perceived popularity of a president during the early part of a war (driven by the rally-round-the-flag effect) but will otherwise revert to their anti-government, skeptical ways.

Chief Justice Rehnquist's claim that "in times of war, laws are silent" does not have any statistical support – at least not for all wars, generally. For whatever reason, war as a context simply does not lend itself to greater deference by the Supreme Court. If anything, the results suggest that the opposite is true – war brings a statistically tendency for the Court to rule against the government. Thus, Justice O'Connor appears to be right after all: war does not appear to be a "blank check" to justify governmental action. War is many things, but it is fails to influence judicial decision-making.

Another key finding is that national security claims are statistically significant but produces a likelihood of voting against the government. Justices are not more willing to be deferential to the government when national security claims are invoked. National security claims are not an automatic win for the government, as suggested by the lower win ratio of 41 percent. The explanation for this discrepancy may be that even if the Court is willing to defer, national security claims cases by themselves are extraordinary and uncommon cases, and as such the usual government competency in win rate does not extend to this class of cases. It may be that government officials simply do not have as much exposure to national security claims cases. After all across all 9082 cases, there are only 223 national security claims cases stretching back to 1941. If wartime cases encompass every corner of legal jurisprudence, national security

claims are singular and exceptional cases that may have very few pertinent precedents and examples to draw upon. Even where the members of the Court seem likely to accept government arguments, it appears that the government may not able to convert this willingness into a success rate simply because the Justices view each case not as part of some well-developed body of law, but as uncommon, if not unique, case that demands a greater attention to the facts of the case rather than the precedents that may influence the case. In other words, national security claims might just be too different from other types of "regular" cases and may force the Justices to perform their own judgment without too much guidance or dependence on previous precedents.

In the next chapter, we will explore how the frame of war portrays national security cases. In particular, the next chapter investigates the government's struggle to portray national security claims cases as a technical matter more suited for executive branch oversight. In addition, the next few chapters will outline the evolving direction of the Supreme Court jurisprudence when government attorneys bring a claim of national security before the Supreme Court.

Chapter 3: Qualitative Framework

In the previous chapter, we explored empirical findings for the idea that war, or at least the war-time context, matters in how the Supreme Court makes its decisions. Scholarly literature, for the most part, emphasizes the expectation that war does matter. This work, however, finds that war does not matter, which is the opposite of what most scholarly literature describes. This project finds that Supreme Court decision-making in wartime brings a likelihood of voting against the government. The previous chapter also featured empirical findings that suggest that even during national security cases, the Supreme Court votes against the government. This chapter expands on the context of national security claims and serves to explain the elements of "threat" and "competency."

Scholarly research on Supreme Court decision-making is dominated by law review cases, which focus upon qualitative analysis of a few select cases. Those few scholars that engage in a quantitative measure utilize the Spaeth database. The database contains a mass of data, but remains somewhat opaque to research on both the context of war and national security because the Spaeth database focuses mainly on existing Supreme Court jurisprudence. The reader may recall the most extensive and in-depth quantitative research by Epstein and her colleagues investigates war as a part of a crisis context. Her findings indicate war and crisis-related emergencies matters influence Supreme Court behavior in non war-related cases. In war-related matters, Epstein and her colleagues find no statistical effect on Supreme Court behavior.

Epstein goes on to argue that the context of war actually does the reverse and causes the Supreme Court to revert to their traditional role of institutional checks and balances.[141]

This study reinforces that major finding but focuses on war as a background context. Instead of looking at a few conflicts as a subgroup of "crisis" events, this work focuses on significant wars. This project engages in the discussion of war, beyond just that of a crisis-inducing moment. This project looks at significant wars that have influenced societal attitudes, which in turn may potentially affect Supreme Court behavior. This work also utilizes the Spaeth database, but also updates the "war" context to contain observations for the largest, most extensive conflict that the US has ever engaged in, namely that of World War II.

This study also looks at the context of war, which includes all kinds of cases, and the government's arguments for these cases are not necessarily related to war. As the reader may recall, the hypothesis that significant wars should invoke more deference on the part of the Supreme Court was not borne out by the empirical findings. The results suggest that the Supreme Court is statistically likely to vote against the government. Previous chapters have discussed some evidence that Justices are influenced by their perception of the war, in some cases anecdotally. Within this study, we have a finding that the Supreme Court does respond to the public's perception of the president's popularity. One interpretation is that the Court either responds much like the general public in a time of war or is in tune with the public's view and reacts accordingly. The introduction of a public approval variable brings Supreme Court behavior in line with John Mueller's model, namely that the Justices seem to align towards the perceived popularity of a president initially but also introduces a statistically significant

[141]Lee Epstein, Daniel Ho, Gary King and Jeffrey Segal, "The Supreme Court during Crisis: How War Affects only Non-War Cases" in *80 N.Y.U.Law Rev. 1* (April, 2005)

likelihood that the Supreme Court will disagree with the government position during that war. It also suggests that the Supreme Court reacts in line with popular opinion to some degree, with a surge of support for the administration at the start of a war which grows to skepticism as the war progresses. One reasonable interpretation may be that Supreme Court resistance to the government position increases as the popular support for the war decreases. However, scholarly work has not progressed much on this front.

In part, this is due to the limitation of the data available to legal scholars. Supreme Court Justices rarely, if ever, discuss their reasons for voting the way they do in conferences. There are collections of private papers by a few Supreme Court Justices, but they are generally not available to the public. There are a few scholars who have worked through some of these private papers, but the information so far is largely not cataloged and remains mostly inaccessible. Legal scholars then often depend upon either the opinions published by the Court, usually clustered around a specific area of legal jurisprudence. This creates a tendency towards a case-by-case select analysis without regard for how the institution of the Court may act in the larger picture.

One factor that has influenced the current scholarly understanding of wartime cases is effect of the frame of war itself. Analysis of wartime cases is often skewered by the "crisis" element, echoed by Epstein and her colleagues. It is the crisis element that draws the most attention to qualitative and quantitative analysis of wartime cases. War creates a frame that persuades critical work to focus on national security claims. When Rehnquist wrote, "in war, the law is silent," he focused mainly on those cases that match civil liberties against national security claims, going back to the American Civil War. Rehnquist's point about the silence of the law

can be understood as based on the idea that the government makes a special claim about justifying its behavior in a time of war as a matter of self-defense. In a time of war, where national security is at stake, Rehnquist argues, the "law" simply has to change to accommodate the nation's needs. The context of wartime claims is often entangled with the idea of a national security claim. As the reader may recall, the quantitative results of wartime and national security were statistically significant and the coefficient had a negative sign. This finding suggests that in both the context of wartime and in national security cases, the Supreme Court is statistically likely to vote against the government.

Quantitative results can show us that decision-making in wartime is generally not deferential. This result cannot explain specific structural or systemic influences on judicial decision-making. Qualitative analysis allows for the possibility of dissecting such behavior more closely, allowing an analysis of decision-making in national security cases over time. Additionally, a qualitative analysis may disentangle the war frame from the national security concerns within each case and explore how and why Justices voted the way they did.

Definitions of National Security

Before one can unpack these arguments further, one must first attempt to define exactly what term "national security" means and how the Supreme Court goes about evaluating such claims. The concept of national security is a hard one to define exactly. Common dictionary definitions mostly define "national security" as involving those actions that pertain to the defense of a country or protection of a country's citizens and the country's secrets.[142] For the generation

[142] "National security" as defined by www.macmillandictionary.com and oxforddictionaries.com.

that founded the nation, national security is really about trade-offs between individual liberty and governmental need to protect its citizens; Alexander Hamilton wrote that:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations that most attached to liberty, to resort for repose and security to institutions, which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free."[143]

As a result, this understanding of the balancing act between the needs of the individual against the needs of the state or those actions taken to ensure national survival or involve national self-defense are written into the very founding documents of the nation. The Constitution recognizes the potential for such an emergency; the suspension of habeas corpus, after all, is possible "when in Cases of Rebellion or Invasion the public Safety may require it."[144] President Lincoln first invoked the Suspension clause, chiefly on the basis of "necessary defence."[145] The term "national security" may not have been used, but Lincoln's act demonstrates the core concept of national security: namely, the balancing act of deciding between the rights of the individual and the needs of the state in the face of a threat.

Since Lincoln's time, "national security" has expanded a bit beyond just "necessary defence." As the complexities of international relationships increased and the role of the United States expanded into the role of a world superpower, "national security" was expanded to mean

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[143] Alexander Hamilton, *Federalist No. 8.*
[144] *US Constitution*, Article 1, Section 9.
[145] Abraham Lincoln, *Letter to Winfield Scott*, April 25, 1861, cited in Pg 217-218 *of Lincoln on Democracy* (New York: Fordham University Press, 2004), eds. Mario Cuomo and Harold Holzer.

more than just self-defense. As of the time of this writing, the Pentagon's definition of national security involves protecting a loosely defined series of "national interests." These include the traditional national defense against a threat – but "national security" also includes less immediate concerns. The armed forces also define "national security" to include the preservation of its political identity of the United States, the sanctity of political institutions, and even establishment and advancement economic and trade interests of the United States beyond its borders.[146] Contemporary political definitions are, if anything, just as broad – if not broader. The Obama administration defines "national security" as involving not just physical security, but also the furthering of economic prosperity and perpetuation of American ideals abroad.[147]

There are potentially other psychological effects that occur in a national security claim. People are susceptible to their environment, and their perception of the threats. Because of their mental framework, how they perceive danger is often affected by emotive fear responses. The executive branch may see themselves as primed to view a national security threat – even a potentially hypothetical one, evoking primordial fight-or-flight instincts and hence, provoke an "Us v Them" attitude. Christina Wells explains this particular phenomenon in political institutions:

> The psychology of risk assessment -- i.e., the study of how people determine the likelihood of uncertain events -- is relevant to understanding executive officials' overreaction to perceived threats in times of crisis. Faced with a potentially catastrophic threat to national security, officials must decide whether and how to react based upon a complex balancing of factors such as the nature of the risk, its likelihood, and the

[146] Joint Publication 1-02: *Department of Defense Dictionary of Military and Associated Terms*, Pentagon, Washington, Joint Chiefs of Staff, US Department of Defense, pp 228. Referenced at: http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf

[147] Office of the President of the United States. *National Security Strategy*, *May 2010*. (DC: White House, 2010). Available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

> possible advantages (such as safety) and disadvantages (such as curtailment of liberties). Psychologists know that use of cognitive shortcuts can skew the risk assessment process into overestimating the likelihood of perceived catastrophic events. This is especially true when people make decisions in an atmosphere of fear and intense social pressure….In times of crisis, government actors can err by misperceiving that certain groups pose a danger or by acting on the erroneous perceptions of others. Occasionally, they might even fan the flames of such misperception to obtain public support for their own agendas…[H]istory bears out this pattern of skewed decision making and suggests that, contrary to the claim of proponents of judicial deference, executive officials are not inherently adept at assessing or reacting to national security threats.[148]

Wells, in essence, argues that Executive officials are affected by fear and emotion, which can distort a true and accurate evaluation of the situation. This very same fear may cause the executive branch to view anyone who might pose a potential obstacle to be part of the problem. This may even predispose them to viewing other branches as part of the threat, if they are view as obstructionist. This is the context that the executive branch might view national security cases. Of course, the Supreme Court has a different perspective – cases come to the Justices after the initial red-hot glow of the emergency, sometimes years after. The Court has a different view of its own role, deliberative in nature, and one predisposed to balancing against different facts and principles. Thus, there is a tension between the emergent necessity of actions taken by the Executive and the detached, deliberation of constitutional principles – one that this is the central theme of this work.

In the context of Supreme Court decisions, the adjudication of "national security" claims closely tracks Hamilton's description of the trade-off between liberty and safety. In most of the national security cases presented below, Supreme Court jurisprudence most often deals with

[148] Christina Wells, "Questioning Deference" in 69 *Missouri Law Review* 903 (Fall, 2004), pp 907-8

whether governmental actions are justified when weighed against the encroachments against the Constitution. The common thread between all these national security cases is the claim that a "threat" exists – and it is this threat that justifies the governmental actions being challenged. However, the Supreme Court does not treat all national security claims equally. The justices seem to draw some distinction between which government agencies are claiming the existence of a threat. In other words, the Supreme Court looks at the expertise and competency of the agency to make such judgments about potential threats.

There are not a lot of examples where the Supreme Court clearly defines what "national security" actually means. Often, when the term is used in legislation, the term "national security" is undefined, with the implicit assumption that it is common knowledge what the term may actually mean. Sometimes the very vagueness of the "national security" can lead to legal problems. In *Cole v Young*, the use of the term "national security" became itself litigated – which leads to the clearest definition the Supreme Court has supplied as to what "national security" may mean.

In 1950, President Truman signed an Executive Order that authorized all governmental agencies to fire employees when "in the interest of the national security." Subsequently, a food and drug inspector in the Department of Health, Education and Welfare was terminated for alleged associations with the Communist Party. Because the term "national security" was not defined within the statute, the Supreme Court undertook to discover what "national security" actually meant within the statute. The majority opinion takes a much narrower view of national security:

> [W]e think it clear from the statute as a whole that the term was intended to comprehend only those activities that are directly concerned with the protection of the nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare… Congress specified 11 named agencies to which the Act should apply, the character of which reveals without doubt, a purpose to single out those agencies which are directly concerned with the national defense, and which have custody over information the compromise of which might endanger the country's security, the so-called "sensitive" agencies.[149]

Hence, the Court's definition of national security indicates both the scope and even the source of the threat. "National security" encompasses those actions that are meant to ameliorate a real, perceptible and specific "threat." An ambiguous claim of activity that might hypothetically help secure the interests of the nation would be too attenuated to constitute a credible national security interest. The source of the threat should be some category of persons or groups that would upset the common peace of the nation, either through internal disruption or external attack. Not every domestic action can be considered to be disruptive enough to be "subversion" – here the standard of disruption or "subversion" necessary to trigger a viable national security claim is one that is on par with the threat from "foreign aggression."

Additionally, the Court's decision signals its awareness of differences in knowledge and information of governmental agencies. Some agencies simply have more experience and expertise in matters that relate to national security matters – and while the Court does not pass comment on which agencies may be so endowed, the majority opinion does note that the Department of Health, Education and Welfare is not one of those sensitive agencies. Furthermore, inspection of food – while an important endeavor – does not rise to the level of

[149] *Cole v Young*, 351 US 536, 544 (1956)

"subversion" or "foreign aggression" necessary to invoke a credible national security claim.[150] There are, however, hints within the case that the level of expertise of a "sensitive" agency might garner more deference from Court about the credibility of the threat. The majority opinion, almost as an aside, states that the case might be different if the agency in question has "responsibility for protection of classified information, [it] should have final say in deciding whether to repose [its] trust in an employee who has access to such information."[151]

More than thirty years later, the Court faced exactly that situation. In *Carlucci v Doe*, an employee of the National Security Agency confessed to homosexual conduct. He was terminated by the agency for actions because Doe's "indiscriminate personal conduct with unidentified foreign nationals."[152] No evidence was presented that Doe meant to pass on classified information – only that his sex life and self-categorization as a homosexual made his employment "inconsistent with the national security interests." Although the lower court found that the government had ignored and superseded civil service procedures to fire Doe, the Supreme Court summarily dismissed such concerns, focusing specifically on whether there was alternate statutory authority for the agency to terminate employment. The majority opinion implicitly accepted both the government agency's judgment on the potential risk to national security and the threat represented by Doe's sexual orientation.

These two cases focus upon association with wildly differing results; the difference appears to the nature of the agencies that brought these claims. The Supreme Court did not see

[150]*Cole v Young*, 351 US 536, 546 (1956). "… [It] is difficult to justice summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions, and who are thus not situated here they could bring about any discernible adverse effects on the Nation's security."
[151]*Cole v Young*, 351 US 536, 546 (1956)
[152]*Carlucci v Doe*, 488 US 93, 97 (1988)

the Department of Health, Education and Welfare as an agency engaged in national security interests. As a result, the actions taken by this agency to ameliorate the threat were deemed unconstitutional. However, an agency whose very name includes the term "national security" receives much greater deference. Although no hint of any actual illegal behavior, the majority opinion accepted without comment that homosexual behavior by itself might constitution a national security risk. One might draw the conclusion that the expertise of the agency, when dealing with a potential threat, may draw greater favor from the Supreme Court.

The distinction between these two categories – the 'sensitive' versus non-sensitive agencies - helps inspire the analysis of national security claims in this study. In those cases where the agency is not a security agency involved in sensitive conduct, the Court is most likely to focus on evaluation of the threat being claimed. This category is called "threat-based" because the predominant analysis by the Supreme Court is focused upon the existence of the threat, and the reasonableness of the government's actions in ameliorating the threat. The reader may also note that "threat-based" is the initial selection criteria for "national security claims." Selection of cases involving "national security claims" require some discussion of a threat in the majority opinion; hence "threat-based" is the default condition and naturally, represents the majority of all cases in this study.

In some cases, the Supreme Court accepts the greater expertise and informational levels of governmental agencies and uses the government's initial judgment as a basis for evaluating the existence of the threat and reasonableness of the government's actions. Most of these cases involve traditionally understood security agencies; protective forces (such as the military and the Department of Defense) counter-terrorism and counter-intelligence agencies (such as the FBI

and parts of Homeland Security), clandestine agencies operating both internally and outside the US against enemy forces (such as the CIA and the NSA).

Threat

Generally, national security claims, at their very core, deal with the idea that the country's interest are at risk. The assessment of said threat to the country's security is based to some degree on how transparent or believable the threat may be in the minds of the Justices. In some situations – such as when the country is at war and the case facts directly implicate the ability of the nation to conduct the war – the risk factors are transparent and the potential for disaster is great. In these cases, the government does not have to work too much to persuade the Justices of the existence of said national security threat. In others – such as when the country is at peace, and the government argues the potential existence of a threat - but without offering the evidentiary existence of said threat – then the risk factors become speculative enough that the Justices do not feel any compulsion to defer to the executive branch. Threat assessments are linked to the coherency and transparency of the risk to national security.

"Threat" mirrors the core concept underlying the "Two Constitutions" model; recall that in this model, the emergent condition of a war shifts the decision-making process of the Court towards a general level of deference. In national security claims, "threat" comes into play where the Justices are confronted with the argument that the usual deliberative stance of the Justices may encumber the other branches – and particular the executive branch – from properly functioning in such heightened conditions. The idea then is that the Justices should allow the government agency to do what is necessary to protect the Republic, even where the

governmental action may appear to be, at first glance, of questionable constitutional basis. Hence, the "threat" axis is best understood as a continuum, where at one end, the Justices are willing to suspend their usual role in the separation of powers, since the theory is that an independent judgment by the Court may create a greater risk to the national interest and implicate the security of the country. At the other end of the continuum lies the usual normative expectation of an independent judiciary guarding against the governmental transgressions against the Constitution. Since these cases involve some implicit or explicit argument about national security issues, the government will almost always take a strong position about the existence and immediacy of the threat in question – and how this perceived threat justifies governmental actions in the case at hand.

Claims of threats to the national security by the government often involve the argument that the administration must be allowed freedom to protect the interests of the United States. Claims of threat therefore signal the government's demand for more deference by the Justices. In this study, the pattern of judicial behavior is that deference is more likely where there is a logical and clear connection to an immediate, physical threat. Hence, not every "national security" claim is granted automatic acceptance; the more speculative the threat is perceived to be, the more likely the Court will dismiss the national security concerns by the government. If the executive branch's claim of threat is too attenuated or hypothetical, then the Court will reject such claims. Chapter 6 demonstrates what happens when the Supreme Court rejects the government's claims of imminent disaster due to communist infiltration. Undaunted, the government brought similar claims in case after cases, ostensibly seeking to purge people from government who might have communist associations. Eventually, the Supreme Court found

government attempts to criminalize behavior on this purported threat as a violation of the First Amendment.[153]

In brief, "national security" is a bit of a moving target but the core concept of Lincoln's "necessary defense" still underlines judicial decision-making about the "threat-based" definition of "national security" – one in which the Justices feel no especially great predilection to defer to the executive branch's point of view. Because of the psychological distance, and the self-perception of the Justices as a deliberative body, the Supreme Court may not feel any great compunction generally to defer to the executive branch's judgment. The exact reasons for this behavior, however, are further explored in subsequent chapters.

Competence

"Competence" is best understood as the inherent knowledge or capacity for the government or government agency to deal with the issues advanced in the case. In this study, the term "competence" is used interchangeably with the term "expertise." Competence is linked to the perceived governmental agency function and the relationship of the government's perceived avowed field competency to the core facts or arguments. In other words, "expertise" is measured by whether an agency is expected to be competent in issues that deal with the core argument in the case. Examples of this include the purely self-defense version where the Court will accept and defer to the executive branch in a situation where foreign spies are attempting to sabotage the infrastructure of the United States.[154]A threat may only potentially exist but where the governmental action directly relates to this threat, the Court will grant such justifications

[153] See *US v Robel*, 389 US 258 (1967)
[154] See *Ex Parte Quirin*, 317 US 1 (1942)

great credibility; for example, the preservation of secrets, whose propagation would harm the position of the United States, its military interests and potentially put Americans in harm's way.[155]

"Competence" must also be relevant to the core facts or arguments in the case; whereas the military may be best suited for protecting the nation, it may be ill-fitted for civilian applications. The US military would have expertise where dealing with averting potential saboteurs during war time, but not are perhaps the ideal organization to administer civilian justice in peacetime. An example occurs in the case of *Duncan v Kahanamoku*, where the defendants were arrested for minor crimes during 1944. By the time this case reached the Supreme Court, in December of 1945, Japan had surrendered and World War II was over. The Court, noting the necessity of martial law in the wake of the Pearl Harbor, found no justification to defer to the military substitution for civilian courts in a time of peace. The military's function is to protect the republic, but the dispensation of law and order belongs to the civilian courts.[156]

In national security claims, greater expertise leads Justices to defer to the government under the theory that the government (and usually an executive branch agency) is better suited to make decisions about such decisions involving the case at hand. "Competence" mirrors the core concept underlying the "Two Presidencies" model; recall that in this model, the Supreme Court defers to the executive Branch in matters involving foreign affairs, as a function of the greater knowledge and ability of the Executive to deal with such issues. In national security claims, "competence" comes into play where the Justices are confronted with facts or arguments where the government appears to be better suited to making decisions. "Competence" is a situation

[155] See *US v Reynolds*, 345 US 1 (1953)
[156] *Duncan v Kahanamoku*, 327 US 304 (1946)

where the Justices acknowledge this greater ability to make decisions in these areas implicitly or explicitly and as such are willing to grant deference to the government's decisions.

Typology

In this study, cases can be divided into four types, producing a 2 by 2 cell. These cells represent the expectations and conditions explored in the next several chapters. These cells assume a national security claim exists in the case.

Quadrant 1 War + Security agency Govt argues: Threat + Expertise	**Quadrant 3** No War + Security agency Govt argues: Expertise
Quadrant 2 No War + No security agency Govt argues: Potential Threat	**Quadrant 4** War + No Security Agency Govt argues: Direct Threat

Quadrant 1: Security agency + War = Expertise

The hypotheses in the previous chapter were built around expectations of behavior built around the conditions of war and national security. The two major hypothesis focus on wartime context and national security claims. During a time of war, I would argue that government attorneys will attempt to argue that the executive branch should have the most leeway in national security cases. In a significant war where the threat is obvious, government attorneys will spend some considerable time emphasizing the threat and invoke judicial deference as a matter of national self-defense. During these conditions, I expect that the Justices should be more deferential when they believe that issue is based on national security and requires executive branch expertise and competency provided by an agency generally accepted to have national security expertise, such as the military or the CIA. In other words, in quadrant 1, there should be

a greater deference where the conditions of war and national security dovetail, and where the government attorneys successful argue that government actions are taken by presumed experts in the field of protecting the nation's security. The net effect of a successful argument is that Justices should refer to the greater expertise as the major explanation for deference.

Quadrant 2: No security agency + No war = Threat

During a time of peace, where no security agency is involved, government attorneys will attempt to argue for greater leeway in national security cases and emphasize threat-based arguments. During these conditions, I expect that Justices will be less deferential, since the issue does not immediately implicate any accepted or known executive branch expertise. Unlike quadrant 1, the lack of a security agency involvement makes expertise arguments inaccessible or less relevant. The threat is often abstract or hypothetical in nature. An example of an abstract or threat is when the government attempts to imply that membership in the Communist Party also means that the defendant has an intent to overthrow the government by force, while providing no proof of any overt hostile actions. In quadrant 2, there should be deference where government attorneys successfully argue that the potential and implied threat to justify government behavior. Peacetime legal jurisprudence usually disfavors deference to government, so government attorneys usually favor an emphasis on threat in these types of national security cases, in order to invoke greater deference.

Quadrant 3: Security Agency + No War = Expertise

During a time of peace, and with security agency involvement, I expect that government attorneys will emphasis the perceived competency and expertise of a security agency should invoke Supreme Court deference. In these cases, the national security claim will be evaluated on the basis of whether the security agency's expertise is a core component for dealing with the supposed national security threat. The actual threat need not be real, but can be abstract, or may be a potential future threat. The net effect is that the Justices are likely to defer to the security agency's perceived greater competency and expertise if they believe that there is a national security threat of some sort.

Quadrant 4: War + No national security

The last condition is when government attorneys argue during a time of war and with no national security agency involvement. Quadrant 4 is similar to quadrant 1, except that the emphasis is almost exclusively on a known threat. This threat is direct, and usually involves an enemy group, organization or nation that is the current adversary in an ongoing significant war. An example would be enemy combatants claimed to be Islamic terrorists, captured during the Afghan War. The national government claimed the detention of these alleged terrorists was necessary to reduce the risk of a future attack by these detainees. The context of war, normally should invoke greater deference, but since no security agency is involved, the government attorneys will emphasize the potential danger to national security from the threat. The net effect is the Justices vote in favor of deference to the government, if the government can persuade them that there is an direct threat as opposed to a potential or abstract threat.

Descriptive statistics

As a reminder to the reader, there are 223 "national security" claims cases. The selection of these cases is explained elsewhere in greater detail, but in brief, a case involves a national security claim where there is a:

- Explicit claim: when there is an explicit discussion or reference to national security issues in the majority opinion of the Supreme Court.
- Implicit claim: the case depends on a statute that explicitly deals with national security matters and the Justices interpret the national security provision of that statute in their decision.

The reader may recall then that there are well over 9000 individual cases in the Spaeth database. The actual breakdown of national security claims cases is about 2.5 percent:

Table 1

Context of cases	# of cases	%of total cases
National Security	223	2.45%
Total cases	9082	100%

There are a few potential reasons for this paucity of cases. National security issues are generally shrouded in secrecy; there may be parties who never bring suit simply because they are not aware that their liberties may have been infringed and hence, those cases are never litigated. There may be a lack of standing – a party may have to prove some potential harm or damage even if he were aware of the government action. There is also the issue of sovereign immunity, which is a common law idea that the government cannot be sued for a criminal or civil wrong unless the government itself allows it via statute or in some other fashion. Even if the aggrieved

party were to be made aware of such potential infringement or has standing to sue, he or she may not be able to obtain cert before the Supreme Court. Approximately 90 to 120 cases are heard every year and the justices may not decide to grant cert for this case. Most importantly, the Supreme Court usually hears the most difficult of cases – ones that involve claims that are wedged in constitutional grey areas. Most cases are heard and disposed in lower courts. As a generalized rule of thumb, the Justices grant cert to those cases that have no 'easy' answers or present new or novel constitutional or statutory questions. Seen in that light, and keeping in mind the extraordinary nature of national security issues, it should not surprise the reader that "national security claims" cases are not particularly abundant.

What may surprise the reader is that the government is actually not as successful as one might expect in cases related to national security. In the 223 cases, the government is successful only 41.70 percent of the time.

Table 2

Category	Number of Cases	Govt wins	Percentage of Govt wins
Total	223	93	41.70%

This win ratio is much less successful than the overall government success rate. The reader should keep in mind that the following table incorporates all cases including national security cases. The following table gives a general overview of the success rate when government is involved as a party in a case.

Table 3

Case Disposition	# of Cases	Percent
Unfavorable	1263	36.07%
Favorable	2239	63.93%
Total	3502	100%

Whenever the government participates in a case in the Spaeth database regardless of the case nature, the government secures a favorable disposition – or wins – nearly 64 percent of the time. So why is there a great discrepancy for favorable disposition of cases between "national security" claims and general government claims? I argue in the following chapters that national security cases are treated differently, because the executive branch has a different perception of its role in separation of powers within the context of a national security claim.

The reader might understand that the other two branches may perceive the executive branch as having greater resources and competency to deal with matters of national security. One might expect this imbalance of knowledge would influence the Supreme Court to accept the government's position – at least with greater frequency than in other cases. However, justices treat these types of cases with more skepticism than one might expect. The Supreme Court's decisions are not generally obstructionist or obsequious. The justices tend to look at the actual context of the case in order to evaluate the government's cases. In most national security cases, members of the Court are likely to side with the executive branch's arguments, where a threat is clearly delineated or commonly understood and where the executive branch competently acts in a way that is reasonably related to the ameliorating the threat. However, what is reasonably related is a judgment call that differs with each case.

The justices may be prone to being deferential to the greater expertise of the executive branch in national security matters – but only in those cases where the executive branch clearly has the upper hand in informational competence. Even then, I would argue that executive branch's claims are subject to greater review, especially where the government position verges upon the Justices' own core competency – namely that of Constitutional interpretation. The executive branch may be better at trying to put out a potential crisis but when it decides to override the Supreme Court's function and tell the Justices how to interpret the law, deference becomes less likely.

The following chapters explore the power dynamic between the executive branch and the Supreme Court in the context of national security cases. If the claims are limited to the debate about "threat" and the reasonableness of governmental actions which are linked to the perceived competency of the governmental agency, then the Court is likely to accept such judgment in lieu of its own. Where the government position infringes upon the separation of powers dynamic and government attorneys claim that the executive branch claim a dominant role in constitutional interpretation, then they are less likely to succeed.

Thus, in this study, Supreme Court decisions involving national security claims are best understood as a framework of interaction between expertise and the perception of threat. All of the cases in this chapter involve some element of a national security claim, but not all claims are equally perceived the same way by the Justices. Although there are many contexts and differences across factual patterns, the government arguments share one universal commonality: their arguments are designed to justify their behavior and ask the Justices to agree with the legality and constitutionality of their actions. Additionally, the analyses of cases are grouped

by specific grouping of events. This allows a more nuanced examination of both the types of claims brought by the Government.

Chapter 5 will cover cases involving the internment of Japanese-American citizens and residents. In the Japanese internment cases, the Supreme Court placed heavy emphasis on both the potential threat of Japanese invasion and subversion from within. The Court also accepted presumed greater competence of military authorities to make such judgments. This chapter deals primarily with how the Supreme Court accepted claims of military necessity and deferred to the executive branch.

Chapter 6 will focus on the Red Scare cases of the early part of the Cold War, as well as cases involving the claim of Communist affiliation or association. In these cases, the Supreme Court hinged around decisions around the perception of the threat of communist infiltration. This chapter primarily investigates why the Court mainly rejected the government's claims.

Chapter 7 segues into Cold War cases. Most of these cases take place in a time of relative-peace. As such, threats are less imminent and the Supreme Court places greater emphasis on the perception of competence of government agencies in national security cases. Even in the "hot war" of the Korean Conflict, judicial decision-making evolved away from deference to military necessity and into a more nuanced and skeptical view.

Chapter 8 covers the post 9/11 cases involving Guantanamo Bay detainees. This chapter investigates the Supreme Court's ambivalence when faced with the government's emphasis on enhanced executive branch power. In the Guantanamo Bay cases, the Supreme Court addressed the claims of war power and weighed them against the liberty interests of individual detainees. This chapter investigates how questions of national security grew into competing views on the

separation of power. This chapter also explores the limits of governmental demands for deference, even in the face of a prominent threat of terrorist action.

A key component to these case groupings is the kind of arguments the executive branch brings to the national security cases. The executive branch is most successful when it presents a case with all relevant information, and explains its motivations in clear and consistent manner. In these types of cases, the justices are willing to see themselves as a partner in the decision-making process of government. In this tripartite system of government, the members of the Court view themselves as both the guardians of the Constitution and a check against the other branches. This often pits the Justices against the needs and desires of the executive and legislative branches. The Supreme Court, in other words is predisposed to saying "No" to the actions of government. Yet, where the government is most successful is where it allows a channel for the Justices to say "Yes." The reader might see this as an intuitive and even mundane point, but the structure of the judicial process is such that the adversarial nature of the litigation often leads government attorneys to view the Supreme Court as an obstacle. Certainly, some presidential administrations view the justices as "activist" and obstructionist to their political needs.

In the emergency and necessity conditions of these cases, the executive branch agencies stress the need to act and place less on "constitutional." However, the determination of what is "constitutional" is the central role of the Supreme Court. Those administrations that ignore or restrict the Court's institutional role risk a negative reaction, for the Supreme Court will to defend their own domain. Deference from the Supreme Court is something that must be asked for, and something that must be shown to be necessary.

The point of the analysis in the next chapters will investigate the process of judicial decision-making in the national security context. The qualitative analysis tells us the context of the reasoning and most importantly, explains why certain arguments worked and why certain contexts are more influential than others. This analysis aims to unpack the opinions and provide an explanatory for judicial decision-making under national security conditions and more importantly, may be able to provide insights for why judicial decision-making occurs the way it does.

Chapter 4: Japanese Internment Cases

National security cases that occur during World War II mostly involve claims about the external threat represented by the subjects of the US' enemies at the time. In these cases, government attorneys attempt to show that the threat by an external enemy, such as the Japanese, is more than justified by the actions taken by the government. Government attorneys argued that the security of the nation would be in peril and in these cases, the government argued that the military was the best equipped to handle the threat represented this external threat. The reader may find it helpful to be reminded of the typology.

Quadrant 1 War + Security agency Govt argues: Threat + Expertise	**Quadrant 3** No War + Security agency Govt argues: Expertise
Quadrant 2 No War + No security agency Govt argues: Potential Threat	**Quadrant 4** War + No Security Agency Govt argues: Direct Threat

Quadrant 1 cases involve a security agency and a significant war; in this case, the military is the security agency charged with defending the nation's security in World War II. One might expect that the Justices would be more deferential to the executive branch, where the government attorneys are successful in arguing that amelioration of the threat is directly related to the competence of the security agency. The examples used to illuminate Quadrant 1 involvement the curfew and detention of Japanese Americans immediately after the attacks on Pearl Harbor. Collectively, these cases have come to be called the Japanese internment cases.

To understand the Japanese internment cases, one must be reminded of some history. On December 7th, 1941 on a calm Sunday morning, a wave of 183 Japanese aircraft streamed inland from the Pacific Ocean and attacked military targets and inland infrastructure of Pearl Harbor.

The US Congress declared war on the next day and Germany and Italy swiftly responded with their own declarations of war upon the United States. On the same day, the Justice Department closed off the borders to all "persons of Japanese, ancestry, whether citizen or alien" with the implication that the US government believed that enemy saboteurs and spies serving the Japanese Empire may hide within the Japanese American community.[157] Ostensibly fearing the potential of sabotage and invasion, on February 19, 1942, President Franklin Roosevelt signed Executive Order 9066, authorizing military commanders to remove any and all persons from specific areas for the "successful prosecution of the war."[158] On February 20, 1942, President Roosevelt appointed General DeWitt as military commander of the California region; and in March, General DeWitt issued a series of military proclamations that established curfews for anyone of Japanese descent that eventually culminated in a proclamation that ordered every man, woman and child with Japanese blood to report to designated areas by May, 1942. Although there is evidence that government officials discussed including Germans and Italians as part of the excluded groups, General DeWitt concentrated exclusively on the perceived Japanese threat.[159] On March 21, 1942, Congress enacted a law that made it a crime for civilians to disobey military restrictions within the designated military areas.

[157] Roger Daniels, *Prisoners without Trial: Japanese Americans in World War II* (New York, Hill and Wang, 2004). pp 27

[158] *Federal Register*, Vol 7, No. 38, pg 1407 (February 25, 1942).

[159] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983). Irons makes the point that DeWitt made the final call to exclude only people of Japanese descent because of his own personal views about "Orientals." People of other Asian descent were not included, mostly because no other Asian nations had declared war against the United States. Although the possibility of including people of German and Italian descent in the exclusion orders was discussed, Irons notes that this was dismissed early due to the potential political fallout more from greater German and Italian populations.

By the US Army's own estimates, there were over 112,000 Japanese Americans and legal residents. Most residents complied peacefully with the order.[160] A few resisted and some fought their detention through the court system. In total, 4 out of the 112,000 people interned openly defied the military proclamations. Only one person later challenged the detention itself via habeas corpus. The first pair of cases were filed by Kiyoshi Hirabayashi and Minoru Yasui, challenging the constitutionality of the curfew orders. A year later, challenges by Fred Korematsu and Mitsuye Endo reached the Supreme Court as well, challenging the internment and exclusion facets of the military proclamations. In 1943, Hirabayashi and Yasui's cases were argued before the Supreme Court. Since both cases challenged the constitutionality of the curfew by the military and shared some common central facts, the Justices treated them as companion cases.

Neither Yasui nor Hirabayashi appeared to be provocateurs or agents of the Japanese empire and the government never contended that either Yasui nor Hirabayashi were actual threats to the national security. Kiyoshi Hirabayashi was a natural-born citizen of the United States, educated in Washington state public schools and at the time of the curfew and internment, he was a college senior in the University of Washington. Hirabayashi refused to follow the curfew because he had rights as an American, and he simply refused to waive them.[161] At the time of the military orders, Hirabayashi was 24 years old and a practicing Quaker. When he

[160]See Christoper Hiroto, Lt. Col, US Army. *"The Evacuation and Relocation of the West Coast Japanese During World War II – How it Happened!"* US Army War College, Carlisle Barracks, PA (1991). Available at: http://www.dtic.mil/dtic/tr/fulltext/u2/a236885.pdf. This document is housed at the Department of Defense's Technical Information Center which houses information for the government-funded scientific, technical, engineering and business related information.

[161] *Hirabayashi v US*, 320 US 81, 84 (1943)

surrendered himself to the FBI office in Seattle, Washington, he handed over a four-page written statement. Hirabayashi explained that:

> If I were to register and cooperate under those circumstances, I would be giving helpless consent to the denial of practically all of the things which give me incentive to live. I must maintain my Christian principles. I consider it my duty to maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation.[162]

Minoru Yasui was also a natural-born citizen, born of Japanese immigrants who owned an apple orchard. Raised as a Methodist, Yasui was educated in Oregon public schools and achieved both a bachelors and advanced degrees from the University of Oregon; in addition, he was attorney of good standing with the state bar of Oregon and was a 2nd lieutenant in the US Army Reserve.[163] Unable to find a legal job after graduation, Yasui looked to his father's connections and secured a job in the Japanese consul in Portland.[164] After he learned of the Pearl Harbor bombing, he quit his job and attempted to re-join the military but was turned down. Learning of the curfews, Yasui informed a former law school classmate and now FBI agent about his plan to test the constitutionality of the military proclamations. Yasui violated the curfew, was promptly arrested, and later, sentenced to one year in prison. The District Court went one step further, stripping Yasui of his citizenship. The District Court remarked that the acts of refusing to follow the curfew and his employment with Japanese consulate served as a renunciation of American nationality.[165]

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[162] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pp 88
[163] *Yasui v US,* 320 US 115, 116 (1943)
[164] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pp 82
[165] *Yasui v US*, 320 US 115, 117 (1943)

In both *Yasui v US* and *Hirabayashi v US*, the government's argument was fairly straightforward. The government argued the relevance and necessity of the military's expertise and claimed the threat to be both immediate and credible enough to justify the military's actions. In other words, both the "threat" and the "competency" elements were heavily emphasized. The government highlighted the military expertise aspect as the principal lever to justify their arguments. The government's position was that California and the West Coast of the US was "particularly subject to attack, to attempted invasion by the armed forces of nation with which the United States is at war and … is subject to espionage and acts of sabotage, thereby requiring adoption of military measures necessary to establish safeguards against enemy operations."[166] This was a not so subtle reminder of the ongoing threat of further Japanese attack, especially in the wake of Pearl Harbor. Congress went further, questioning the loyalty of potentially all US born Japanese, on the basis of their "dual citizenship... and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American born-children of the Japanese."[167] Congress thought there were potential seeds of disloyalty and suspected widespread fifth-column activity among the Japanese leading the Congress to pass an act in March 21, 1942, making it a crime to disobey military authorities in a military area. General DeWitt's proclamations were authorized and blessed by both the executive branch and by Congress, and in both Yasui and Hirabayashi's cases, the government's position was that these curfews were necessary for the military mission to protect the security and safety of Americans citizens from potential attack. According to the best judgment of the military commander in the

[166] *Hirabayashi v US,* 320 US 81, 86 (1943)
[167] *Hirabayashi v US,* 320 US 81, 91 (1943)

area, the curfews and internment were militarily necessary to protect against a potential threat of Japanese invasion and subversion.

In both these cases, the Court accepted both the competency and threat argument with very little difficulty. The Supreme Court went even further. The majority of the Justices simply declared that they were not permitted by the Constitution to intervene. The Court seemed to be saying that due to the context of war that the Justices felt themselves obligated to defer to the executive branch. The competency of the other branches, and especially the executive branch in prosecuting a war and defending the nation in the face of an imminent threat meant that the Court must defer to the executive's superior knowledge:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[168]

The majority opinion reiterated the conditions of the war, noting that there was a possibility of espionage, and the uncertain loyalty of Japanese Americans. In the opinion, the Court accepted the government's hypothesis that the Japanese community has never truly assimilated and therefore, the entirety of the Japanese American community has suspect loyalty, but without too much conviction. In fact, the Court's opinion accepted that there may be a lack of support or even proof for the proposition of a "Japanese fifth column", but was justified nonetheless:

> Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authority and of Congress that there were disloyal members of that population, whose number and strength could be precisely and quickly

[168] *Hirabayashi v US,* 320 US 81, 93 (1943)

> ascertained. We cannot say that war-making branches did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[169]

One might argue that the majority of the Justices "cannot say" because this opinion represents the abdication of independent judgment. The opinion here nothing to test the government's rationale, and offers only the speculative possibility of threat. The perspective of the Court's opinions draws directly from the point of view of the military authorities. Both cases have almost no discussion about the constitutionality of the military actions, focusing specifically on whether the defendants violated the military orders and whether these orders were justified by the emergency conditions. The combination of "threat" and "competence" proved too difficult to overcome as the Supreme Court deferred entirely to the judgment of the executive branch.

"Threat" and "competency" resurface again a year later in Fred Korematsu's legal challenge before the Supreme Court. Whereas Yasui and Hirabayashi challenged the constitutionality of curfew orders, Korematsu challenged of the constitutionality of the military exclusion of Japanese Americans. In effect, Korematsu was fighting his forced removal from his own home. Born in Oakland, California, Korematsu was one of four brothers. The rest of his brothers reported to the relocation centers. In the interim, he worked as a welder in a shipyard, under an assumed name, but was caught and arrested.[170] When arrested, he claimed he was Spanish-Hawaiian. Under further questioning, Korematsu admitted that he had stayed so that he

[169] *Hirabayashi v US,* 320 US 81, 99 (1943)
[170] Roger Daniels, *Prisoners without Trial: Japanese Americans in World War II* (New York, Hill and Wang, 2004). pp 61

could be with his Italian-American girlfriend. He also admitted that he had cosmetic surgery, in order to remove facial features that might identify him as Japanese.[171]

The government did not choose to argue Korematsu's loyalty. Instead, the government's position rested squarely on the tried and tested "military necessity." The government's logic was simple: the curfew was justified by military necessity and upheld by the Court. Exclusion and temporary removal rests on the same military need to protect against Japanese subversion. As before, in the Hirabayashi and Yasui cases, the government's claims depending heavily upon the military's competency and the potential threat of attack by Japanese forces. Even where the government implicitly accepts that, Korematsu individually was not a threat, the government's position held that the military orders were constitutional and necessary, to prevent the larger potential threat.

Much like *Hirabayashi* and *Yasui*, the Court was influenced heavily by both the competency and threat arguments. Justice Black in particular, felt the need denounce the idea that the military's exclusion was racially based. Black noted that even if the result was limited to one racial group, this was not a racially driven order, but one driven by the national security needs of the nation. Black's majority opinion held that the possibility of disloyalty by of Japanese Americans was enough to justify the exclusion orders. While there was not any specific proof, the Court drew a negative inference from the actions of some of the group:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country… The judgment that exclusion of the whole group was, for the same reason, a military imperative

[171] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pp 93-96

> answers the contention that the exclusion was in the nature of a group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to announce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.[172]

Black's opinion puts some weight upon the refusal by some to swear a loyalty oath. Black's loyalty oath test carries with it the assumption that oaths have some dispositive, magical quality that can prove or disprove evil intent. The mere fact that some people refused to take a loyalty oath is not proof that they were disloyal. The logical problem extends further. A potential saboteur can take a loyalty oath and be considered "loyal" in this scenario.

Additionally, Black's majority opinion rested its opinion almost entirely upon the report and findings presented by General DeWitt. DeWitt's report was treated as uncontested fact, and in fact, serves as the primary evidentiary source for the claim of military necessity. In his research, Peter Irons uncovered evidence that government officials doubted the veracity of the Final Report. Both the FCC and the FBI found no evidence for the "facts" included in DeWitt's report. The FCC noted that DeWitt's personnel were poorly trained and found no evidence of DeWitt's claims of enemy radio signals from Japanese submarines. The FBI directly refuted the claim that there was signaling from shore to ship. More problematically, Peter Irons claimed that the Solicitor General was aware of the factual errors but use the Final Report in his brief to buttress the "military necessity" argument.[173]

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[172] *Korematsu v US*, 323 US 214, 218-219 (1944)

[173] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pp 282-292. Irons details memos exchanged between various government officials and Solicitor General Fahey about the problems in General DeWitt's Final Report.

Not all the Justices agreed with Justice Black. In the same case, Justice Jackson wrote a dissent in which he argued that the explanation given by the general was only a cover for racial discrimination. The military order, Jackson argued, was based entirely on race, noting that Germans, Italians and even someone who is convicted of treason - but out on parole, would not be liable under the curfew and internment orders. The difference between these groups, as Jackson writes, is "that he was born of different racial stock."[174] Jackson explains that the other error that drives the majority opinion is a misunderstanding of the role of the military and how the Court should treat military orders:

> The armed services must protect a society, not merely its Constitution…But a commander, in temporarily focusing the life of a community on defense, is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional.[175]

By implication, it should be the job of the Court and judicial system to test and question military orders, not from the point of view of whether it was militarily necessary, but whether it is Constitutional. If the role of the military and by extension, the Executive branch, is to protect the country, the role of the Supreme Court should be to make sure that such actions conform to the Constitution. If the Court becomes too deferential, Jackson notes that "then we [the Supreme Court] may as well say that any military order will be constitutional, and have done with it."[176] If the Court only goes so far as to take the military commander's word for it, then there is no real judgment that the Justices need to show, and where the Court only views the government's position without independent judgment, then one risks a particular problem:

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[174] *Korematsu v US*, 323 US 214, 243 (1944). Justice Jackson, dissenting.
[175] *Korematsu v US*, 323 US 214, 244 (1944). Justice Jackson, dissenting.
[176] *Korematsu v US*, 323 US 214, 245 (1944). Justice Jackson, dissenting.

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus, it will always be when courts try to look into the reasonableness of a military order.[177]

Jackson's reasoning points out the flaw in unquestioning deference to the government's position; if the Court substitutes its own judgment for that of the government's position, then the Court abdicates its self-held position as a check against the other branches. If the Court decides that it must accept the government's position simply because of the exigencies of war, then Justices simply become an extension of the Executive branch. It may be tempting to accept the government's position, for the sake of the moment, but unquestioning deference, Jackson argues, has far greater ramifications because of the unique role of the Supreme Court:

> A military order, however unconstitutional, is not apt to last longer than the military emergency… But once a judicial opinion rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated [that] principle… The principle then lies about like a load weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes… A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[178]

The role of the armed forces and the Executive branch, in an emergent situation is different from that of the Court. Jackson argues that the military cannot and does not presume to worry about

[177] *Korematsu v US*, 323 US 214, 245 (1944). Justice Jackson, dissenting.
[178] *Korematsu v US*, 323 US 214, 246 (1944). Justice Jackson, dissenting.

the constitutionality of their actions, only that they fulfill their primary function of protecting the nation. The actions by military commanders, from their point of view, are not meant to please the Constitution or appease the delicate balance of civil liberties versus government power; the military was not built for and cannot be expected to worry about Constitutional limits. That role rightfully belongs to the Supreme Court, and here Jackson argues that where the Justices abdicate their responsibility to guard that balance, and defer unthinkingly to the needs of the moment as presented by the government, it may fulfill a shortsighted goal during the emergency but create long-term problems.

The Limits of Deference

Recall then the pattern for the Supreme Court's decisions in these cases. As we note above, government attorneys would attempt that a great threat existed and government actions were justified by its greater competency to neutralize this threat. In the three cases involving Japanese internment above, the majority accepted the government's position without much difficulty, finding that there could be some potential, though not proven threat, and that military necessity required judicial deference.

This being said, a claim of military necessity does not automatically mean judicial deference. Justice Jackson may have feared some instinctive deference by the Supreme Court whenever the government appeal to military authority, but perhaps he need not have been too concerned in every case. Government attorneys still have to prove that the competency of the executive branch justifies actions taken to ameliorate the threat. Simply invoking "military necessity" in every case does not create an automatic win for the government. The Court has to

be convinced that the executive agency responsible for the contested government actions must have some recognized expertise in the national security arena.

The clearest example is a companion case for Korematsu v US. In the case of *Ex Parte Endo*, argued and announced contemporaneously with the Korematsu decision, display a differing result, highlighting what happens when justices use the pattern established in the Japanese internment cases and find an opposite result. In *Ex Parte Endo*, the same Supreme Court dealing with the same context of war, also looked at the government's claim of a credible threat as well as the claim that the government's expertise was necessary and deemed the resulting internment of a Japanese American to be unreasonable and invalid.

Ex Parte Endo was announced on the same day as *Korematsu v US*. At the start of her detainment, Endo was twenty-year old American born citizen of Japanese ancestry who worked for the Department of Motor Vehicles in Sacramento, California. Endo was raised Methodist, did not speak nor understand Japanese, never visited Japan and had a brother serving in the US Army. After the military exclusion orders, she removed to a "relocation center." Here, she filed for a habeas corpus petition. Habeas corpus petitions do not seek to challenge the constitutionality of government action, but rather focuses upon the detention itself. Without questioning the substantive legality of the detention, a petitioner filing a habeas corpus writ requests that the government produce sufficient evidence or cause to justify the detention. Habeas corpus petitions then, differ from a general constitutional challenge, in that it asks the court to focus specifically on individual facts in the instant case; Endo's petition did touch the larger question of constitutionality of the internment but only asked the government explain their basic premise for Endo herself was being held.

Like the other petitioners in the Japanese internment cases, the government never accused Endo herself of being disloyal or traitorous. The government conceded that she was a loyal and law-abiding citizen. The government's position returned to the winning argument in the cases of Yasui, Hirabayashi and Korematsu, noting that military necessity required the removal of Japanese Americans from the area. The government's claim, when pressed, was that her detention and others like her, was necessary for matters of logistics. In the alternative, her continued detention was temporary and for her "best interests" as a form of protective custody, alluding to possible reprisals in her community.[179] Simply put, the indefinite internment of Endo is derived from the original military need and should be treated as an extension of the war power of the president. The government claimed that without detainment and supervision by government authorities, there would be:

> "a dangerously disorderly migration of unwanted people to unprepared communities… [and] that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program."[180]

In other words, the government explained that they had to detain Endo and others like her, because their home communities were not prepared to let them return home. The government then, wanted to keep Endo detained for both for her own good and to avoid disruption and violence for the good people of California, who might wish to do her harm. The Solicitor General was arguing that the original rationale of military necessity necessarily created the need to detain individuals. Indefinite detention is derived from and depends upon military necessity, and for the good of Endo and others like her, she should be restrained for her own benefit, and

[179] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley, CA: University of California Press, 1983) pp 318.
[180] *Ex Parte Endo*, 323 US 283, 296-297 (1944)

for the benefit of the community at large. Since the government acknowledged that the "threat" element in Endo's case (and others like her who were declared "loyal") was negligible, the logical extension of their argument would be rely heavily upon "competency" and more precisely, upon the combination of "threat" and "competency" encompassed in the military necessity argument.

Justice Douglas, writing for the majority, dispensed with the military necessity argument. He noted that the War Relocation Authority – the agency that was responsible for evacuating and interning Japanese Americans – was a civilian agency. Although the military may have been involved, the largest part of the responsibility was left to a civilian agency. Military authority may be given greater deference in a war-time situation, with a possible imminent threat, but a civilian agency charged with the logistics of housing detainees does not stand in the same situation. Douglas noted that military proclamations were constitutional in nature because of the perceived threat and because of the military's undisputed role as the nation's protector – highlighting again the combined aspects of "threat" and "competence" to deal with the threat. In Endo's case, the government's explanation had nothing to do with necessity. Detention may be necessary where there is a potential danger but where the government had conceded that Endo was both loyal and not a threat, and then the government's claim cannot rest upon "military necessity":

> If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens … If we held that the authority to detain continued thereafter, we would transform an

> espionage or sabotage measure into something else. This was not done by Executive Order No. 9066 or by Act of March 21, 1942 … What they did not do, we cannot do.[181]

Implicit within Endo is the connection between threat and reasonableness of governmental action. There may be great deference when a claim of military necessity occurs, but it is a very narrow band. Necessity is not a universal rationalization for any government action.

The Endo decision was handed down on the same day as Korematsu's. The difference in outcomes can be explained by Justices' perception of the threat and competency components as well as the lack of participation by the military or any other "security" agency with a recognized national security competency. In a situation of a global war, very soon after a surprised attack, the Justices were more than willing to grant extreme deference. However, the opinions in *Korematsu* and *Endo* show a Court wary of continued unrestrained deference. *Endo* in particular demonstrates the limits of the "military necessity" argument, especially if the government attempts to substitute a civilian agency that specializes in logistical support. The majority in *Endo* focused on specific facts and did not accept a vague declaration of a potential threat. Another factor was that Endo and Korematsu' cases were announced in December 18, 1944, and end of the war was seemingly in sight. The members of the Court wanted to show a unified, patriotic front against a common enemy, but the emergent condition of war was ending, and the imminence of the threat was beginning to recede. At this stage of the war, the threat of Japanese invasion was a fast receding and fading event.

Consequences and Issues of Deferring Judgment

[181] *Ex Parte Endo*, 323 US 283, 302 (1944)

The cases above present an extreme of judicial deference. In these scenarios, for various reasons, members of the Court substitute their own judgment in favor of presumed experts. Part of this is an understandable reaction to the unknown and the need to rally around a potential threat to the national order. Military necessity was presented as a legal argument, here defined as the justification for military actions that were undertaken to protect the nation's physical well-being in the face of potential threats. The problem with this kind of substitution of independent judicial judgment is that it creates a void for an institutional check against abuse of power.

In a time of exigent circumstances, such as war, there are often demands for Justices to give greater leeway to other branches. There may be calls exhorting the Supreme Court to defer as a matter of patriotism, and of showing unity. From time to time, such calls for deference may affect Justices individually and personally. A Supreme Court Justice may believe that the Executive branch may need greater deference in other to preserve the Nation's security. Although the Court *in Hartzel v US* was speaking towards political propaganda, the opinion expresses the idea that deferring to the government may be necessary to protect the country's interests:

> We are not unmindful of the fact that the United States is now engaged in a total war for national survival, and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal.[182]

This is dilemma for a Court during a time of war and faced with a national security claim. Members of the Court make judgments with the fact available. They may justifiably fear that their intervention might harm the national interest. But the flip side is that too much deference, without the exercise of independent judgment may lead to some extraordinary reversals in the

[182] *Hartzel v United States*, 322 US 680, 689 (1944)

civil liberties. The most cautious approach would be to accept the government's perceived expertise to ameliorate the great threat.

The decision to abdicate independent judgment to military authorities may be justifiable at the time. It may be driven by some patriotic instinct or the need to build unity with the other branches of government because of a desire not to seem to be interfering during a time of crisis. There are consequences, for decisions made by the Supreme Court have their own echo and their own life beyond just the exigencies of the moment, and unlimited deference to the government position creates a potential for greater problems in future life of the nation. Jackson's argument then points out the key tension between the desire to avoid interfering with the government and the normative role of the Court as a check upon the government in the separation of powers. The government, in this case the executive branch, will, for the best of intentions, present self-serving claims. If the Court does not challenge the executive branch, it can only serve to degrade the separation of power between the branches, relegating the Supreme Court as an adjunct to the executive branch. There are also the miscarriages of justices that can occur along the way where the Justices do not fulfill their responsibility as guardians of the Constitution. Jackson's arguments against blind loyalty to the self-serving government position would be proved correct, but it took nearly four decades to come to light.

In 1980, the US Congress established the Commission on Wartime Relocation and Internment to investigate the allegations and process of the Japanese internment. The Commission's report directly contradicted General DeWitt's claim of military necessity, noting that the military deliberately ignored other reports dismissive of the potential of Japanese disloyalty. The Commission's report notes that military decision to intern Japanese Americans

derived mainly from race prejudice, war hysteria and a failure of political leadership.[183] As a result, in 1983, Fred Korematsu's lawyers filed for a writ of coram nobis. The writ of coram nobis is an unusual and obscure writ. Essentially, it is a plea by a convicted party to correct an error that lead to the conviction when there are no other remedies available to the party. It is very rarely granted, and it is granted only "to correct prosecutorial impropriety or harassment of the defendant and to assure that the public interest is not disserved."[184] It is also one of the few legal procedures that can override a Supreme Court decision, for where the Court is ruling upon a constitutional issue, the writ here asks for a correction of substantive errors that led to the original conviction – a finding of fact, in other words, which is usually outside the appellate jurisdiction of the Supreme Court.

Revisiting Korematsu's case, the district court judge relied heavily upon the Commission's report, noting that General DeWitt's report acted to conceal contradictory reports from other government agencies. Where the 1944 decision by the Supreme Court based its own opinion primarily upon General DeWitt's report, the judge found that the Supreme Court's decision was based upon flawed and selective information. As a result, the judge found that the omission of relevant facts was enough to overturn the conviction.[185] Not long after that, Hirabayashi's lawyers also filed a coram nobis, based partly upon information discovered in Korematsu's case. The Circuit court, in its decision, supported the District Court's approval of the coram nobis petition, noting that General DeWitt had submitted an original report that

[183] Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*, (Washington, DC, 1982). Available online from www.nps.gov/history/history/online_books/personal_justice_denied/index.htm. This site is an online depository run by the National Park Service. Last accessed: April 18, 2013
[184] See *Korematsu v US*, 584 F. Supp. 1406 (N.D. Cal 1984)
[185] See *Korematsu v US*, 584 F. Supp. 1406 (N.D. Cal 1984)

explained his decision to intern the Japanese was not based on military necessity, but instead the racial traits of Japanese which made it impossible to separate the loyal from disloyal. Although the War Department helped alter the report and destroyed all the original copies before presenting it to the Supreme Court as the "original report," a copy of the unaltered report was discovered.[186] In this report, DeWitt wrote about the rationale for targeting the Japanese as a group:

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized', the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes. It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction are at large today.[187]

The District Court found that General DeWitt did view the internment as necessary targeting people of Japanese descent, because of the "racial strain." Furthermore, the Circuit Court agreed with District Court held that the government had deliberately doctored the finding before it was presented to the Supreme Court and that if the material were not suppressed, the Justices' finding could have been different. The Ninth Circuit found no difficulty in ordering that Hirabayashi's

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[186] See *Hirabayashi v US*, 828 F.2d 591 (9th Cir. 1987)

[187] US Army, Western Defense Command and Fourth Army, *Final Report: Japanese Evacuation From the West Coast 1942*. Washington DC, 1943. Pp 34. Available online from: http://archive.org/details/japaneseevacuati00dewi; This document was deposited as part an online depository of historical documents, located in San Francisco and supported in part by the Library of Congress, the National Science Foundation, the Sloan Foundation and other charitable organization and foundations.

convictions be vacated in the light of the government's alteration of the report. With those decisions, the Japanese internment cases came to a quiet end. The precedents represented by *Korematsu* and the other cases, however, still represent viable Supreme Court precedents.

Summary

The Japanese internment cases exemplify the approach that is repeated in later cases that involve national security claims occurring during a significant war, and where active participant is a security agency such as the US military. These early cases identify the usual approach to argue the justification for government actions. The underlying argument is that the government's expertise is fundamental to combat an external, great threat. A companion argument is that Justices are not suited to making decisions about national security threats, and as such should defer to the judgment of the executive branch.

One might argue that judges and justices may find it to resist the urge to defer to a presumed authority. It is an understandable reaction to rally around the president, and his proxies in a significant war, where survival of the national order may be at stake. The Korematsu, Yasui and Hirabayashi, however, represent the result of a confluence of favorable conditions. Where government attorneys attempted a similar strategy with Endo's case, they failed spectacularly, mostly because the government attempted to pass imprimatur of "military necessity" upon a civilian agency dealing with logistics. The agency in question lacked any recognized security expertise and hence, did not receive and special deference. Judicial deference may be available to the executive branch, under the right circumstances, but it is by no

means, automatically conferred just because government attorneys argue the mantra of "military necessity" even during a time of major war.

This set of four cases presents the template of uneasy tension between the institutional expectations of the Court's role in separation of powers, and the very human emotions of fear and patriotism. The decisions in the Japanese internment cases served short-term needs and left some legal inconsistencies. Even so, it took the better part of 40 years before Korematsu and Hirabayashi were successful in having their convictions reversed. The desire to circle the wagons and rally around the flag is understandable, but judges and justices do not have the luxury of deciding with their emotions. If independent judgment is sacrificed, then there is no real check upon the executive. At a bare minimum, the possibility of a miscarriage of justice may occur. In the worst case scenario, short term emotional judgments by justices can lead to precedents that may allow future legal problems. The saving grace is that these situations are few and far between, and judicial deference is not unlimited. The Supreme Court may be inclined towards deference when there are active threats and where the government appears to be competent to act against such threats. Unreasonable attempts to extend such deference may find a skeptical Supreme Court. Where a government agency attempts to invoke a national security claim, and has no ostensible or perceived expertise in national security matters, the Court's attitude will not be favorable.

The question is whether the Supreme Court actually abdicates its responsibility during significant wars. The empirical results in Chapter 3 suggest that in the instance of World War II and the Korean War, members of the Court were already disposed to defer to the executive branch, but that the pattern reverses itself in the Vietnam and Afghan wars. What these cases

may represent was a high water mark for respect and confidence in the credibility and competence of the executive branch in a war that enjoyed strong support. The useful lessons that one can draw from these cases is the pattern that government attorneys would return to, time and again, when national security claims cases are argued before the Supreme Court. In brief, in national security cases, government attorney attempt to argue that the executive branch should be granted deference because of their greater expertise in combating a particular external threat.

The reader might suspect that government attorneys might find more of a challenge in a peace-time environment. Without a significant war, claims of an external threat are harder to prove, and judicial resistance returns to its natural level. In the next chapter, we explore what happens when the executive branch is confronted by the prospect of trying to argue a national security threat, while in a context of peacetime. Peace reigned in the early era of the Cold War, but the US soon felt itself under threat; namely, that of a communist infiltration and takeover of government.

Chapter 5: Red Scare and Communist Association Cases

National security cases that occur in the early era of the Cold War include an attempt by government attorneys to invoke the "crisis" of a global communism as well as justifications for government action based on executive branch expertise. The reader may find it helpful to be reminded of the typology used in this study.

Quadrant 1 War + Security agency Govt argues: Threat + Expertise	**Quadrant 3** No War + Security agency Govt argues: Expertise
Quadrant 2 No War + No security agency Govt argues: Potential Threat	**Quadrant 4** War + No Security Agency Govt argues: Direct Threat

These cases fall into quadrant 2, with no security agency involvement, and no significant war. Because there is no inherent expertise represented by a security agency, government arguments center around the "threat" stemming from an external, foreign source that endanger the public interest in some manner. In these cases, government attorneys argue that threat derived from communist sources, that groups in society and in government were being controlled by external forces hostile to the United States Outside of a brief two year stretch of the Korean Conflict, the US was free of a major war until the Vietnam War fully erupted in the late 1960s. Because of this ostensible period of peace, government attorneys found an uphill battle before the Supreme Court. Whereas in a significant war, an external threat (like a hostile Japanese Empire) may be plainly obvious, in a time of peace, there is no universal acceptance by the Supreme Court. Without the recognized national security expertise as an issue, one might expect that government attorneys were less successful in achieving deference in national security cases during peacetime than in wartime. This chapter focuses upon those cases that involve the "Red Scare" period in

the early Cold War era, and the evolution of Supreme Court jurisprudence when dealing with claims of communist infiltration as time passed on.

Early perception of the Communist Threat

In the years immediately after World War II, the Soviet Union grew into a political and military threat, fuelling fears of internal subversion from a "fifth column" of communist sympathizers embedded in the nation's institutions. During this era, officials from the executive and legislative branches led the charge to root out these perceived threats. The perception of Communist infiltration into every sector of society gave rise to ubiquitous government demand for loyalty oaths. Meanwhile Congressional investigations fed the fear of the Communists, while garnering attention and power to individual members of Congress. The alliance with communist Soviet Union was replaced with a cold war, as an iron curtain fell between the two superpowers. The West responded to the threat by forming NATO (the North American Treaty Organization) on April 4, 1949, with its avowed purpose to come to each member-nation's aid in event of attack. A few months later in August 29, 1949, the Soviets exploded their first atomic bomb. Later, the USSR detonated a hydrogen bomb in 1953. In response to the creation of NATO, the Soviet Union formed the Warsaw Pact amongst its client states on May 14, 1955. The world was divided between two power blocs, and conflicts around the globe became proxy wars underwritten by both superpowers.

On the domestic side, the government's approach was consistent; the federal and state governments acted as if communist association was a signal of guilt and intent to harm the country. Congressional investigations saw the potential of subversive behavior in every nook

and cranny of society, from the State Department, to the offices of labor unions and even to the movie sets of Hollywood. [188] In these cases involving claims of the national security risks of communist threats, the Justices simply do not treat government claims with the same level of deference as they did in "necessity" cases detailed in previous chapters.

One explanation may be that the legislative and executive branch officials view "threat" in a different manner than does the Supreme Court in that era. Threat in the Cold War, for successive administrations and Congresses, meant a communist-led insurrection or revolution that would overthrow the government by violent means. In this world-view, every person who joined the Communist Party was dedicated to the cause of overthrowing the government. Passive participants do not necessarily espouse any or all of a group's goals but the government's goal was to root out the subversive elements, regardless of the degree of the threat. It was simpler to assume that anyone would be willing to associate with the communists must also harbor similar preferences. In the Red Scare cases, the government generally brought a claim that the defendant had associated in some fashion with the Communist Party, backed by statutes that criminalized affiliation with any subversive organization. Impliedly, a person who joined such a group shared the goals of the Communist Party. The Communist Party was identified with the violent overthrow of the federal and state governments. As such, the person

[188] There are many books written on the "Red Scare" and its influence at the dawn of the Cold War. For a representative sample, see Robert Griffith, *The Politics of Fear*, (Amherst, MA: University of Massachusetts Press, 1987), detailing the rise and fall of Senator Joseph McCarthy; John Earl Haynes, *Red Scare or Red Menace?* (Chicago: Ivan R. Dee, 1996), outlining the growth of investigative committees and the decline of anti-communist trends; Peter Steinberg, *The Great "Red Menace"* (Westport, CT: Greenwood Press, 1984), detailing federal prosecutions of American Communists right after World War II; Katherine Sibley, *Red Spies in America* (Lawrence, KS: University Press of Kansas, 2004), presenting new information on Soviet intelligence work during the Cold War era in the United States.

associating with the communist party was also assumed to be guilty, at least with the passive intent of being a threat to the nation's security.

Supreme Court decision framework

For the Supreme Court, such cases dealt with the First Amendment right of free association. As such, this fell squarely within the legal and constitutional bailiwick of judges and justices. The executive branch may be perceived as better capable of dealing with foreign threats, but the Court has no problem thinking of itself as better equipped to decide matters touching upon the First Amendment. Because of this expertise, the Supreme Court evaluated the government's positions with more care and engaged in more detailed statutory and factual interpretation. There may be reason for deference if the subject matter in the case involves the threat of foreign invasion but no such exigent interest drives judicial deference in a case involving the First Amendment.

I would argue that the Supreme Court framework instead of one focusing upon government expertise, mainly because of their familiarity with the subject matter and because precedents and decisions abound in peacetime that deal specifically with First Amendment association cases. Government attorneys might want to argue for greater deference to the executive branch because of the global "threat" of communism, but certain arguments which might be made in wartime, cannot be made with the same visceral force in peacetime. As such, government attorneys have to work with the available precedents and decisions, which means that even where there are national security claims, the framework is that of the "normal" jurisprudence.

The generally understood jurisprudence in the First Amendment recognizes that freedom of speech and free association is not unlimited. In communist association cases, the government often argues that the association with an organization such as the communist party should be enough to prove the guilt of the defendant, regardless of any actual proof of a crime. In these cases, as a matter of precedent and common law, the Supreme Court, as a whole, eschews the government's argument of guilt by association. The Court acknowledges that the community party's intention to overthrow government may be a national security threat – but individuals joining said group may not be guilty at all. Simply joining a group, even one that may harbor criminal intentions, is not the same as being guilty of a crime. This nuanced view leads to a more factual analysis of the "threat" portion of a national security claim.

Red Scare cases

Underlying most of these claims represented by government is loyalty – or more accurately, lack of loyalty on behalf of the defendant. Membership in the Communist Party was enough to create a shadow of doubt over the loyalty defendant. This is nowhere clearer than the concurring opinion by Justice Frankfurter in *Dennis v US*:

> We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial, and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the [Communist] Party would create a substantial danger to national security.[189]

[189] *Dennis v US*, 341 US 494, 547 (1951). Justice Frankfurter, concurring.

Dennis is a typical of early communist association cases in the Red Scare period. As in other communist association cases, the government attempts to root out disloyal citizens and residents, usually pointing to their association with the communist party. In *Dennis,* the government employed the Smith Act, which set criminal penalties for any intent or advocacy or affiliation with any group that advocates or teaches the overthrow of government by force of violence. In practice, the government used the Smith Act to paint any association with the Communist Party as criminal in nature. In *Dennis v US*, the government arrested and convicted Eugene Dennis and other leaders of the American Communist Party for conspiracy to overthrow or advocate the overthrow of the government of the United States under the authority of the Act. The defendants argued that as leaders of the party, they were teaching aspects of Communism, which is an expression protected by the First Amendment. They also argued that the government had not demonstrated that they had any intent to overthrow the government. Dennis and the others argued that they were convicted on the basis of their association with the Communist Party – which also would be protected under the First Amendment.

The Court disagreed. The majority opinion noted that expression may be protected but unlawful conduct – and violent overthrow of government would be unlawful – is never protected by the First Amendment. The majority opinion, written by Chief Justice Vinson, separated out expression from advocacy. Expression may be speech, but advocacy is conduct and government has a duty to protect itself from unlawful conduct. The reader may ask how 'advocacy,' an action which the Court admitted is transmitted by protected forms of speech, can be unlawful. Chief Justice Vinson added that only those forms of speech which create a "clear and present danger" of unlawful conduct may be deemed unprotected and here, the government does not

have to wait for the danger to reveal itself, but can act proactively to protect itself from such a threat.[190]

Vinson's opinion accepts the "threat" element of the Communist Party. Guilt, in this case, stems from the intent of the person joining the association. Impliedly, an official in any organization has a greater knowledge of the organization than a rank party member. Dennis and the others were all leaders and high officials in the Communist Party. As such, Vinson had no trouble assigning a different "intention" level, and hence, the enhanced association with the Communist Party was seen as endorsing and even embracing the violent tendencies of the group.

In other communist association cases, the Supreme Court's nuanced view of intent behind the "threat" element continued to evolve. Congress, however, continued its investigations, expanding its reach and bringing more litigation to the Supreme Court's doorstep. Through-out the 1950s, both houses of Congress investigate a variety of people from all walks of life, both civilians and soldiers alike for their suspected association with the Communist Party. While Congress launched hearing after hearing (with the most famous being the House Un-American Committee or HUAC), much of the investigative energy of the Executive branch went into discovering the backgrounds of immigrants and naturalized citizens for association with the Communist Party and other subversive organizations Although the government continued pursuing and purging suspected Communist members, judicial deference of government claim was not consistently reliable. By the mid 1950s, the Supreme Court signaled their growing impatience with this kind of free-wheeling investigation and prosecution.

[190] See *Dennis v US*, 341 US 494 (1951)

In *Watkins v US*, the House Un-American Committee (HUAC) convicted the petitioner, Watkins, for contempt of Congress. Watkins claimed that he was not part of the Communist Party but had merely contributed to their cause. When asked to confirm if certain people were Communist party members – "to name names" – the petitioner refused. Watkins argued that this was beyond the scope of the Committee's investigative power. Chief Justice Warren, writing for the majority, noted that Congress may have very broad investigative powers and may be justified in identifying threats of subversion, but Congress cannot reach into private lives of individuals without limit. Warren remarked that the abuse of Congressional power could lead to informal forms of punishment even without formal criminal charges:

> Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous… Those who are identified by witnesses, and thereby placed in the same glare of publicity, are equally subject to public stigma, scorn and obloquy… That this impact is partly the result of nongovernmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction.[191]

The Chief Justice remarked that the government's argument that it was only trying to root out and purge communist infiltration would allow investigations that "can radiate outward infinitely to any topic thought to be related in some way to armed insurrection."[192] Followed to its logical extreme, Congress could fish for details from the private lives of innocent citizens, far beyond

[191] *Watkins v US*, 354 US 178, 197-198 (1957)
[192] *Watkins v US,* 354 US 178, 204 (1957)

any legitimate legislative purpose. In brief, the majority opinion simply did not accept the government's carte blanche argument of seeking out "threats" to the nation.

The mere invocation of a potential threat is not enough to secure judicial deference. The nuanced judicial approach towards divining "threat" involves not just the subject, but the government itself. The Court looks to "intent" of the parties, at who is accused of bringing the threat, and in this case, the justices also look at the intent of the inquisitors. The Court can accept the constitutionality of Congressional investigations into communist ties, but the use of that investigative power to bully witnesses is beyond the realm of eliminating "threat."

The Court's evolution on association cases would include a differentiation between "conduct" and passive association. Intent may be inferred from actions and conduct can be used to discern whether a person embraces the Communist Party's criminal behavior. Examples of the Supreme Court perspective on this kind of threat can be seen with *Scales v US* and *Noto v US*. Scales was convicted under the Smith Act for being a member of a subversive organization. The petitioner challenged the constitutionality of the Act as infringing upon his right to free association. The petitioner was convicted because he specifically advocated revolution and demonstrated skills that can be used in the overthrow of government. The Court decided that, based upon evidence introduced in the lower courts that Scales clearly and consciously engaged in behavior designed to incite a riot.[193]

Decided on the same day was *Noto v US*. Noto was convicted under the Smith Act as well but the Court found that Noto was only answering and teaching the principles of the Party's beliefs. Noto did not embrace the teachings, and his conduct was explanatory in nature. An

[193] *Scales v US*, 367 US 203 (1961)

academic theoretical discussion is not enough to overcome the threshold of passive association. Conduct that is otherwise innocent and protected – such as academic teaching, even of the communist credo is not by itself illegal.[194] These cases show the Court's proclivity to look deeply into the "threat" element, without instant deference.

Up until this point, the Court has accepted that there may some element of threat from association with the Communist Party. In previous cases, the justices implicitly accept that the ideology of communism might have, at its core, a professed desire to overthrow national and local governments by force and violence. By criminalizing the act of associating with the Communist Party, the government placed pressure on the Supreme Court. If the Court were to deny the government claim, the justices could be seen as helping the communist cause. If the Court were to accept the government position, the justices tacitly accept that citizens may be punished for an otherwise constitutional act, without any intent to commit any crime. In case after case, the Court resisted the government's blanket claim of criminality based upon the implied threat of the communist party. That is, until *US v Robel*, decided in 1967.

Robel was a member of the Communist Party who was employed as a machinist in a shipyard. In October of 1961, the government labeled the Communist Party as a subversive organization. In August of 1962, the defense department designated the shipyard where Robel was employed as a "defense facility." At this point, the government notified Robel that his continued employment was a violation of the law. Robel continued to go to work until May of 1963. Relying upon Scales v US, the government portrayed this action as a willful intent to be an active participant in the Communist Party. Robel was charged convicted under a section of

[194] *Noto v US*, 367 US 290 (1961)

the Subversive Activities Control Act (also known as the McCarran Act). In essence, Robel was charged and convicted for being otherwise legally employed.

In most of these association cases, the Supreme Court attempted to weigh the balance between the declared security needs of the government and the constitutional rights of defendants. In case after case, the Court has attempted to fine-tune their responses after a careful review of the statute and the intent of the defendants. After *Robel*, however, the Supreme Court abandoned this approach completely. Chief Justice Warren, writing for the majority, overturned the conviction. The majority declared the entire act to be unconstitutional, on the basis that it infringed upon the right of free association. Warren noted that the government's invocation of war power to justify their action could not rescue the unconstitutionality of the enabling statute:

> The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature… However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.

In this case, the Chief Justice's opinion can be read as a wholesale rejection of the government's demand for deference. The government's approach has been to claim the legislative need to act in the face of a potential threat. In effect, the Court is being asked to defer to the law-making branch's ability to proclaim war.

The government's logic here is that the government's power to declare war should also include the power to designate individuals as national security threats. The government's argument in *Robel* was that the Congress should be able to declare guilt over any person, without trial or due process based on group affiliation, as a basis of the government's general

competency to wage war. The Supreme Court balked at the logic of this argument. In this world view, there is no difference between the Cold War and a "hot" war such as World War II. National defense under this definition would mean regulating the human mind, and criminalizing anything that may even remotely be associated with communism.

The Court rejected the portrayal of an extreme "threat" scenario. Congress may have a duty to safeguard the national defense, but not at the expense of rights enshrined in the Constitution. As Warren notes:

> More specifically in this case, the Government asserts that [McCarran Act] is is an expression "of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s]. Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.[195]

The law-making branch of the government has a constitutional duty to protect the public interest, but certainly not at the expense of the public's constitutional rights. This case also demonstrates the Court's final evolution away from deference to outright defiance of the government's position. The justices went from a nuanced attempt to tease out intent, to a wholesale rejection of the statutory foundation of the government's actions. After *Robel*, the writing was on the

[195] *US v Robel*, 389 US 258, 263-264 (1967)

wall: the Court would no longer tolerate "guilt by association" even in the name of national security. The number of cases that touch upon association with "subversive organizations" dwindled dramatically. Once the Supreme Court signaled that the First Amendment's free association rights held primacy in these cases, the convictions on the basis of being members of the Communist Party dwindled to nothing – at least on the federal level.

State based Communist infiltration claims

Threat-based claims also come from another source – the states. Although this study focuses mainly on cases where the federal government brings against before Supreme Court, the states have some cases deriving from claims of national security. Running parallel to the loyalty and subversive organization statutes deployed by the federal government, the states had their own versions of such laws and some even had legislative investigative bodies modeled after the HUAC itself. In *Taylor v Mississippi*, the state of Mississippi enacted a statute that criminalized any conduct that has an evil or sinister purpose or incites subversive action. In this instance, the state convicted three Jehovah's witnesses for not saluting the flag, reasoning that such conduct was calculated to encourage disloyalty to the United States. The Court disagreed, noting that the refusal to salute was an action of free expression that did not create a clear and present danger to the government.[196]

State action on subversive organizations and loyalty oaths continued even after the Supreme Court declared that federal law preempted state law. For example, Pennsylvania's sedition acts essentially duplicated the federal Smith Act, although Pennsylvania's law predated

[196] *Taylor v Mississippi*, 319 US 583 (1943)

the Smith Act.[197] States continued their own version of investigative committees, usually focusing on the loyalty of state employees. More often than not, the Supreme Court found these committees to have violated the defendant's rights, especially where refusal to participate meant that the state employee would be terminated or convicted, as was the case in *Slochower v Board of Higher Education*.[198] The pattern would repeat, as states attempted to purge "subversive" organizations but in most of these cases, the Supreme Court found the state's investigative procedures to be unconstitutional.

The states, however, expanded their search for subversive elements outside of state employees. The state of California even attempted to force loyalty oaths upon every taxpayer in their jurisdiction, resulting in legal challenges from a military veteran and a Unitarian church. The Supreme Court agreed with the petitioners, noting that such loyalty oaths violated the 14th amendment. The state of Florida even attempted to investigate the NAACP, as a possible subversive group, but here again, the Court found that the state overreached its authority.[199]

The states have found more success with loyalty oaths for state employees. The Supreme Court holds state civil workers to somewhat greater standard than the average citizen because civil servants are the backbone of state government. As a result, the Supreme Court allowed states to screen undesirable workers by using loyalty oaths. In *Garner v Board of Public Works of Los Angeles*, the Court agreed with the city of Los Angeles that public employees must take a loyalty oath. The Court noted that the oaths had the effect of ensuring the competency and efficiency of the state civil service. Members of the Court also ruled the states had an interest in

[197] *Pennsylvania v Nelson*, 350 US 497 (1956)
[198] *Slochower v Board of Higher Education of New York City*, 350 US 551 (1956)
[199] *Gibson v Florida Legislative Investigation Committee*, 372 US 539 (1963)

insuring the integrity of their workers to protect the public's trust in state institutions.[200] However, the Court did not allow extension of loyalty oaths to particular organizations deemed "subversive."[201] By 1972, the Court accepted that the states can compel a loyalty oath, but only in a generalized fashion without regard to any particular association. The Court reasoned state civil employees must be willing to live by constitutional processes of government. Hence, state employees can be asked to and uphold the Constitution via oaths but states cannot ask about constitutionally protected First Amendment rights.[202]

Communism and Immigration

Closely related to communist association cases are those involving immigrants and their alleged past and possible present associations with the Communist Party. Immigration is not usually treated in the same fashion as other legal fields. Immigration has historically been treated as a privilege and not a right. The federal government may withdraw immigration benefits without the usual constitutional protections.[203] Naturalization and alien residency are governed by statutes created by Congress, which delegates to the executive branch for the administration of such laws. Immigration is generally treated as a sovereign right of the national government.[204] In this chapter, the communist association cases involve the removal of

[200] *Garner v Board of Public Works of Los Angeles*, 341 US 716 (1951)
[201] *Whitehill v Elkins*, 389 US 54 (1967)
[202] *Cole v Richardson*, 405 US 676 (1972)
[203] *US v Macintosh*, 283 US 605, 615 (1931). "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms Congress imposes… At the final hearing in open court, he and his witnesses must be examined under oath, and the government may appear for the purpose of cross-examining in respect of 'any matter touching or in any way affecting his right to admission."
[204] US Constitution, Article 1, Section 8, Clause 4; "[The Congress shall have the Power] [t]o establish a uniform Rule of Naturalization..."; see also *Toll v Moreno*, 458 US 1 (1980) (noting that the federal government has broad

immigration benefits. Specifically, these cases involve the removal of US citizenship (also known as "denaturalization") and the withdrawal of residence privileges (known as "deportation").

Applications for immigration are considered sworn oaths or affidavits. An immigrant had to list truthfully, every past association with "subversive" organizations, such as the Communist Party. In practice, however, these forms were a blunt tool that did not fully stop deception. As noted in the above cases, the government often viewed any association, even the most trivial, with the community party as potentially criminal in nature. Those immigrations who filled out these immigration forms found themselves in a "damned if you do and damned if you don't" situation. If they were part of a communist organization in whatever capacity, and for however short a period of time, they faced potentially negative consequences. If they filled out the forms truthfully and accurately, they might be deported and removed from friends and family. This admission was often used to deny immigration benefits, such as permanent residency or naturalization to full citizenship. If the immigrants did not fully disclose their affiliation from any point in time, and such ties are later discovered, they might have their citizenship removed. In these cases, the government generally claimed material misrepresentation by the immigrant on his or her immigration applications, which is used to invalidate whatever privileges and benefits are granted by the government. In cases involving

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power over immigration). See also *US v Curtiss-Wright Export Corporation,* 299 US 304 (1936) (holding that the Federal Government has sovereign power over foreign affairs, of which immigration is a part) ; there are many other cases that outline the foreign affairs and sovereignty aspect to immigration, but one of the earliest Supreme Court cases detailing this aspect as a primary influence on immigration decision is: *Chae Chan Ping v US*, 130 US 591 (1889), also known as the Chinese Exclusion Case (holding that the US can alter its own immigration rules at will and require no judicial intervention)

immigrations, the Supreme Court is broadly in agreement with the government's position – except where the case involves denaturalization because of communist association.

During the height of World War II, the majority opinion in *Schneiderman v US* established a core principle about association and denaturalization. *Schneiderman* established that the right of citizenship is valuable beyond just as a matter of conferred benefits, but that citizenship is core to the very idea of liberty especially for an immigrant:

> [Denaturalization] is more serious than a taking of one's property or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country… By many, it is regarded as the highest hope of civilized men…. But such a right once conferred should not be taken away without the clearest sort of justification and proof… [W]e believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.[205]

The precedent in *Schneiderman* established that the government must prove by "clear and convincing" evidence that the immigrant's petition was flawed in some material manner. [206] This lies beyond the usual civil litigation standard of "preponderance of evidence" that the government was arguing for. "Preponderance of evidence" means that something argued is 51 percent more likely than not.

The best explanation for such behavior would be that determination of immigration cases falls squarely into Supreme Court's bailiwick as legal generalists who understand constitutional interpretation. As such, the government does not enjoy reflexive deference in such matters. Additionally, the right of association is a constitutional right, and the government's attempt to

[205] *Schneiderman v US*, 320 US 118, 122 (1943)
[206] *Schneiderman v US*, 320 US 118, 125 (1943). "To set aside such a grant [of citizenship], the evidence must be 'clear, unequivocal, and convincing' – 'it cannot be done upon upon a bare preponderance of evidence which leaves the issue in doubt'

link such association with removal of citizenship reads of punitive action of an otherwise entirely legal right. In these cases, the Court seems to take on more of an equity role, attempting to insure fair play even in the face of national security claims involving the "threat" of association.

Once again, the Court has chosen the frame of a well understood jurisprudence even in the face of claims of national security threat. For similar reasons as the communist cases above, the government attorneys were forced to use those cases and precedents that were pertinent. Since most of these cases happen in the context of peace-time, government attorneys have the challenge of "proving" the threat within the framework of the legal jurisprudence that places a high burden of proof for claims otherwise involving a constitutional right for free association.

Schneiderman's precedent cast the onus on the federal government as clear and convincing proof is a very high standard to make. In case after case, the federal government did not enjoy any particular success when claiming misrepresentation based solely on a person's membership in subversive organization – usually the Communist Party. The talismanic invocation of membership in the Communist Party was not sufficient by itself. The government had to prove intent and knowledge of the subversive organization's goals as well. In *Maisenberg v US*, the government failed to prove that the petitioner had a "meaningful association" with the Communist party. The Court found that the petitioner had no actual knowledge of the actual aims of the Communist Party. In effect, the Court found that she had joined but with no idea or intent of the Party's proscribed goals.[207] In *Chaunt v US*, the failure to divulge a previous arrest but not conviction for putting up handbills advertising the Communist Party was not enough to

[207] *Maisenberg v US*, 356 US 670 (1958).

justify denaturalization.[208] In the deportation case of *Gastelum-Quinones v Kennedy*, the government failed to establish that alien had any meaningful association with the Communist Party, calling back to the denaturalization standards established in *Schneiderman v US*.[209]

This does not mean that government can never make this level of proof. The government usually won in those cases where the Supreme Court was convinced that the defendant's role in a subversive organization was not just innocent or trivial. In *Berenyi v INS*, the lower court accepted witness testimony showing an active and purposeful participation in the Hungarian Communist Party. The Supreme Court found that this evidence was more than enough to make the clear and convincing standard.[210] In *Fedorenko v US*, a man entered on a visa describing himself as a "displaced person" after World War II. Fedorenko eventually naturalized as a United States citizen, but subsequently was discovered to have served as an armed guard in the Nazi concentration camp in Treblinka, Poland. The Court agreed with the government that the original intent to defraud the government was clearly and convincingly proven from the onset of the visa, and a continuing intent to defraud the government existed. As a result, the petitioner's citizenship was revoked, nearly 40 years after the end of World War II.[211] In these cases, denaturalization usually happens where the Court believes the threat imposed by the defendant to be substantial enough that their entry should have been prevented in the first place. Innocent or trivial associations do not rise to the level of threat necessary to justify the penalty of deportation and denaturalization. In matters of deportation and denaturalization, the Supreme Court appears

[208] *Chaunt v US*, 364 US 250 (1960)
[209] *Gastelum-Quinones v Kennedy*, 374 US 469 (1963)
[210] *Berenyi v INS*, 385 US 630 (1967)
[211] *Fedorenko v US*, 449 US 490 (1981)

to look beyond the government's blanket assertion of fraud, and often acts as a court of equity, attempting to insure a fair outcome for the defendant.

Summary

These national security claims are usually brought by agencies that do not specialize in "national security." As such, the Court does not perceive any lesser expertise on the subject area and can focus upon the constitutional issues in the case. This forces the government to argue the "threat" as justification for government action. But in a time of peace, this is becomes a challenge all by itself. In these situations, the Court defaults to the existing jurisprudence and does not show any especial need for deference.

As we have seen, association and membership as rationale for government action does not claim a higher level of deference. The Supreme Court treats each case as if the government's claims must meet a fairly high level of burden of proof – certainly not as high as criminal cases, but definitively more than the relatively low "some evidence" or the civil litigation standard of "preponderance of evidence" standard. These cases do not attract any predisposition by the Justices to be more deferential. There are multiple explanations for this difference in judicial behavior, but the one that seems most likely is that, given a context of peacetime, the Supreme Court does not simply reflexively accept the level of risk in the "threats" presented by the government in a national security case. Peacetime cases, even where national security claims are invoked, are predicated upon framework of legal jurisprudence. We may not know exactly which precedents that Justices choose to form their decisions, but we can conclude that the

members of the Supreme Court are quite comfortable making decisions without feeling some especial need to defer to the government and give up their independent judgment.

The national security claims in this section span more than half a century and come from a wide variety of governmental agencies, Congressional committees and even state and local government activities. The consistent, overriding pattern shown by the Supreme Court is a careful scrutiny of the facts and actions of the lower courts. In other words, this conforms to the usual expectation of a Supreme Court operating in the context of a separation of powers.

As a reminder, the reader may note that the executive agencies involved in the cases above are not usually seen as "national security" organizations, such as the CIA or the NSA or the military. The reader might ask, however, what happens if the Supreme Court has to deal with cases involving those agencies that deal with "sensitive" security matters. The next chapter explores how government attorneys attempt to stress the expertise component of a security agency in their arguments, but within the context of the Cold War.

Chapter 6: Security Agencies during the Cold War

The previous two chapters explored the Japanese internment cases during World War II and the Red Scare and associated Communist cases in the early part of the Cold War. This chapter delves into national security cases that encompass a wide swath of history, across the wider expanse of the Cold War. If the reader may recall the typology, the previous two chapters dealt with Quadrants 1 and 2.

Quadrant 1 War + Security agency Govt argues: Threat + Expertise	**Quadrant 3** No War + Security agency Govt argues: Expertise
Quadrant 2 No War + No security agency Govt argues: Threat	**Quadrant 4** War + No Security Agency Govt argues: Threat

This chapter will explore Quadrants 3 and 4 in selected case studies. The first case involves the landmark case of Youngstown Sheet & Tube versus Sawyer.

Youngstown v Sawyer: The limits of an appeal to military necessity

By the end of World War II, Allied and Soviet forces redrew country lines across the globe. The end of World War II saw the Korean peninsula occupied by Allied and Soviet forces, with the northern portion held by the Soviets and the south occupied by the Allies. Divided along the 38th parallel, this division foreshadowed the boundaries between Soviet-backed North Korea and South Korea, heavily influenced by Western forces. Within a few years, North Korea enacted a communist government. South Korea responded with a democratic government. Both Koreas initially expressed their intent to reunify Korea. On June 25, 1950, North Korean forces crossed the 38th parallel. The US and allied forces from 15 nations committed troops to assist

South Korea. In response, communist China sent in three hundred thousand troops and the Soviet Union sent in their best pilots and state of the art fighter jets on the North Korean side. The Western and communist forces fought to a standstill. By the time the Korean truce was signed on July 27, 1953 thousands of US servicemen had been killed. In the first conflict since World War II, the United States facing an implacable and evenly matched foe – and came out with a draw. Just a few years removed from the victories in Europe and the Pacific in a worldwide conflict, the United States found itself in an ideological war, fought mostly by proxies and with the ever-looming threat of nuclear mutual destructions that would last for 5 decades.

Meanwhile back in the United States, in the latter part of 1951, the steel industry was facing a national strike. Federal mediators attempted to break the deadlock, but to no avail. After protracted negotiations, the labor unions called for a national strike in April 9, 1952. With just a few hours to spare, President Truman issued Executive Order 10340. The Order authorized the Secretary of Commerce to take control of the steel mills and federalize the work force so that they could not strike. The unions immediately challenged the action, and asked for a permanent injunction against the order. The government's case was that the steel strike would create scarcity of a strategic resource, which would lead to shortages in ammunition and weaponry. This shortage would imperil the on-going war effort on the Korean peninsula. The government's reply to the injunction relied heavily on national security as well as the war-power inherent in the executive branch. The Truman administration argued that there has to be a quick resolution to avoid a national security catastrophe affecting the military effort overseas.[212]

[212] *Youngstown Sheet & Tube Co v Sawyer*, 343 US 597, 582 (1952). "[The President has acted] to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that, in meeting this grave

With the context of a "hot" war occurring, and the president himself signaling the need for quick action in the face emergency of a national security, the reader could expect the Court to demur and defer to the executive branch. Within the typology presented above, Youngstown fits within Quadrant 4, in that there is a significant war occurring, and a national security claim is presented. However, there is no participation by a security agency, which in this case would be the US military. Without a security agency, the Court should concentrate solely on whether there is an actual threat, in its consideration of the case. As we can shall see, this is exactly what the Supreme Court did, brushing aside Truman's claim of military necessity.

Justice Black, writing for the majority, noted that there is no express war power in the Constitution that allows the President to nationalize domestic property and no Congressional statute that might authorize such an action. To the contrary, Justice Black noted pre-existing statutes created by Congress specifically for such labor disputes. He noted that Truman administration bypassed such statutes, which had argued that such statutes were too cumbersome. Black did not dispute that there is a war going on and that steel is an important strategic resource for war-making, but he rejected the government's assertion of military necessity:

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate as such

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emergency, the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and Commander in Chief."

> to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[213]

The principal rationale for the Court's rejection of the government's argument is that of "competency" or more specifically, the lack of constitutional competency for the executive branch to interfere in a domestic issue. A hot war makes the assertion of a threat very real and undisputed, but the Truman administration attempted to override existing federal statutes that could have resolved the labor dispute. The Court refused to allow the executive branch to invoke the war-power to influence a domestic issue. However, there have been other cases where the Supreme Court has demurred to executive control of a strategic industry.

One such example is the case of *US v United Mine Workers of America* announced just a few years earlier in 1947.[214] US coal mines produced strategic material necessary for the conduct of the war. As such, US coal mines had been commandeered by the government close to the start of World War II. By 1946, these mines continued to be operated by the government as a necessary part of the transition to peacetime. In October 1946, union leaders planned a nationwide coal miners' strike but the District Court issued a preliminary injunction against the strike. The Supreme Court agreed. While noting the Executive Order authorizing federal control of the mines, the Court directly stated the mines was necessary for the war effort. By extension, the coal miners were federal employees and as such, could not ignore the existing labor contract with the government.

Yet several years later and in the midst of an ongoing war, the Supreme Court rejected Truman's attempt to take over the steel industry. One reasonable interpretation is that the

[213] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 587 (1952)
[214] *US v United Mine Workers*, 330 US 258 (1947)

Truman administration acted too quickly and did not allow the resolution through usual legal channels. The majority opinion and the concurrences focus upon the existence of the Congressional labor relations statute and the Truman's conscious effort to circumvent them. If we factor in the precedent in *United Mine Workers*, the outcome may have been different in *Youngstown* if Truman seized the steel industry *after* there was credible effect on war production. In *United Mine Workers*, the production of coal was and had been continuously operated by government as a necessary part of the war effort. The federal government commandeered the coal industry, partly in order to produce steel and partly to support the economic needs of the nation at home. If Truman had waited until the strike actually occurred or if the military stockpiles had seen an actual reduction of the number of weapons or munitions available, members of the Supreme Court may have been more likely to see war-power as a viable justification. In that scenario, there would be a legitimate military necessity as the president would be seen acting within his commander-in-chief powers to prevent the troops from equipment shortages, and potentially lose the war.

As evidence, we can look to concurrences and dissents in the case. Justice Clark's concurrence notes that:

> "[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that, in absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation."[215]

Clark specifically points to the Truman's abrupt suspension of the statutory process, but noted that there could be leeway for the president to act if Congress were silent. Similarly, Justice

[215] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 662 (1952). Justice Clark, concurring

Frankfurter's concurrence argued that the separation of powers doctrine required the Court to restrain the executive branch when acting in contravention of Congress. Frankfurter also noted that the context of war creates an "implication that it may have been desirable to have given the President further authority, a freer hand in these matters."[216] Frankfurter seems to echo Clark's statement that absent Congressional intent, the President's actions could have won his approval.

Justice Douglas in his concurrence noted that while he does not doubt the emergency conditions that motivate the President to act swiftly, the executive branch could not absorb legislative powers of the Congress even in that instance. Douglas suggested that "what a President may do as a matter of expediency or extremity may never reach a definitive constitutional decision" and then points to Congressional ratification of Lincoln's suspension of habeas corpus as a possible example of proper constitutional order.[217] Justice Douglas here seems to suggest that an emergency might justify executive action – if Congress retroactively approved it. Justice Jackson's concurrence hints that he would approve a greater flexibility for the President to react to emergency conditions:

> [B]ecause the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some [constitutional] clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications…"[218]

The dissenting opinions in *Youngstown* view Truman's actions as justified since there was a pressing need for action. The Chief Justice's dissent, joined by Justice Reed and Minton

[216] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 603 (1952). Justice Frankfurter, concurring.
[217] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 634 (1952). Justice Douglas, concurring.
[218] *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 640 (1952) Justice Jackson, concurring.

emphasize the point that the president's constitutional duties require him to act quickly to meet the needs of the situation.[219]

Common to all of opinions is the acknowledgement for some sort of flexibility for presidential action – if the conditions should call for it. All of them point towards extraordinary circumstances allowing the executive branch to act in the national interests. None of them contradict the interpretation that if the war were going badly, if the military started to see a shortfall in weapons and the outcome of the war were in question, then the executive branch could seize the steel mills. If this were the case, the Justices would probably have very little difficulty seeing the military necessity.

Youngstown is sometimes presented as a continuing trend of the government through the 20th century to attempt an expansion of national security as well as a landmark example of the retrenchment of presidential power. I would add that *Youngstown* represents the general pattern of judicial decision-making in national security cases. Both in peace and in war, Supreme Court decisions in national security involve the "reasonableness" of governmental action by a determination of "threat" and perception of the core "competence" of the government agency. In this study, *Youngstown* stands for the proposition that judicial decision-making involves taking a hard look at both threat and competency of the government in determining the reasonableness of governmental action even in the face of a "hot" war. Youngstown stands for the idea that the Court does not defer simply because government lawyers intone the phrase of military necessity.

The opinion in *Youngstown* touches obliquely upon military needs. There is a suggestion within the opinion, that military necessity might be treated with greater deference in national

[219] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 667 (1952). Chief Justice Vinson, Justice Reed, and Justice Minton, dissenting.

security matters. The cases in this study demonstrate that this deference may only occur if the military – as with any executive branch organization - is operating clearly and plainly within its core competency of defending the nation against foreign enemies. When the military acts outside of its perceived core competency, the Supreme Court is unprepared to grant deference. One such example is the case of *Duncan v Kahanamoku*, decided in 1946.

Duncan v Kahanamoku,: the limits of expertise argument

In the typology above, *Duncan v Kahanamoku* would represent a Quadrant 3 case. In this case, there is an absence of a significant war, but a security agency – the US military – is a direct participant and makes an argument of its expertise as part fo the case. We would expect that the Court would be deferential to the government's argument if the expertise were necessary for the amelioration of a perceptible threat. Since there is no active significant war, the Court is less likely to accept a blanket argument about threat.

During wartime, the need for order may justify martial law, especially if civilian authorities called for it. In *Duncan v Kahanamoku*, after the attack on Pearl Harbor, the civilian governor asked military authorities to enforce martial law. Acting with the authorization of the president, the Hawaiian military commander named himself the military governor and instituted martial law. Operating as one of the main naval bases against Japanese forces in the Pacific, military authorities took over existing civilian functions, such as law enforcement and judicial decision-making. This state of affairs remained throughout the war and began to ebb as the end of the war approached. In the interim, military police arrested civilians, and military personnel tried civilians in military tribunals. Some of those civilian defendants filed habeas corpus,

claiming that their conviction and detention by military tribunals as unconstitutional. These challenges eventually reached the Supreme Court.

As part of the proceedings, the District Court found that the civilian courts were operating perfectly well, but were shuttered by the military after the declaration of martial law. This fact proved difficult for the government to overcome, especially where the government attempted to argue that the tribunals were necessary due to the lack of operating courts. Justice Black, writing for the majority, stated:

> We note first that, at the time the alleged offenses were committed, the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area, or even to evacuate any of the buildings necessary to carry on the business of the courts… We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. For these petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts.[220]

Justice Black's opinion is skeptical of the government's justification of the "necessity" of military law, where the military both suspended and occupied civilian functions, including the legal system. In effect, Black noted that government argument created a tautology. There was no civilian legal function available, because the military suspended such authority, which therefore justifies the use military tribunals. Additionally, Justice Black remarked that there is a distinct role for the military, but in the course of ordinary events, it cannot subsume role of the judiciary.

[220] *Duncan v Kahanamoku*, 327 US 304, 314 (1946)

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. Our system of government clearly is the antithesis of total military rule, and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret, and enforce the laws. Their philosophy has been the people's throughout our history. For that reason, we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments…. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing.[221]

The core competency of the military is a focus on the national defense, and not on the administration of law and order. In *Duncan*, the threat of Japanese invasion induced the civilian authorities to ask the military to install martial law, but this was done for the purpose of protection against the enemy. Black notes that it is both historically and constitutionally beyond the constitutional capacity of the military to function as both judicial and legislative branches. In a pinch, where there is an absence of civilian authority, martial law may be acceptable, but only as a stopgap measure. In this case, the threat by Japanese forces was undisputed, but the competency of the military authority operating as a civilian substitute was soundly rejected. Within the civilian governmental agencies, similar limitations abound. The Court does not grant deference to all civilian agencies that claim expertise in national security matters. In this study, competency is always an issue for Supreme Court decision-making.

The character of a security agency's expertise

[221] *Duncan v Kahanamoku*, 327 US 304, 322 (1946)

Competency may be an issue, but what kinds of competency and expertise actually matter? We've seen that the military enjoys more respect and influence in terms of national security claims from the Court. *Cole v Young* represents the Supreme Court's clearest explanation of what kind of expertise may matter and what kinds of civilian agencies would garner greater respect for their competency in national security claims cases. For the purposes of the typology, Cole represents Quadrant 2, with no active significant war and at first glance, a civilian agency dealing with health, education and welfare does not seem to be a security agency. Thus, we would expect that the Supreme Court would not pay especially attention to a claim of greater expertise and focus upon the potential of the threat.

In *Cole v Young*, the Department of Health, Education and Welfare terminated a food inspector for alleged affiliation with the Communist Party. Citing a 1950 act that allowed government agencies to terminate employees as "necessary or advisable in the interest of national security," the government argued that the flexible statute justified the act of terminating the petitioner from his post.[222] The Court disagreed, noting that the Act in question covered only those agencies considered vital to the defense and security of the nation, or the "sensitive agencies." In addition, this Act would not affect those employees engaged in "nonsensitive" positions. The majority dismissed the Department's justification for the need for unswerving loyalty – but the opinion suggests that the nature of the agency is a major factor in the result.

The Court's opinion suggests a distinctive difference between a sensitive and non-sensitive organization – a distinction that colors their decision-making process. The Supreme Court here defines a "sensitive agency" as those organizations that are concerned with military

[222] See *Cole v Young*, 351 US 536 (1956)

operations, weapons developments, international relations, internal security and nuclear materials. Additionally, Court noted that a sensitive agency may also deal with classified or secret information vital to specific national security interests. The majority opinion remarked that the Department of Health, Education and Welfare was not engaged in any "sensitive" activities that might affect national security. Furthermore, a food inspector did not have access to classified or secret information. By implication, the majority opinion may have reached a different opinion if the food inspector or Department of Health was heavily involved in national security matters.

The Supreme Court is most willing to show deference in national security cases to a "sensitive" agency that is performing core competency function to ameliorate a national security threat. The caveat however, is that the Court must perceive that the challenged actions are part of core agency functions and those functions must involve national security tasks. Where the case involves domestic functions, such as owning and running steel mills or administering justice for civilians, then there is no great compulsion to defer. There is a great respect by the Court throughout all the years and cases of this study, but if the Court perceives that the executive branch agency is acting outside of its accepted competency, then the justices are unlikely to accept the government's actions as reasonable.

The clearest example of judicial deference to a "sensitive" executive agency engaged in a core national security task is the state secrets privilege claimed by the military in *US v Reynolds*, which was decided in 1953. The typology would place this case in Quadrant 1, where a security agency is directly involved in a national security claim during a significant war (in this case, the Korean conflict). The typology suggests that the Court would be amenable to deferring if the

core competency of the security agency was directly implicated in ameliorating a possible threat. Because there is a significant war, the threat does not have to be as specific.

In *US v Reynolds*, several military personnel were killed during a military test flight in 1948. Their families sued the government, seeking damages for negligence. The families asked for all relevant materials, including the Air Force investigation report and witness statements. The government demurred, claiming the privilege to keep such facts secret for the mission. The government explained that the mission was highly secret and if the government released the investigation, it would damage national security by revealing secrets about classified military equipment. In support of this claim, the government produced a letter from the Secretary of the Air Force asserting that it "would not be in the public interest to furnish this report." The Judge Advocate General (the military's legal department) produced an affidavit that supported the generalized claim of classified material without any specifics.[223] In this case, the government produced no evidence and took a claim of privilege against revealing state secrets. Despite this lack of positive proof, the Supreme Court went on the record to take judicial notice of the government's underlying security claims:

> In the instant case, we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past wars has made it common knowledge that air power is one of the most potent weapons in our scheme of defense and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests…. Certainly there was a

[223] *US v Reynolds*, 345 US 1, 4-5 (1953)

> reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.[224]

Judicial notice usually occurs when a judge decides that a particular fact is commonly known or cannot be disputed or where there is no doubt as to its factual nature. When a court takes judicial notice, the judge simply accepts the matter as the truth without further need for verification. Hence, in *Reynolds*, the Court's assertion of judicial notice of the government's claims is unusual. With the judicial notice in place, the reader may not be surprised to learn that the Supreme Court dismissed the family's claims for production of said documents. As the typology suggests, once the Supreme Court accepted the expertise of the military as a necessary component of the case, their judgment was deferential towards the government.

Some 50 years later, when the documents requested in the above case were declassified. The Air Force documents pointed to a fire that started in the engines and ultimate caused the plane to crash. There was only a notation that secret equipment was onboard, but with no other description of the equipment. The families sued again. The appellate court decided that even if the government's original contention of sensitive secrets had no basis in fact, the government's investigation report contained other technical information which may be "seemingly insignificant pieces of information.. [but that] would have been keen interest to a Soviet spy fifty years ago."[225] On that basis, the families again lost their suit.

The following cases can be considered Typology 3, meaning no war but a claim of national security by a security agency. The typology suggests that the Court would focus more specifically on the threat at hand, rather than the expertise of the agency. As long as the core

[224] *US v Reynolds*, 345 US 1, 10 (1953)
[225] *Herring v US*, 424 F.3d 384 (2005)

competency of the agency is relevant, the Court will focus on deciding if the threat exists or is too abstract.

For instance, *Weinberger v Catholic Action* deals with classified information about nuclear weaponry. In this case, the US Navy was asked to provide information via the Freedom of Information Act about the storage of nuclear weapons in Hawaii. Citing national security concerns, the Navy declined. The majority had no difficulty finding for the Navy. Chief Justice Rehnquist wrote for the Court, with every justice joining in the judgment or a concurrence. Rehnquist's opinion stressed that there the balancing act between the public's need for information and the need to preserve military secrets. In this case, the need for information is trumped by the need to preserve classified information about nuclear weaponry.[226] Similarly, in *Weinberger v Romero-Barcelo,* the Navy was enjoined from weapons training exercises off the coast of Puerto Rico. The plaintiffs cited a violation of federal pollution acts and the lower court agreed. The government cited national security exemptions to the statute. The Court once again found no difficulty siding with the government, noting that national security concerns may permit an exemption to the act in question.[227]

A recent example of a quadrant 1 case is *Winter v National Resources Defense Council*. This is a case occurring in the middle of the recent Afghan conflict and involves the Navy, as a security agency, claiming actions that are of military necessity to prevent of a threat. Quadrant 1 suggests that during a significant war, the threat being examined may be abstract. If the Court accepts that the security agency's core competency is vital to the question, then the Court will be willing to be more deferential.

[226] See *Weinberger v Catholic Action of Hawaii*, 454 US 139 (1981).
[227] See *Weinberger v Romero-Barcelo*, 456 US 305 (1982)

In *Winter*, the Court was asked to decide if the Navy's use and testing of sonar violated several federal environmental policy laws. Environmentalists filing the suit, specifically alleged that the sonar testing would harm sea-going mammals. Chief Justice Roberts, writing for the majority, held once again there was a balancing test between the environmental needs of the public and national security concerns. In this case, Roberts deferred to the judgment of the military. Specifically, the Court cited declarations from some of the Navy's most senior officers, testifying to the need for sonar training to counter enemy submarines. The Court cited its historical tendency to give great deference to this professional military judgment because of the military authorities' greater expertise in making such judgments.[228]

The same deference extends to control and selection of personnel for security agencies as well. In most cases, the Justices have supported the judgment of commanders and agency heads where it pertains to the specifics of employees or personnel of security agencies. An example of a quadrant 1 case, In *Orloff v Willoughby*, a medical doctor who refused to affirm or deny affiliation with Communist Party, was denied a commission when he was drafted into the Army. The majority noted that power of commissions belonged to the President and deferred to the judgment of the Army.[229] The following quadrant 3 cases would have suggest Supreme Court deference where the Justices accept that the agency's security competence was vital to the case. *In Cafeteria Workers v McElroy*, the base commander denied security clearance for a cook who operated a private concession stand, on the premises of the Naval Gun Factory. The Court

[228] See *Winter v Natural Resources Defense Council*, 555 US 7 (2008), citing *Gilligan v Morgan* 413, US 1, 10 (1973) where issues involve "complex, subtle and professional decisions as to the composition, training and equipping of a military force [which are] essentially professional military judgment" and also citing Goldman v Weinberger, 475 US 503, 507 (1986) noting that the Court will "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."
[229] See *Orloff v Willoughby*, 345 US 83 (1953)

deferred to the base commander's judgment. The majority opinion noted that the Factory produced weapon systems of a highly classified nature and the military commander in charge is to be granted great leeway to make decisions involving his command of personnel within the Naval Gun Factory.[230] Similarly, in *Department of Navy v Egan*, the Court decided that the Court of Appeals could not overturn a decision upholding the ability of the Navy to strip a civilian laborer of his security clearance for past criminal convictions. Citing the executive branch's ability and responsibility to classify and control access to national security information, the Court agreed with the government's decision to deny security clearance.[231]

The branches of the military are not the only agencies that receive such deference. Civilian agencies that specialize in national security interests are treated similarly as well. *Carlucci v Doe* is another typical Quadrant 3 case, in that there is no significant war happening but a security agency is involved as a direct participant in a national security claim. Quadrant 3 suggests that as long as the Supreme Court believes that the agency's core competency is important to the question, they are likely to be more deferential.

In *Carlucci v Doe*, a cryptographic officer in the National Security Agency (NSA) was fired after disclosing that he had engaged in homosexual relationships outside of work. The NSA terminated his employment on that basis, noting that the affairs with unidentified foreign nationals constituted a threat to the national security of the United States. The government never alleged that the federal employee had divulged any secrets or ever intended to do so, but charged that his "indiscriminate personal conduct with unidentified foreign nationals" was a danger to

[230] See *Cafeteria Workers v McElroy*, 367 US 886 (1961)
[231] See *Department of Navy v Egan*, 484 US 518, (1988)

national interests and hence, was the primary reason for his dismissal.[232] The majority opinion found that the agency need only apply general security considerations. The NSA Director's finding that the federal employee's behavior was not "consistent with national security" was more than sufficient.[233] In *Webster v Doe*, faced with a similar fact pattern where a CIA employee was terminated for the disclosure that he was a homosexual, the Supreme Court held for the government. The Court found, as in the NSA case, that the CIA Director has a very broad authority to protect intelligence sources and may act where he believes that there is a security concern.[234]

This broad authority is granted only to the specialized security agencies. An otherwise non-security oriented agency would not receive such treatment. In both cases, the majority opinion accepted the judgment of the agency head, without delving into exactly what or why such behavior was against the national interest. In these decisions, the Court shows how compelling it may view the professional judgment of agencies that specialize in national security. Much like the situation in military matters, the Court defers because the Justices do not feel that they are competent to override the professional judgment of the national security agencies, especially the claim itself falls within the rubric of the agency's expertise.

Similarly, when the Court perceives that the government's actions in the case are to protect continuing the operational capacity of the security agencies, they are far more likely to grant the same deferential level of interpretation in national security cases. The following cases are all examples of quadrant 3 cases involving the CIA. As the reader might recall, quadrant 3

[232] *Carlucci v Doe*, 488 US 93, 97 (1988)
[233] *Carlucci v Doe*, 488 US 93, 102 (1988).
[234] See *Webster v Doe*, 486 US 592 (1988)

cases occur during a significant war, and where a security agency argues its own technical expertise within the case. Quadrant 3 suggests that the Supreme Court will be more willing to accept the government claims if its finds the agency's core expertise in security matters is relevant to the case at hand. In *Haig v Agee*, a former CIA officer engaged in a campaign to expose other federal security officers abroad. In response, the government suspended his passport, explaining that the officer in question may cause serious damage to national security. The Court had no difficulty finding for the government because of the passport holder's professed intention to harm national security.[235] In *CIA v Sims*, the Court agreed with the government's denial of a Freedom of Information Act request seeking information on CIA research on brainwashing and interrogation techniques for the periods of 1953 to 1966. The Court denied the request. The majority reached this decision after noting that the agency had broad authority to protect intelligence sources from disclosure, and inferences could be drawn to existing sources that should remain confidential.[236] In *Snepp v US*, the Supreme Court confiscated the proceeds of the sale of a book written by an ex-CIA agent that was published without official permission. The majority opinion noted that the government did not allege that Snepp published classified material. However, the Court found that Snepp breached a trust that he had pledged to the United States government. The majority opinion found that Snepp's publication could have potentially damaged national security interests. Even if the government does not allege any immediate breach, the majority agreed with the government's that the book may have impaired the effectiveness of existing intelligence operations.[237]

[235] See *Haig v Agee*, 453 US 280 (1981)
[236] See *CIA v Sims*, 471 US 159 (1985)
[237] See *Snepp v US*, 444 US 507 (1980)

The Attorney General and the Justice Department can be involved in cases that involve claims of national security. In this 1950s and 1960s, these cases usual involved deportations or convictions of individuals suspected of being Communists. This is covered in depth in Chapter 5 of this study. The Attorney General and the Justice Department, for the most part, operate in the realm of law enforcement and federal criminal law. This is, of course, an area where the members of the Supreme Court have extensive legal experience as attorneys and jurists. Where law enforcement is concerned, however, the justices are not usually beholden to the Justice Department's expertise. The Court is able to substitute its own knowledge and competency in matters involving enforcement and interpretation of the law.

Most cases that are brought by the Justice Department fall squarely within the conventional criminal or statutory process. Traditionally, cases brought by the Justice Department are processed along the traditional criminal law and civil litigation system, complete with constitutional processes well-established by precedent and common law. Most criminal investigations do not generally implicate national security issues. Even in those occasions where the Justice Department makes claims about national security issues, the Supreme Court does not accord the Justice Department any special deference. This can be explained by the fact the Justice Department is not seen by the Supreme Court, pre 9/11, as a "sensitive" security agency. Primarily operating as a law enforcement agency, the Justice Department is quite unlike the specialized security agencies such as the CIA, or the military.

In the early 1970s as the Vietnam Conflict dragged on, the unpopularity of the war brought protests and unrest. The United States charged several defendants with conspiracy to destroy government property. Defendant's attorneys discovered existence of electronic

surveillance and asked for its disclosure. Attorney General John Mitchell had authorized the wiretaps of certain individuals, including one of the defendant, whom the government believed belonged to a group that was about to bomb a CIA branch office in Michigan. Normally, the Fourth Amendment would require government agents to acquire a warrant before starting surveillance upon suspects. In the typology of this study, the case of *US v US District Court* would be considered part of Quadrant 4, where there is no recognized security agency involved, and there is a significant war occurring. In quadrant 4 cases, the expectation is the executive agency is not generally thought of to have security expertise and as such, government will emphasize the threat aspect of the case. The Court is only likely to defer to the government's judgment if it believes that the threat is not just abstract, and that the government's actions are the necessary to the amelioration of the threat.

In *US v US District Court*, the Justice Department argued an exception to the warrant requirement in the Omnibus Crime Control and Safe Streets Act of 1968 and refused to disclose their evidence. Judge Damon Keith of the Eastern District Court in Michigan ordered the government to disclose all intercepted conversations to the defendants. This series of events culminated in an extraordinary situation where the executive branch sued a district court, while appealing to the Supreme Court.

The government claimed that the power of the president to protect the nation from national security threats was exercised through the Attorney General. As a result, the Attorney General had a constitutional duty as well as statutory authority to utilize warrantless surveillance. In response, the unanimous 8-0 opinion handily rejected this interpretation. The Court noted the President had such power, but the statute in question was written with intent to protect against a

foreign external threat. The statute did not encompass a domestic security risk, such as a possible bombing conspiracy. The Court also noted that a warrant requirement was not so obstructive that it would unduly constrain the executive branch. Without the warrant requirement, the Supreme Court noted an especial concern about possible arbitrary and constitutional action by the government. As the Court noted:

> History abundantly documents the tendency of Government – however benevolent or benign its motives – to view with suspicion those who most fervently dispute its policies… The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect "domestic security."[238]

The opinion rejected the government's attempt to meld domestic law enforcement with national security concerns. In doing so, they reinforced the idea that domestic law enforcement still requires all the procedures and processes guaranteed by the Constitution.

Underlying this case is the theme of separation between domestic and foreign security threats. If a person acts within the country's borders, the government must conform to constitutional requirements and treat domestic risks as criminal investigations. Outside of the country, the matter falls into the rubric of foreign affairs and within the primacy of national security organizations. In those situations, the Court would show greater defer to the executive branch.

Later cases in lower federal courts acknowledged the separation, but found ways to reconcile this dichotomy. Although no Supreme Court cases, these cases do not fit the typology of this study, but present a view of the continuing evolution of the role o domestic law enforcement in national security claims cases. In *US v Brown*, the government was conducting

[238] *United States v United States District Court, Eastern District of Michigan,* 407 US 297, 314 (1972)

warrantless surveillance as part of foreign intelligence operation. During the surveillance, Brown spoke of his plan to commit a domestic crime. The government arrested Brown on the basis of that conversation. The Circuit Court noted that the principal action of the government was intelligence gathering for a foreign operation. However, the action of capturing the intent to commit a domestic crime was incidental in this case, and was constitutionally acceptable.[239] In *US v Butenko*, the Third Circuit Court found that warrantless surveillance of conversations between a Soviet national and the defendant were constitutional where the defendant and the foreign national were engaged in a conspiracy to exchange classified information involving Strategic Air Command.[240]

After the abuses of Watergate came to light, and with subsequent Congressional investigations, Congress enacted the Foreign Intelligence Surveillance Act of 1978, which strengthened and codified the separation between domestic investigations and foreign intelligence operations.[241] Eventually, this separation became institutionalized and was known informally as "the wall." In practice, this meant that any domestic security threat were strictly treated as criminal investigations and fell into the domain of the FBI. Criminal investigations required the full complement of constitutional rights and procedures. Foreign intelligence operations operated outside of the United States. As a result, these operations were usually burdened with few, if any, constitutional constraints. Because of the extra-territorial nature of such operations, the executive branch received little interference from the other branches.

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[239] See *US v Brown*, 484 F.2d 418 (5th Circ. 1973)
[240] See *US v Butenko*, 494 F.2d 593 (3rd Circ. 1974)
[241] 50 U.S.C. chapter 36, section 1566 (1978). See also the Department of Homeland Security's overview of FISA at: http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/foreign-intelligence-surveillance-act.html

Matters became more complicated if the foreign intelligence operations moved into US soil. Such investigations would involve both domestic and foreign intelligence sources and often required coordinated efforts. In such endeavors, there were bureaucratic and institutional hurdles working against cooperation, for the domestic law enforcement agencies, primarily the FBI and specialized security agencies such as the CIA and NSA. The FBI viewed themselves primarily as a law-enforcement agency, which required adherence to constitutional restrictions and procedures. CIA and other intelligence organizations did not focus on law enforcement and hence did not often hew to law-enforcement procedures. Federal prosecutors often viewed the evidence procured by security organizations were as having possible constitutional infirmities.[242] Even within the FBI, criminal investigations units formed specific and separate units that did not interact with their counter-intelligence counterparts. The corporate culture within the law enforcement community was such that external security agencies were simply not thought of as being part of the team.[243]

For ten years, from the fall of the Soviet Union in 1991, until the September 11, 2001, this was the dominant paradigm. There were external threats to the safety of the United States, but the Cold War arch-nemesis no longer was a threat. The dominant paradigm was that events happening within US soil were treated as domestic law enforcement issues with all the concomitant constitutional safeguards and jurisprudence. Once past the shores, they were an external foreign affairs issue and the executive branch would have dominance, with little judicial

[242] Cedric Logan, "The FISA Wall and Federal Investigations," in 4 *NYU J of Law and Liberty* 209 (2008)
[243] Office of the Inspector General, Department of Justice. "Special Report: A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks (Released publically June 2005)" Available at: http://www.justice.gov/oig/special/0506/chapter2.htm

interference. Cases during this period proceeded as one would expect, with the government succeeding at the approximately the same rate as its overall general success rate.

Table 1: Government wins during October 1991 through October 2000 terms

Case Term	# of Cases	Wins	Percent
1991-2000*	312	193	61.86%
1941-2010	3502	2239	63.93%

*October term of 2000 ends in Summer/June of 2001

Business continued as usual, but national security claims became even rare. During the ten year period from the dissolution of the Soviet Union, until the September 11, 2001, this study records only 2 national security claims cases. One was the *Reno versus American-Arab Anti-Discrimination*, 525 US 471 (1998). As a Quadrant 4 case, with no significant war and no security agency intervention, the case should follow conventional jurisprudence on immigration law and technical arguments about jurisdiction. This case was predicated on whether the petitioners could challenge their deportation after the government charged with as members of an "international terrorist and communist organization." The actual resolution of the case hinged on whether the lower court had jurisdiction to hear the case. The majority opinion written by Justice Scalia decided in the negative and the petitioners' challenge was dismissed.

The other case is *Crosby v National Foreign Trade Council*, 530 US 363 (2000). This is also another Quadrant 4 case and even if the government argues threat, the outcome should follow standard legal jurisprudence, with no expectation of greater Supreme Court deference. In this case, the Court held that where the federal government had designated that the country of Burma had engaged in actions that could be a threat to the national security and policy of the US, the state of MA could not echo this sentiment by instituting a state wide ban on economic

activities with Burma. The majority opinion decided this case on the basis of the supremacy clause, noting that individual states could not interfere with the federal government's foreign affairs powers.

This was the state of affairs in national security claims until September 11th, 2001. Domestic law enforcement and covert intelligence agencies were separated by officially mandated divisions. Cases from law enforcement were treated without any great deference by the courts, whereas covert intelligence and security agencies received far greater deference due to their perceived competence in the national security area. This would all change one fall morning in 2001.

Chapter 8: Guantanamo Bay Cases

After the events of September 11, 2001, Congress and other government officials blamed the major intelligence failure on the lack of coordination between the domestic and external security agencies for the attack on the Twin Towers.[244] With a series of new laws and revisions to FISA, Congress signaled a new role for the domestic law enforcement agencies. The "wall" would be brought down. Domestic law enforcement and intelligence organizations would be expected to act in tandem to stop the common threat. Law enforcement was expected to have a greater role in intelligence and national security operations. The reader may find it helpful to be reminded of the typology used in this study.

Quadrant 1 War + Security agency Govt argues: Threat + Expertise	**Quadrant 3** No War + Security agency Govt argues: Expertise
Quadrant 2 No War + No security agency Govt argues: Potential Threat	**Quadrant 4** War + No Security Agency Govt argues: Direct Threat

The net effect is that it turned law enforcement agencies into something akin to security agencies, at least in the eyes of judges and justices. Before 9/11, these cases would be fall into quadrant 4, with no particularly special reason for the Supreme Court to defer. The context of these cases happen after the outbreak of war in Afghanistan, and with law enforcement seen as vital partner, to the protection of the homeland, the effect was to shift the equation away from strict constitutional protections and towards greater deference. In this study, these cases occupy Quadrant 1, where a significant war lowers the barriers for justifying government behavior. In

[244] Widely reported in every major newspaper, a succinct summary is written by Josh Meyer, "Finger Point at an Intelligence 'Wall'" in Los Angeles Times, April 14, 2004. Available at: http://articles.latimes.com/2004/apr/14/nation/na-wall14

these cases, government attorneys argue that the existence of the threat and the combination of the expertise and competence of the executive branch should be more than enough to justify governmental actions. Accordingly, one might expect Justices to act in a more pro-government fashion and defer to the judgment of their perceived experts in the area of national security. Now we look at this group of cases grounded in quadrant 1, which in this study are collectively called the Guantanamo Bay cases.

In terms of this study, the Supreme Court's response was to re-evaluate the core competency of law enforcement. After the Twin Towers attack, the Supreme Court treats law enforcement investigations of potential terrorist activity with the same deference as other "security" agencies. One such example occurred in the case of *Ashcroft v Al-Kidd*. The petitioner claimed that Attorney General Ashcroft lacked probable cause to arrest, but the Attorney General issued a material-witness warrant to detain him as a terrorism suspect. Scalia, writing for the majority, noted it did not matter if the Justice Department had no intention of using Al-Kidd as material witness. The majority noted the subjective intent of the use of the warrant was irrelevant to the constitutionality of the warrant.[245]

All the Justices joined in concurrence. A concurrence written by Justice Ginsburg agreed with the judgment but questioned how such a warrant could be valid if the investigators misled the magistrate as to the actual use of the warrant. Ginsburg noted that it was a material misrepresentation for the government officials to use the warrant to detain a witness to circumvent their lack of probable cause. However, Ginsburg noted that Ashcroft had immunity even if abuses occurred on his watch because there was no established law that made such an act

[245] Ashcroft v al-Kidd, No. 10-98, 563 US ____ (2011)

illegal.[246] In effect, Ginsburg was saying that the majority opinion was ignoring the fraud at the heart of the case. Ginsburg all but accused government officials were "gaming" the system to avoid a stricter constitutional constraint. Despite these criticisms, even Justice Ginsburg was willing to grant deference to the Attorney General.

Qualified immunity was also at issue in *Ashcroft v Iqbal*. This time, the petitioner claimed that his arrest was part of a pattern of discrimination against people of Arabian descent by the FBI. The petitioner claimed that this racial discrimination led to his subsequent abuse while in detention. The majority opinion, written by Justice Kennedy disagreed that there was any race-based discrimination. Kennedy noted that:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of Al Qaeda, an Islamic fundamentalist group…. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs or Muslims.[247]

The majority opinion concluded that that Ashcroft had no supervisory liability since he had no knowledge of any illegal actions. In any event, Kennedy found that the underlying action was inherently constitutional and reasonable. Kennedy's opinion emphasized that government officials acted with the purpose of investigating immigration violations. Kennedy's opinion accepted the government view that terrorist organizations like Al Qaeda predominantly draw from one ethnic group that shares the religion of Islam. His opinion essentially accepts that race

[246] Ashcroft v al-Kidd, No. 10-98, 563 US ____ (2011). Justice Ginsburg, dissenting.
[247] *Ashcroft v Iqbal*, 556 US 662, 680 (2009)

and religion could be markers for a potential terrorist. Kennedy however, goes on to say that arresting and detaining people of Arabian descent was just an incidental, disparate impact.

The logical flaw with Kennedy's opinion is that not every person of Arabian descent practices the Muslim religion, and not every follower of the Muslim faith is a member of an extremist group. Another logical problem is that "religion" does not usually have a physical marker. It seems difficult "designate" a Muslim without an assumption based on physical appearance, and ethnic/racial markers. Kennedy's opinion simply notes that government officials were acting "plausibly." The reader may also detect similar logical reasoning from *Hirabayashi v US*. Recall that Hirabayashi's opinion held that governmental action targeting one particular ethnic group is acceptable, as long as the discriminatory impact was incidental. Nevertheless, the Court's opinion emphasizes the changing attitudes of Supreme Court jurisprudence in national security matters. One may infer that the threat of another attack certainly has raised the threat level for the Supreme Court, lessening their skepticism of the government's justifications. One may argue that this new analysis of the potential threats has lent an aura of necessary deference to law enforcement in the post 9/11 era. A criminal case may swiftly become a matter of national security and the Court treats alleged terrorism cases with a concomitant level of deference.

On the international stage, after the events of 9/11, the US accused the government of Afghanistan of harboring the top leadership of Al Qaeda. The US demanded that the Afghani government turn them over. The Afghanis refused. Subsequently, the United States and other forces invaded Afghanistan. US forces and their allies captured both men and material belonging to the Al Qaeda network. The US government is a signatory of the Geneva

Convention, which provides basic protocols for treating prisoners of war. Crucially, this international agreement only covered uniformed forces of established states. The Conventions were built for armed conflict among nation-states but there were no provisions for armed militants who belonged to stateless, terrorist groups.

The Bush administration stated a desire to detain the prisoners as long as possible for several reasons. First, the government wanted to extract as much intelligence as possible. Secondly, the administration wanted to prevent these men from returning to the fight. Eventually, the Bush administration evolved a strategy to transport these men to the Guantanamo Bay, a naval base on the island of Cuba. Although not given access to attorneys or even allowed to speak to anyone, some of the families of the over 640 people detainees filed legal challenges in US courts.[248]

The Bush administration evolved a three-prong response to the legal challenges. First, there was the separation of powers argument deriving from multiple wartime precedents. In this argument, the government stressed that the country was at war, and as such the President had an inherent constitutional duty to protect the nation as Commander-in-Chief. Detainments were incidental to this war-making power. If the courts took on habeas corpus cases that involved enemy personnel, then the judiciary was interfering with military decisions. The administration was, in effect, arguing that courts could not have any competency to second-guess command decisions, such as detainment of enemy individuals. The Bush administration developed an argument that courts entertain habeas corpus arguments were violating the separation of powers,

[248] *Rasul v Bush*, 542 US 466 (2004). This number is derived from the estimate in the majority opinion written by Justice Stevens.

by interfering and subverting the constitutional duties of the Executive branch.[249] Sounding like the old "military necessity" argument from World War II Japanese internment cases, the government claimed that judges and justices needed to defer to expertise of the executive branch and its military arm.

The second argument derived from a Cold War precedent decided in 1950 called *Johnson v Eisentrager*. In this case, after the surrender of Nazi Germany in World War II, the military captured several German soldiers who continued resistance in China. Convicted by a US military tribunal overseas, these defendants challenged their detention by habeas corpus. The Court decided that a US court has no jurisdiction to hear habeas corpus arguments by an alien enemy engaged in war against the United States. Additionally, the sole responsibility for legal proceedings for such aliens, outside of the US territory belongs to the executive branch. As such, the courts cannot intervene.[250] Extending that argument, the Bush administration transferred enemy aliens to the naval base on Guantanamo Bay, Cuba. The administration argued that Guantanamo Bay was on Cuban soil, and outside US jurisdiction. They argued that no habeas corpus challenges originating from Cuba could not be heard by US judges since they had no jurisdiction on foreign soil. In addition, the United States has no diplomatic relationship with Cuba, so any attempt at extradition from Cuban territory would be a legal nullity.

The third argument was based on legal precedent in *Ex Parte Quirin*. "Enemy combatant" as a term derives from the distinction of lawful and unlawful combatants within this case:

[249] *Hamdi v Rumsfeld*, 542 US 507, 527 (2004)
[250] *Johnson v Eisentrager*, 339 US 763 (1950)

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful…. [The] enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who generally deemed not to be entitle to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[251]

In this case, two groups of uniformed Nazi saboteurs landed on beaches on the Eastern seaboard. Immediately upon landing, they removed their German military uniforms, donned civilian gear, and fanned out across the country in an attempt to damage the US infrastructure. All the conspirators were eventually caught. Since they were out of uniform, the government argued that these men did not have the benefit of the Geneva Convention protocols and were unlawful combatants. The Supreme Court agreed that these German soldiers were still combatants, and that military tribunals were the proper place to try them.[252]

Relying upon this precedent, the Bush administration created a category called "enemy combatant." The administration defined "enemy combatant" as a person who has engaged the United States in enemy action but is not a member of any legitimate nation-state or uniformed force. Enemy combatants were not given official protections afforded by the Geneva Convention. The Bush administration argued that these enemy combatants could be held indefinitely, without any formal charges as part of the war-making powers of the President.[253] Historically, US citizens are granted greater constitutional protections. However, the

[251] *Ex Parte Quirin*, 317 US 1, 31 (1942)
[252] See *Ex Parte Quirin*, 317 US 1 (1942)
[253] *Hamdi v Rumsfeld*, 542 US 507, 509-510 (2004)

administration argued enemy combatants lose the usual constitutional protections for criminal proceedings. In effect, the government declared that the "war on terror" justified a level of military necessity that could supplement some of the usual criminal law procedures.

The government tested this concept in *Rumsfeld v Padilla*. Jose Padilla was a US citizen who was arrested in 2002, originally on a material witness warrant, but later designated as an "enemy combatant" and sent to a military prison. In Padilla's case, once he was determined to be an enemy combatant, the government argued that he could be held without formal charges. This detention can extend for the duration of the conflict, and his access to attorneys would be restricted and these conversations monitored. Padilla's challenge came in the form of a habeas corpus petition. The reader may be reminded that a habeas corpus challenge questions the lawfulness of detention, but does not challenge the constitutionality of the detention. In other words, Padilla was asking to see the evidence that led to his detainment. In this context, Padilla's petition amounted to asking the government to charge him with something or release him.

The majority opinion of the Supreme Court written by Chief Justice Rehnquist focused on the technical issues and avoided the habeas corpus question. Specifically, the opinion discussed whether the district court had proper jurisdiction, and the appropriate designation of the proper parties to the case. Rehnquist's opinion avoided any discussion of the evidence or the government's core argument about Padilla's "enemy combatant" status. The ruling held that that the case should have been tried in South Carolina (where Padilla was being held in a military prison), instead of a New York district court and returned it to the lower courts.[254]

[254] See *Rumsfeld v Padilla*, 542 US 426 (2004)

Justice Stevens, writing in dissent, agreed that detention of enemy soldiers may be justifiable to prevent them from returning as part of the conflict. However, Stevens wondered if Padilla's detention was actually a thinly veiled attempt to extract information by confining the petitioner. Stevens argued that the detention was an interrogation tactic, one where detainment might last indefinitely as long as the government sees fit.[255]

In any case, Padilla was undisputedly an American citizen, and the continuing denial of his constitutional rights remained politically sensitive. After his Supreme Court case, the government stopped classifying Padilla as an "enemy combatant." Eventually, the government dropped the terrorism charges as well. In 2006, Padilla was transferred to federal prison and his case moved to the federal courts. In 2008, he was convicted of conspiracy to commit murder and sentenced to 30 years in prison.[256]

Within a week of the Padilla case, Court also heard the case of *Rasul v Bush*. These were actually an amalgamation of several cases, involving two Australians and 12 Kuwaiti citizens. Here the government trotted out its jurisdiction defense. In brief, the Bush administration claimed that the precedent in *Eisentrager* removed the ability of alien enemies to seek habeas corpus challenges. In this the government trotted out a theory about sovereignty and legal jurisdiction. The government pointed out that the Guantanamo Bay naval base was situated in Cuba. The US naval base was, at least on paper, within the geographic control of the sovereign nation of a foreign power. Hence, the government argued that the *Eisentrager* precedent overrules the complaints of Guantanamo Bay detainees. The reader should be reminded that in

[255] See *Rumsfeld v Padilla*, 542 US 426 (2004). Justice Stevens, dissenting.
[256] Case synopsis and current update available at the New York Times website, specifically: http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html

Johnson v Eisentrager, enemy personnel detained overseas were ruled to be outside the legal jurisdiction of the United States courts.

Justice Stevens, writing for the majority, noted that the defendants in *Eisentrager* were actual soldiers of the German Reich government, captured in China soon after World War II. Additionally, these soldiers were already tried and convicted of wrong-doing against the United States. In contrast, Stevens noted that the Guantanamo Bay detainees were not connected to any national army, nor were they members of a nation at war with the United States. These detainees were, in effect, civilians. More problematically, these detainees were held without a trial or even specific charges. Additionally, the government signaled their intention to hold them indefinitely. On the subject of jurisdiction, Stevens dismissed the idea that Guantanamo Bay was not in US territorial jurisdiction. Although the government painted a theory based upon the sovereignty of the Cuban government, Stevens noted that the United States exercised complete control over Guantanamo Bay.[257] Stevens noted that the state of relations with Cuban government was particularly poor. The US naval base at Guantanamo Bay is separated from the rest of the island by a long fence, guarded continuously by armed personnel on both the US and Cuban side. In theory, Cuba may have sovereignty over Guantanamo Bay, but in practice, the United States military exercises complete jurisdiction and control over everyone and everything within the Naval Base itself.

Justice Scalia's dissent supported the government's argument. Scalia's dissent argued that the majority were re-writing history and attempting to avoid the plain meaning of the *Eisentrager* precedent. Scalia's opinion claimed that the majority had veered away from stare

[257] See *Rasul v Bush*, 542 US 466 (2004).

decisis. Scalia wrote that the Court has intervened in what is effectively a military decision and citing *Eisentrager*, he accused the majority of creating a situation where "such trials would hamper the war effort and bring aid and comfort to the enemy" and creating a situation which "has a potentially harmful effect upon the Nation's conduct of a war."[258] Scalia agreed with the government's underlying claim that military necessity demands deference from the courts, or else the executive branch would falter in its defense of the nation.

The government continued this claim for judicial deference in *Hamdi v Rumsfeld*, but also argued that very structure of Constitution prohibited the Supreme Court from hearing any such cases. Announced on the same day as *Rasul v Bush*, the government's case revolved around an American citizen, Yaser Esam Hamdi, who later moved to Saudi Arabia and eventually to Afghanistan. He was seized in Afghanistan by forces allied to the United States. Hamdi was transferred from Guantanamo Bay to the South Carolina after his status as a US citizen was discovered. The petitioner's father filed a habeas corpus challenge, stating that he had no contact with his son and the military was not allowing his son access to any legal counsel or even affirm any charges against him.

The government's evidentiary support comprised of an affidavit by a government official named Mobbs in the Department of Defense. In the affidavit, Mobbs stated that he had reviewed the relevant classified records, and affirmed that Hamdi was a member of enemy forces engaged in battle with the United States. The government used the Mobbs affidavit to support its assertion that Hamdi was an enemy combatant. Justice O'Connor, writing for the majority noted this affidavit was hearsay. Hearsay is generally defined where a party offers evidence from a

[258] *Rasul v Bush*, 542 US 466 (2004). Justice Scalia, dissenting.

source which has no direct experience of the fact. Hearsay can be oral or written and in the legal context, is offered as the truth of the matter asserted. In this case, Hamdi's attorneys had no opportunity to question Mobbs in court. Additionally, the Mobbs was a civilian official, designated as a Special Advisor, who was not anywhere near the battlefield. Mobbs proffered assertions of veracity while alluding to records not available to defendant or any court. The District Court noted that the government's case revolved around the Mobbs Declaration affirming Hamdi's status as an enemy combatant. The District Court dismissed this document because it was hearsay and had little evidentiary credibility. Nevertheless the Fourth Circuit court overruled the District Court. The Fourth Circuit agreed with the government's position that detention was derived from war-making powers of Article I and II, and as such no court could intervene without violating the separation of powers.

O'Connor's opinion agreed that capture and detention of both lawful and unlawful combatants are part of war. Citing *Ex Parte Quirin*, O'Connor affirmed that being a US citizen is no bar to being held as an enemy combatant. However, O'Connor's opinion disagreed with government's self-proclaimed power to hold detainees indefinitely, for as long as the war continues:

> The Government [argues] that the detention of enemy combatants during World World II was just as 'indefinite' while that war was being fought… We recognize that the national security underpinnings of the "war on terror,' although crucially important are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a normal cease-fire agreement… If the Government does not consider this unconventional war won for two generations, and if it maintains that during that time that Hamdi might, if released, rejoin forces fighting against the United

> States, then the position it has taken through the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

In this study, we have seen that the Court is willing to defer to executive branch expertise in those situations where the threat is imminent and the agency's expertise is appropriately used to ameliorate the threat. During the emergent phase of a national security crisis, judges and justices are generally supportive of the executive branch actions generally. The Court, however, has an expectation that once the period of active hostilities has passed, there will be a return to the status quo. The imminence of the threat plays a large factor in determination of the reasonableness of governmental action. O'Connor statements fit squarely within this general Supreme Court trend. Her opinion suggests that members of the Court see the benefit of allowing the executive branch some leeway in areas of national security, subject to reasonable limits. O'Connor writes that:

> It is a clearly established principle of the law of war that detention may last no longer than active hostilities…Further, we understand Congress' grant of authority to detain for the duration of the relevant conflict and our understanding is based on longstanding law-of-war principles. If 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."[259]

The government's primary argument, however, is based on separation of powers claims. In essence, the government argues that in a time of war, and where the case involves some element of the ongoing conflict, the judicial branch is not constitutionally allowed to contradict any of the executive branch's decisions. If the judiciary should be asked to make any decisions, it should do so under the greatest deference to the judgment and needs of the executive branch.

[259] *Hamdi v Rumsfeld*, 542 US 507, 519 (2004)

Reiterating the argument before the Fourth Circuit, the majority opinion summarized the government's claim:

> Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process… At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard…where the focus is exclusively on the factual basis supplied by the Executive to support its own determination.[260]

The executive branch's claim would broaden the war-making power to the point where the executive branch alone can define what the role of the other branches may be. The government's argument is that in a time of war, the constitutional role of the judiciary is to accept whatever the executive branch deems is necessary for the war. The needs of national security should allow the executive branch a free hand. If the judiciary should act independent and use its own judgment, it would be interfering with the constitutional role of the executive branch and would upset the division of power envision by the Framers of the Constitution. In wartime and where the case might involve some element of the conflict, the role of the Supreme Court should be reduced to a complementary role, supporting the executive branch.

O'Connor disagreed, noting that the military and members of the Executive branch have their roles to play in a time of war, but so does the Supreme Court:

> The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs…Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their

[260] *Hamdi v Rumsfeld*, 542 US 507, 527 (2004)

> steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[261]

O'Connor's remarks emphasize that there is a balancing act between the needs of the government against the constitutional liberty interests of the individual. The government has an incontrovertible interest in waging and winning a war, but this interest cannot subsume the very the constitutional rights that the government is ostensibly defending in this conflict.

The majority rejects the government's claims of ruinous catastrophe if judges were to hear habeas corpus challenges. The majority opinion notes that the habeas corpus clause in the Constitution demonstrates a structural demand for some element of due process. At its very heart, habeas corpus is a time-honored mechanism, meant to enforce some government accountability against arbitrary detention. Thus, O'Connor notes that the habeas corpus clause allows detainees, even if they are not citizens, some due process to challenge their detention. In the meantime, O'Connor rejects the government's claim for the very lenient "some evidence" standard because the possibility of indefinite detention, weighs too heavily against the liberty interest of the individual. However, O'Connor's opinion does not mandate exactly what due

[261] *Hamdi v Rumsfeld*, 542 US 507, 535 (2004)

process procedures are necessary, only that the detainees have some "opportunity to rebut the Executive's factual assertions before a neutral decision maker."[262]

Finally, O'Connor disposes of the separation of powers argument. She notes that the government's argument against judicial hearings on habeas corpus violates the very concept of separation of powers:

> [T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights if the Nation's citizens… Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[263]

The government's claim of power in *Hamdi* is an expansive one and supported by its own proclaimed expertise in war-related matters. The government's logic is that very nature of warfare places the executive branch decision-making as paramount above others. In essence, the war justifies every executive branch action, and no other branch may question the constitutional of its actions. O'Connor notes this is an extreme position, and not one that supports Framer's intention to divide power in the Constitution.

Justice Scalia, who sided with the government in the previous *Rasul* case, surprisingly disagreed with the government claim. Scalia's opinion goes way beyond O'Connor's statement that "some due process is required." Scalia's dissent argues that the Executive cannot hold any United States citizen indefinitely. Contrary to the claim of the executive branch, a habeas

[262] *Hamdi v Rumsfeld*, 542 US 507, 537 (2004).
[263] *Hamdi v Rumsfeld*, 542 US 507, 536 (2004)

corpus challenge is a proper one in this situation. In fact, Scalia notes that historically, the habeas corpus clause was built into the Constitution specifically to combat indefinite detention by the government. Absent some definitive suspension of the habeas corpus clause in the Constitution, Scalia would advocate either a charge of treason or let Hamdi go free. In any case, without a suspension of habeas corpus, the military cannot indefinitely imprison citizens without some form of due process.[264]

The reader may sense that administration's patronizing towards the Supreme Court did not help. Additionally, there are several extreme claims within the government's argument that undercut its own credibility before the Supreme Court. First, the administration showed some conscious attempt to create a jurisdictional grey area. The administration separated US citizens from non-citizens within the prisoner population and moved foreign prisoners to Guantanamo Bay. Early on, the executive branch relied heavily upon the lack of US "sovereignty" within the heavily fortified Guantanamo Naval Base to deny jurisdiction by any US court. By insisting on the legal fiction that Cuban retained control over the US naval base, the administration showed an attempt to "game" the system and exploit a legal loophole.

Secondly, the government presented no independent evidence. In *Hamdi*, the government's case relied primarily on the affidavit of a government aide who, by government's own admission, had no direct knowledge of the situation but merely consulted classified documents. To compound matters, neither the courts involved nor any detainees were ever allowed to question the credibility of this "expert witness." Both Scalia's dissent and O'Connor's majority opinion find great fault in this lack of evidentiary support. As a tactic, the

[264] *Hamdi v Rumsfeld*, 542 US 507 (2004). Justice Scalia, dissenting.

use of a hearsay document ignored federal rules of evidence. More problematically, the government's lawyers built their entire case around a questionable hearsay and apparently expected no resistance from the Supreme Court.

Finally, the government's claim that habeas corpus claims heard by the Judiciary would interfere with the conduct of a war is a rather bold argument. In effect, the government's claim holds the judiciary as an obstacle. The executive branch's claim in this case, implies an adversarial view of the Court's constitutional function. In point of fact, the government's position openly attacks the Court's competence. If the government's claim is to be believed, the Court can never be constitutionally capable of judging the executive branch either in a time of war and where a case might touch and concern a war-related subject. The executive branch's claim would reduce the Court to an impotent rubber-stamp, an adjunct to the Executive. It is a direct challenge to the Court's constitutional authority to be a check against the Executive. The government's position is a stark claim of absolute executive branch primacy during a time of war. The reader might see how such an adversarial stance would not necessarily be popular with the Court, even if they were predisposed to a deferential treatment of the government's position. Undaunted with the result in *Hamdi*, the government prepared a new strategy. This time around, the executive branch would enlist Congress as an ally against the Court for the next set of habeas corpus challenges.

In response to *Hamdi*, Congress enacted the Detainee Treatment Act (DTA) in 2005. This statute, among other things, enforced certain procedures for treatment of all prisoners, including detainees. It ratified the military commissions created by order of the Bush administration and purported to strip jurisdiction of federal courts from hearing habeas corpus

petitions. It also gave authority to Combatant Status Review panels, which evolved from a military order Bush administration authorized in 2003. The DTA established a series of military commissions, called Combatant Status Review Tribunals.[265] The stated goal of such tribunals was ascertain the status of certain detainees at Guantanamo Bay. If they were adjudged to be "enemy combatants", they could be held indefinitely. One of the first detainees to be considered for these trials was Salim Hamdan, a Yemeni national.

Hamdan was captured during the hostilities in Afghanistan, and the government charged him with being involved in terrorist after having received weapons training in Afghanistan. The government believed that Salim Hamdan was a good test case for the newly created tribunal system because of Hamdan's close association with Al Qaeda's terrorist head, Osama Bin Laden, having served as bodyguard and driver.[266] In Hamdan's case, the government charged him with "conspiracy [to] attack civilians; civilian objections… and terrorism."[267] While the military commission proceedings were underway, a lower district court granted the habeas corpus petition by Salim Hamdan, finding that Hamdan should be afforded the protections of the Geneva Convention. The DC Court of Appeals reversed this decision, arguing that the Convention did not apply to Hamdan, as an enemy combatant. Thus, there were two related arguments by the government before the Supreme Court in this case.

The first claim was that the Detainee Treatment Act (DTA) which stripped jurisdiction of all federal courts from hearing habeas corpus cases of detainees. Theoretically, the statute could

[265] Deputy Secretary of Defense, *Memorandum for the Secretary of the Navy*, 7 July 2004. Available at: http://www.defense.gov/news/Jul2004/d20040707review.pdf. This is a website and document repository run by the Department of Defense.
[266] Jonathan Mahler, *The Challenge* (New York: Farrar, Straus and Giroux, 2008), see especially pp 83
[267] *Hamdan v Rumsfeld*, 548 US 557, 561-562 (2006).

also strip the Supreme Court of the ability to hear the instant case. The second claim was that the military commissions had sole jurisdiction to try individuals such as Hamdan under both the inherent constitutional powers of the president and the Authorization for the Use of Military Force (AUMF) enacted by Congress. It was an open question whether DTA actually stripped jurisdiction of the Supreme Court of cases that were in progress, such as Hamdan. Senators Graham and Kyl filed an amicus brief stating that there was legislative history recorded in the Congressional Record intended to strip such jurisdiction from the Supreme Court. The petitoner's lawyers discovered that no such exchange ever happened in real time. In fact, the Senators had it inserted after the fact into the record and portrayed the exchange as contemporaneous.[268]

Justice Stevens, writing for the majority in part, noted that military commission are creations of military necessity and in order to be legitimate, must be authorized by some enabling statute or law. Stevens noted that the Congressional statute authorizing force, also known as AUMF had no language that authorized any military tribunal in any location. In addition, Stevens questioned the existence of military exigency when Hamdan was charged nearly five years after his capture. Stevens noted that any tribunal or military commission must abide by the Uniform Code of Military Justice as enacted by Congress and confirmed in treaties such as the Geneva Convention.

The majority opinion also rejected the charge of "conspiracy to commit terrorism." The charge of "conspiracy" is traditionally a criminal charge and appears nowhere as a violation of

[268] *Hamdan v Rumsfeld*, 548 US 557, 572 (2006). See also Mahler, the Challenge, pg 242-243. A similar investigative account is presented by Emily Bazelon at: http://www.slate.com/articles/news_and_politics/jurisprudence/2006/06/not_live_from_capitol_hill.html

war in international law of war. In effect, the government could not convict him for something not considered a violation of the law of war. In addition, the Court found that the military commissions lacked the due process requirements that are provided in the Uniform Code of Military Justice as well as the Geneva Convention. In particular, Stevens highlighted the inability of defendants from challenging evidence used against him. Hearsay or "coerced evidence," also known as admissions gathered during torture, may be entered against the defendant.[269] The majority found that the procedures were so defectively unfair that they violated the fairness expectations built into federal law and international treaties. Almost as an afterthought, the Court also announced that jurisdiction could not be stripped for a pending case such as Hamdan's.

In this case then, the Supreme Court pushed back against the other two branches of government. The majority opinion primarily focused on the competing visions of the role of the due process. The military commission was created as result an demand of O'Connor opinion in *Hamdi* requiring "some due process." The executive branch enabled such commissions, but defiantly added elements of torture and hearsay that could not satisfy the majority opinion's expectation of "due process." While Congress can certainly strip jurisdiction of federal courts, in the instant case, the Supreme Court avoided the question as to whether the Legislative branch can override the ability of the Judiciary to hear habeas corpus cases. The majority opinion simply answered the question as to the instant pending case, without going any further. In *Hamdan,* the Court reiterated and clarified the *Hamdi* ruling, demanding that that due process must play in any kind of tribunal. With *Hamdan*, the Court held that if the executive branch

[269] *Hamdan v Rumsfeld*, 548 US 557, 607-608

insists on administering judicial-like proceedings, they must still abide by basic elements of fairness expected of judicial proceedings, which are themselves enshrined in both federal law and the Constitution itself.

Justice Stevens' opinion glossed over the constitutionality of Congress attempting to strip jurisdiction over detainee habeas corpus cases. The Constitution grants power to Congress to "[t]o constitute Tribunals inferior to the supreme Court" which implicitly means that Congress can add or remove jurisdiction from federal courts below the Supreme Court.[270] Additionally, the Constitution allows the Congress to modify the jurisdiction of the Supreme Court.[271] Not satisfied with the *Hamdan* result, Congress would attempt to clarify their point of view with the Military Commissions Act (MCA) in 2006, removing jurisdiction from all federal courts for habeas corpus cases. The MCA purported to bar any federal court, including the Supreme Court from hearing any habeas corpus case originating from Guantanamo Bay.

Invariably, another petition made its way to the Supreme Court, and in *Boumediene v Bush*. Once again, the government tried the same jurisdiction argument, derived from *Eisentrager*. As before, the executive branch contended that since Cuba had sovereignty over the physical location of Guantanamo Bay, then no US court could hear the detainee cases that originated from Guantanamo Bay. The government attempted to argue the sovereignty theory was in existence even before the colonial period of the early United States. In response, Justice Kennedy writing for the majority, engaged in an extensive foray into historical legal texts and simply found the argument about geographical location removing jurisdiction to be flawed.

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[270] *US Constitution*. Article 1, Section 8, Clause 9.
[271] *US Constitution*. Article 3, Section 2, Clause 2. "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Kennedy favored the practical and contextual view of jurisdiction, noting that a formalistic approach simply did not work. Most strikingly, Kennedy remarked upon the singularly unusual effect upon the Constitution if the government's formal, technical view of sovereignty were followed:

> [B]y entering into the 1903 Lease Agreement, [the government recognized] that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that surrendering formal sovereignty over any unincorporated territory to a third party, which at the same time entering into a lease that grants total control… it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even where the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution"… The former position [of abstaining from questions involving formal sovereignty] reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter [of allowing the branches the ability to switch off the Constitution at will] would permit a striking anomaly in our triparte system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."[272]

Kennedy's opinion showed the bizarre inconsistencies of the government position. In response to the constant repetition by the executive branch about sovereignty, the majority attempted to answer the question by equating it with an unconstitutional absorption of power. Justice Kennedy put any doubt about the constitutionality of the "sovereignty argument" to rest.

[272] *Boumediene v Bush*, 553 US 723, 758 (2008)

With regards to the purported jurisdiction stripping capacity of the MCA, Justice Kennedy's opinion launched into the long history of the habeas corpus. Kennedy outlined its central place in English legal history, stretching back to the Magna Carta and perhaps beyond. Kennedy noted that the Framers of the Constitution understood the importance of the suspension clause involving habeas corpus and they specifically wrote the habeas corpus clause to protect against abuses by government. As such, with the habeas corpus clause, the Constitution protects a liberty interest as well as a constitutional right. Congress may be able to strip jurisdiction from federal courts, but they must amend the Constitution if they intend to remove the ability of federal courts to hear habeas corpus challenges.

The *Boumediene* case then represents the complete repudiation of the other branches' attempts to circumvent habeas corpus. The Court initially showed some deference to a military necessity argument, until the executive branch's approach reframe the argument around the competency of the Court to perform its constitutional function. In this study, we've seen that the Court is more likely to be deferential in matters where members perceive the executive branch has appropriate competency in the case's subject matter. The government's attempt to wrestle the Court's core function of "saying what the law is" transformed these cases into a struggle for competing vision of separation of powers. One might view the government's approach in these cases as problematic, considering that the administration was asking the Supreme Court to agree that the Court would be incompetent to perform its primary function.

Discussion and Summary

Much as quadrant 1 would have forecast, most of the cases decided in a pro-government fashion. But where the government strategy turned the focus upon the Court's own authority, it changed the dynamic of the decision-making process. Instead of trying to decide if the executive branch's expertise was sufficient to declare certain persons as "enemy combatants" and therefore close off their ability to bring a legal suit, the government's approach became one where the very authority of the Court to hear cases was called into question. By transforming the argument into a debate about whether the Court should even be allowed to hear habeas corpus arguments, government attorneys explicitly demanded that the Court defer, or else the security of the nation would suffer. This strategy implicated the Court's ability to render an independent judgment as problematic, where a ruling that did not otherwise agree with the executive branch would imperil the national security.

The Court responded to this challenge by pushing back against both the legislative and executive branches. By stating habeas corpus rights are a direct constitutional right, the majority re-framed the decision. Instead of the Supreme Court acting in a fashion that defied the ability of the executive branch to defend the nation, the Court's opinions recast three Guantanamo Bay detainee cases as a matter of constitutional interpretation relatively free of political or military issues. The majority opinions do acknowledge that war may be a pressing issue that may justify some detainments, but Justice O'Connor's point was that there should be accountability even in wartime. These decisions pushed back on the government's argument of unlimited and unfettered power to act due to the exigencies of war. In the process, the Court re-established that even in wartime, members of the Court will protect their authority and ability to interpret the Constitution.

The quadrant typology would have predicted deference towards the government, and initial cases that preceded the troika of *Hamdan*, *Hamdi* and *Boumediene* displayed a generalized deference towards the executive branch. Once the government approach became more heavy-handed and adversarial, the frame of the argument no longer was solely about government expertise. To some degree, the government's arguments were also about the degree to which the executive branch could interpret the constitution and where the executive branch's constitutional interpretation could override Supreme Court decision-making. Once the arguments settled into this framework, the subtext of the battle became that of the war-time authority of the president pitted against the judicial independence of the Supreme Court. The frame quickly changes from the 4 cell typology about expertise and threat, and into an argument about relative power of each branch in a time of war. The reader, then, may not be surprised that the Court ruled against the government and incidentally, the ruling also preserved the Court's authority and ability to hear habeas corpus cases. The takeaway point, then, is that if the government makes less adversarial arguments, based on its superior expertise to ameliorate the threat, one might expect a more pro-government reaction by the Supreme Court. However, if the executive branch attempts an argument that challenges the Court's very authority, the results will not be very favorable to the government. The Supreme Court may be the "weakest branch" as Hamilton says, but they are not without their own means to protect their own turf and power.

Chapter 8: Summary and Conclusion

This study started out with two questions. The first was: "Does war influence judicial decision-making?" The second was: "Do national security claims influence judicial decision-making?"

The answer to the first question is: In a general hypothetical significant war, there is a statistically significant finding of voting against the government. In the models run using the Spaeth database where the government is a party, the influence of all significant wars on judicial decision-making generally was to vote against the government. Presidential approval ratings are statistically significant only in wartime, but with a positive coefficient. Outside of wartime, presidential approval ratings are not statistically likely to influence Supreme Court behavior. This result suggests that while Courts vote strategically and support a popular president, they are still statistically likely to find against the government in a significant war. These findings altogether suggest that that the Supreme Court votes strategically with an eye towards the popularity of the president, but revert to skepticism of government's wartime claims as the war progresses.

The answer to the second question is: National security claims brought by the government achieve a statistically significant likelihood that the Supreme Court will vote against the government. National security claims were statistically significant with a negative signifier. This finding is consistent across all the major wars as well as peacetime. It also suggests that the Supreme Court generally is not predisposed to defer to the executive branch's arguments when it comes to national security claims.

There are 223 cases of national security claims from across 70 years from the October term of 1941. In the qualitative analysis of those cases, judicial decision making starts with great deference towards the executive branch. The Japanese internment cases demonstrate the general tendency for members of the Court to abdicate their independent judgment for the sake of military necessity. This deference waned as World War II reached a conclusion, but left judicial precedents that expanded presidential power.

However, we have seen in this study that this deference towards the executive branch is limited. As the Cold War dawned, the impending threat of invasion receded. The majority of cases in this study, as one might expect, occurred during the 50 years of the long cold war between the two-superpower blocks. Initially, the Red Scare cases showed some of the same proclivity towards judicial deference. At first, the Supreme Court seemed ready to accept that members of the Communist party were ready and willing to engage in violence and overthrow the government of the United States. Yet, the repeated claims of impending violence rang hollow, as the government pursued individuals who seemed to have little or no intent to do any harm. Members of the Court could not help but be exposed to the continuing claims of threat that never really quite surfaced in case after case.

During the Cold War period, members of the Court were cognizant about the possibility of threat by the Soviet Union. The Court was far more willing to defer to the expertise of security agencies but only in those cases where security agency was acting reasonably to ameliorate a threat or to preserve their operational capacity against a threat. The ambivalence of the Court only extended to those cases where the justices perceived that the government overreached its claims. As the Cold War progressed, and the government's secret operations before and during

the Vietnam War were exposed, judicial skepticism of government claims were reinforced. The judges and justices strictly vetted claims about national security. Even Congress shared this view, as law enforcement was required to separate their own operations from that of the clandestine services.

The September 11 attacks brought a new sense of imminent threat to the country. The Supreme Court acted with great deference towards government claims that would, in other times, be considered discriminatory and constitutionally suspect in the early years after the 9/11 events leading into the Afghan War. As time went on, the executive branch attempted to expand its power, declaring that no other branch could decide upon the propriety or the constitutionality of its actions. Deliberately adversarial, the executive branch decided that it would attempt to limit Supreme Court's ability to make decisions.

The Court responded to the challenge by flexing its own institutional muscles. In the Guantanamo Bay cases what started as a series of cases about habeas corpus challenges evolved into a power struggle between the Supreme Court and her sister branches. Initially, the Court accepted the executive branch's justification for indefinite detention, but balked at some of the extreme arguments to restrict habeas corpus. In each successive case, the executive branch raised the stakes, actively invoking the specter of losing the Afghan war because of judicial interference. The Court resisted, noting the various constitutional deficiencies. Both the liberals and the conservatives on the Supreme Court banded together and pushed back against the attempt to limit habeas corpus jurisdiction. Additionally, the Court categorically rejected the government's arguments as both incomplete and unconstitutional.

There are some areas that are outside the field of this work but could have added insight. The most interesting addition would be a study on how lower federal courts deal with both wartime cases and national security claims cases. One specific question involves the lower courts: is there any difference in deference levels at the federal district level and the appellate levels? Certain circuit courts have a reputation as being more conservative or more liberal. In this study, ideological motivations, represented by the Martin-Quinn scores, are not statistically significant. The specific question would then be: do the Circuit Courts act ideologically? One might speculate that the circuit courts know that the Supreme Court is the final arbiter, which may free the appeals courts to act more within their own ideological preferences. Appeals court judges might very well vote their policy preferences, even if – or especially if – they expect the Supreme Court to override their decisions.

This study focuses upon the Supreme Court as an institution but does not focus on individual judicial votes. Individual votes by Justices have produce patterns of behavior that could be interesting. In particular, a focus on the development of the area of the "swing" voter, or the voter who has the most influence in an otherwise split court would be an interesting study. One such specific question is: Do the government and other political actors attempt a more precise and pointed presentation in their brief and oral arguments, targeting those they believe are the more influential judges? This would in effect, represent the government's attempt to lobby a court in a pinpoint fashion. Even if the government does attempt such a tactical approach, another related question would be: If such tactical approaches exist, how successful are they? This type of question would complement this study by connecting tactical and strategic approaches to Supreme Court appearances.

One other area that might be worthy of future research would be in the denial of certiorari. The problem with a denial of cert, from a logical point of view, is that the lack of evidence is not evidence of anything. There are quite a few reasons why a cert is denied, but where the Justices rarely – if ever – explain why they did not grant a cert. A denial of certiorari is generally hard to analyze. However, there may be different patterns of cert grants and cert denials during a time of war. Although a denial of cert by the Supreme Court is not proof of anything, the net outcome of a denial of cert with a lower federal court favoring a government position can be seen as an indirect way of showing deference to the government. There may be some statistical evidence of deference in these situations but the methodology would probably be complicated and definitely require a federal database of lower court decisions as well.

In this survey of cases, the common theme in wartime and national security claims is one of emergency, or the prospect of impending emergency. In these cases, the actions of a governmental agency are challenged, and the Supreme Court is asked to pass judgment upon the legality or the constitutionality of these actions. To do so, the Court usually makes an implied judgment about how great or imminent the threat may be. The decision may be influenced by the psychological context of the case. The fear of making the wrong decision may cause the Justices to be more dependent on the judgment of others who are perceived to be more competent to handle said emergency. In every case in this study, judicial decision-making attempts to strike a balance between the needs of the people and the needs of the government, given the facts of the cases and the presence of the elements of threat and perceived competency. In these situations, the government enjoys a natural advantage, but justices are not predisposed towards deference. As we have seen in this study, the Court does not reflexively and

automatically defer to the government position. The Supreme Court has an important role - more so in a time of emergency - to ensure that the other two branches of government are not just acting for short-term needs of the moment.

Justice O'Connor was correct. War is not a blank check for judicial deference – at least, not all the time. War is not the talismanic invocation that produces instant judicial acquiescence. The balance of power and the checks built into the Constitution are, for the most part, secure, even in a state of war. The law, it would seem, is not silent, even during war. Where the Justices show markedly higher levels of deference, one may surmise that those are exceptional circumstances that demand a greater level of flexibility. Justices make decisions based upon what they know, what they are presented and their perception of the possible outcomes. In that sense, the Supreme Court is acting normally, attempting to use their own independent judgment under the most exceptional of circumstances. Both in war and in national security cases, the Supreme Court continues to fulfill its role as a check and balance against the executive branch. One might argue that this is the most exceptional finding of all.

Appendix

National Security Cases

Citation	Term	Name of Case
314 U.S. 326	1941	TEXTILE MILLS SECURITIES CORP V COMMISSIONER
314 U.S. 510	1941	EX PARTE DON ASCANIO COLONNA
315 U.S. 289	1941	UNITED STATES V BETHLEHEM STEEL CORP.
317 U.S. 1	1941	EX PARTE QUIRIN
317 U.S. 69	1942	EX PARTE KUMEZO KAWATO
318 U.S. 236	1942	VIERECK V UNITED STATES
319 U.S. 432	1942	KOREMATSU V UNITED STATES
319 U.S. 583	1942	TAYLOR V MISSISSIPPI
320 U.S. 115	1942	YASUI V UNITED STATES
320 U.S. 118	1942	SCHNEIDERMAN V UNITED STATES
320 U.S. 81	1942	HIRABAYASHI V UNITED STATES
322 U.S. 398	1943	L.P. STEUART & BRO. INC V BOWLES
322 U.S. 665	1943	BAUMGARTNER V UNITED STATES
322 U.S. 680	1943	HARTZEL V UNITED STATES
323 U.S. 214	1944	KOREMATSU V UNITED STATES
323 U.S. 283	1944	EX PARTE ENDO
325 U.S. 1	1944	CRAMER V UNITED STATES
325 U.S. 478	1944	KEEGAN V UNITED STATES
326 U.S. 135	1944	BRIDGES V WIXON
326 U.S. 404	1945	MARKHAM V CABELL
327 U.S. 1	1945	IN RE YAMASHITA
327 U.S. 304	1945	DUNCAN V KAHANAMOKU
327 U.S. 92	1945	CASE V BOWLES
328 U.S. 303	1945	UNITED STATES V LOVETT

328 U.S. 654	1945	KNAUER V UNITED STATES
329 U.S. 211	1946	FISWICK ET AL. V. UNITED STATES
330 U.S. 258	1946	UNITED STATES V. UNITED MINE WORKERS OF AMERICA
330 U.S. 631	1946	HAUPT V. UNITED STATES
331 U.S. 111	1946	FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, V. MOHAWK WRECKING & LUMBER CO. ET AL.
331 U.S. 503	1946	CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, V. ALLEN ET AL.
332 U.S. 469	1947	SILESIAN-AMERICAN CORP. ET AL. V. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
332 U.S. 480	1947	CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, V. UEBERSEE FINANZ-KORPORATION, A. G.
332 U.S. 708	1947	VON MOLTKE V. GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION
333 U.S. 138	1947	WOODS, HOUSING EXPEDITER, V. CLOYD W. MILLER CO. ET AL.
334 U.S. 742	1947	LICHTER ET AL., DOING BUSINESS AS SOUTHERN FIREPROOFING CO., V. UNITED STATES
335 U.S. 160	1947	LUDECKE V. WATKINS, DISTRICT DIRECTOR OF IMMIGRATION
335 U.S. 188	1947	AHRENS ET AL. V. CLARK, ATTORNEY GENERAL
335 U.S. 601	1948	KLAPPROTT V. UNITED STATES
337 U.S. 472	1948	PROPPER, RECEIVER, V. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.
338 U.S. 197	1948	HIROTA V MACARTHUR
338 U.S. 327	1949	PARKER ET AL. V. COUNTY OF LOS ANGELES ET AL.
338 U.S. 521	1949	UNITED STATES EX REL. EICHENLAUB V. SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION
338 U.S. 537	1949	UNITED STATES EX REL. KNAUFF V. SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION
339 U.S. 162	1949	DENNIS V. UNITED STATES
339 U.S. 258	1949	MORFORD V. UNITED STATES
339 U.S. 763	1949	JOHNSON, SECRETARY OF DEFENSE, ET AL. V. EISENTRAGER, ALIAS EHRHARDT, ET AL.
339 U.S. 846	1949	OSMAN ET AL. V. DOUDS, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD
340 U.S. 159	1950	BLAU V. UNITED STATES
340 U.S. 332	1950	BLAU V. UNITED STATES
340 U.S. 367	1950	ROGERS V. UNITED STATES
341 U.S. 123	1950	JOINT ANTI-FASCIST REFUGEE COMMITTEE V. MCGRATH, ATTORNEY GENERAL, ET AL.

341 U.S. 446	1950	ZITTMAN V. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
341 U.S. 471	1950	ZITTMAN V. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
341 U.S. 475	1950	MCCLOSKEY V MCGRATH
341 U.S. 494	1950	DENNIS ET AL. V. UNITED STATES
341 U.S. 56	1950	GERENDE V. BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE
341 U.S. 716	1950	GARNER ET AL. V. BOARD OF PUBLIC WORKS OF LOS ANGELES ET AL.
342 U.S. 1	1951	STACK ET AL. V. BOYLE, UNITED STATES MARSHAL
342 U.S. 308	1951	GUESSEFELDT V. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.
342 U.S. 330	1951	CITIES SERVICE CO. ET AL. V. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
342 U.S. 347	1951	UNITED STATES EX REL. JAEGELER V. CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.
342 U.S. 485	1951	ADLER ET AL. V. BOARD OF EDUCATION OF THE CITY OF NEW YORK
342 U.S. 524	1951	CARLSON ET AL. V. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE
342 U.S. 580	1951	HARISIADES V. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION
343 U.S. 156	1951	KAUFMAN ET AL. V. SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL.
343 U.S. 169	1951	UNITED STATES V. SPECTOR
343 U.S. 205	1951	UEBERSEE FINANZ-KORPORATION, A. G., V. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
343 U.S. 341	1951	MADSEN V. KINSELLA, WARDEN
343 U.S. 579	1951	YOUNGSTOWN SHEET & TUBE CO. ET AL. V. SAWYER
343 U.S. 717	1951	KAWAKITA V. UNITED STATES
344 U.S. 149	1952	UNITED STATES V. CALTEX (PHILIPPINES), INC. ET AL.
344 U.S. 183	1952	WIEMAN ET AL. V. UPDEGRAFF ET AL.
344 U.S. 375	1952	NATIONAL LABOR RELATIONS BOARD V. DANT ET AL., DOING BUSINESS AS DANT & RUSSELL, LTD.
345 U.S. 1	1952	UNITED STATES V. REYNOLDS ET AL.
345 U.S. 183	1952	ORVIS ET AL. V. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN
345 U.S. 206	1952	SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, V. UNITED STATES EX REL. MEZEI
345 U.S. 229	1952	HEIKKILA V. BARBER, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.
345 U.S. 242	1952	ALBERTSON ET AL. V. MILLARD, ATTORNEY GENERAL OF MICHIGAN, ET AL.

345 U.S. 83	1952	ORLOFF V. WILLOUGHBY, COMMANDANT
346 U.S. 209	1952	BRIDGES ET AL. V. UNITED STATES
346 U.S. 273	1952	ROSENBERG ET AL. V. UNITED STATES
347 U.S. 522	1953	GALVAN V. PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE
349 U.S. 155	1954	QUINN V. UNITED STATES
349 U.S. 190	1954	EMSPAK V. UNITED STATES
349 U.S. 219	1954	BART V. UNITED STATES
349 U.S. 331	1954	PETERS V. HOBBY ET AL.
350 U.S. 422	1955	ULLMANN V. UNITED STATES
350 U.S. 497	1955	PENNSYLVANIA V. NELSON
350 U.S. 551	1955	SLOCHOWER V. BOARD OF HIGHER EDUCATION OF NEW YORK CITY
351 U.S. 115	1955	COMMUNIST PARTY OF THE UNITED STATES V. SUBVERSIVE ACTIVITIES CONTROL BOARD
351 U.S. 345	1955	JAY V. BOYD, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE
351 U.S. 536	1955	COLE V. YOUNG ET AL.
351 U.S. 91	1955	UNITED STATES V. ZUCCA, ALIAS SARNI
352 U.S. 1	1956	MESAROSH, ALIAS NELSON, ET AL. V. UNITED STATES
352 U.S. 145	1956	LEEDOM ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD V. INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS
352 U.S. 153	1956	AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, V. NATIONAL LABOR RELATIONS BOARD ET AL.
352 U.S. 270	1956	SORIANO V. UNITED STATES
352 U.S. 306	1956	UNITED STATES V. ALLEN-BRADLEY CO.
352 U.S. 313	1956	NATIONAL LEAD CO. V. COMMISSIONER OF INTERNAL REVENUE
352 U.S. 36	1956	BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, V. CHASE NATIONAL BANK OF NEW YORK, TRUSTEE, ET AL.
353 U.S. 194	1956	UNITED STATES V. WITKOVICH
353 U.S. 232	1956	SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO
353 U.S. 252	1956	KONIGSBERG V. STATE BAR OF CALIFORNIA ET AL.
353 U.S. 657	1956	JENCKS V. UNITED STATES
354 U.S. 178	1956	WATKINS V. UNITED STATES

354 U.S. 234	1956	SWEEZY V. NEW HAMPSHIRE, BY WYMAN, ATTORNEY GENERAL
354 U.S. 298	1956	YATES ET AL. V. UNITED STATES
354 U.S. 363	1956	SERVICE V. DULLES ET AL.
355 U.S. 115	1957	ROWOLDT V. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE
355 U.S. 273	1957	HEIKKINEN V. UNITED STATES
355 U.S. 66	1957	YATES V. UNITED STATES
356 U.S. 129	1957	NISHIKAWA V. DULLES, SECRETARY OF STATE
356 U.S. 148	1957	BROWN V. UNITED STATES
356 U.S. 165	1957	GREEN ET AL. V. UNITED STATES
356 U.S. 363	1957	YATES V. UNITED STATES
356 U.S. 576	1957	SACHER V. UNITED STATES
356 U.S. 660	1957	NOWAK V. UNITED STATES
356 U.S. 670	1957	MAISENBERG V. UNITED STATES
356 U.S. 691	1957	BONETTI V. ROGERS, ATTORNEY GENERAL, ET AL.
357 U.S. 116	1957	KENT ET AL. V. DULLES, SECRETARY OF STATE
357 U.S. 144	1957	DAYTON V. DULLES, SECRETARY OF STATE
357 U.S. 197	1957	SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., V. ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.
357 U.S. 399	1957	BEILAN V. BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA
357 U.S. 468	1957	LERNER V. CASEY ET AL., CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY
357 U.S. 513	1957	SPEISER V. RANDALL, ASSESSOR OF CONTRA COSTA COUNTY, CALIFORNIA
357 U.S. 545	1957	FIRST UNITARIAN CHURCH OF LOS ANGELES V. COUNTY OF LOS ANGELES ET AL.
358 U.S. 147	1958	FLAXER V. UNITED STATES
358 U.S. 331	1958	ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, V. CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE, ET AL.
359 U.S. 535	1958	VITARELLI V. SEATON, SECRETARY OF THE INTERIOR, ET AL.
360 U.S. 109	1958	BARENBLATT V. UNITED STATES
360 U.S. 423	1958	RALEY ET AL. V. OHIO

360 U.S. 474	1958	GREENE V. MCELROY ET AL.
360 U.S. 709	1958	TAYLOR V. MCELROY ET AL.
360 U.S. 72	1958	UPHAUS V. WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE
362 U.S. 1	1959	NELSON ET AL. V. COUNTY OF LOS ANGELES ET AL.
362 U.S. 390	1959	NIUKKANEN, ALIAS MACKIE, V. MCALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE
363 U.S. 405	1959	KIMM V. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE
363 U.S. 666	1959	SCHILLING V. ROGERS, ATTORNEY GENERAL
364 U.S. 350	1960	CHAUNT V. UNITED STATES
364 U.S. 372	1960	MCPHAUL V. UNITED STATES
364 U.S. 388	1960	UPHAUS V. WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE
364 U.S. 426	1960	POLITES V. UNITED STATES
364 U.S. 631	1960	TRAVIS V. UNITED STATES
365 U.S. 399	1960	WILKINSON V. UNITED STATES
365 U.S. 431	1960	BRADEN V. UNITED STATES
366 U.S. 259	1960	SLAGLE ET AL. V. OHIO
366 U.S. 36	1960	KONIGSBERG V. STATE BAR OF CALIFORNIA ET AL.
366 U.S. 82	1960	IN RE ANASTAPLO
367 U.S. 1	1960	COMMUNIST PARTY OF THE UNITED STATES V. SUBVERSIVE ACTIVITIES CONTROL BOARD
367 U.S. 203	1960	SCALES V. UNITED STATES
367 U.S. 290	1960	NOTO V. UNITED STATES
367 U.S. 389	1960	COMMUNIST PARTY, U. S. A., ET AL. V. CATHERWOOD, INDUSTRIAL COMMISSIONER
367 U.S. 456	1960	DEUTCH V. UNITED STATES
367 U.S. 886	1960	CAFETERIA & RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, ET AL. V. MCELROY ET AL.
368 U.S. 278	1961	CRAMP V. BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY
368 U.S. 436	1961	NOSTRAND ET AL. V. LITTLE ET AL.
372 U.S. 539	1962	GIBSON V. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE
373 U.S. 647	1962	WHEELDIN ET AL. V. WHEELER

374 U.S. 109	1962	YELLIN V. UNITED STATES
374 U.S. 469	1962	GASTELUM-QUINONES V. KENNEDY, ATTORNEY GENERAL
376 U.S. 149	1963	GREENE V. UNITED STATES
378 U.S. 500	1963	APTHEKER ET AL. V. SECRETARY OF STATE
380 U.S. 479	1964	DOMBROWSKI ET AL. V. PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UNAMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL.
380 U.S. 503	1964	AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN V. SUBVERSIVE ACTIVITIES CONTROL BOARD
380 U.S. 513	1964	VETERANS OF THE ABRAHAM LINCOLN BRIGADE V. SUBVERSIVE ACTIVITIES CONTROL BOARD
381 U.S. 1	1964	ZEMEL V. RUSK, SECRETARY OF STATE, ET AL.
381 U.S. 301	1964	LAMONT, DBA BASIC PAMPHLETS V. POSTMASTER GENERAL
381 U.S. 437	1964	UNITED STATES V. BROWN
382 U.S. 70	1965	ALBERTSON ET AL. V. SUBVERSIVE ACTIVITIES CONTROL BOARD
383 U.S. 825	1965	DEGREGORY V. ATTORNEY GENERAL OF NEW HAMPSHIRE
384 U.S. 11	1965	ELFBRANDT V. RUSSELL ET AL.
384 U.S. 702	1965	GOJACK V. UNITED STATES
384 U.S. 855	1965	DENNIS ET AL. V. UNITED STATES
385 U.S. 630	1966	BERENYI V. DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE
386 U.S. 484	1966	HONDA ET AL. V. CLARK, ATTORNEY GENERAL
387 U.S. 82	1966	DOMBROWSKI ET AL. V. EASTLAND ET AL.
389 U.S. 258	1967	UNITED STATES V. ROBEL
389 U.S. 309	1967	W. E. B. DUBOIS CLUBS OF AMERICA ET AL. V. CLARK, ATTORNEY GENERAL, ET AL.
389 U.S. 54	1967	WHITEHILL V. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL.
390 U.S. 17	1967	SCHNEIDER V. SMITH, COMMANDANT, UNITED STATES COAST GUARD
396 U.S. 64	1969	BRYSON V. UNITED STATES
398 U.S. 427	1969	MITCHELL ET AL. V. DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL.
401 U.S. 1	1970	BAIRD V. STATE BAR OF ARIZONA
401 U.S. 23	1970	IN RE STOLAR
403 U.S. 207	1970	CONNELL V. HIGGINBOTHAM ET AL.

403 U.S. 713	1970	NEW YORK TIMES CO. V. UNITED STATES
405 U.S. 676	1971	COLE, STATE HOSPITAL SUPERINTENDENT, ET AL. V. RICHARDSON
406 U.S. 583	1971	SOCIALIST LABOR PARTY ET AL. V. GILLIGAN, GOVERNOR OF OHIO, ET AL.
407 U.S. 297	1971	UNITED STATES V. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. (PLAMONDON ET AL., REAL PARTIES IN INTEREST)
408 U.S. 606	1971	GRAVEL V. UNITED STATES
408 U.S. 753	1971	KLEINDIENST, ATTORNEY GENERAL, ET AL. V. MANDEL ET AL.
410 U.S. 73	1972	ENVIRONMENTAL PROTECTION AGENCY ET AL. V. MINK ET AL.
414 U.S. 441	1973	COMMUNIST PARTY OF INDIANA ET AL. V. WHITCOMB, GOVERNOR OF INDIANA, ET AL.
421 U.S. 491	1974	EASTLAND ET AL. V. UNITED STATES SERVICEMEN'S FUND ET AL.
426 U.S. 548	1975	FEDERAL ENERGY ADMINISTRATION ET AL. V. ALGONQUIN SNG, INC., ET AL.
444 U.S. 507	1979	SNEPP V. UNITED STATES
449 U.S. 490	1980	FEDORENKO V. UNITED STATES
453 U.S. 280	1980	HAIG, SECRETARY OF STATE V. AGEE
454 U.S. 139	1981	WEINBERGER, SECRETARY OF DEFENSE, ET AL. V. CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT ET AL.
456 U.S. 305	1981	WEINBERGER, SECRETARY OF DEFENSE, ET AL. V. ROMERO-BARCELO ET AL.
468 U.S. 222	1983	REGAN, SECRETARY OF THE TREASURY, ET AL. V. WALD ET AL.
471 U.S. 159	1984	CENTRAL INTELLIGENCE AGENCY ET AL. V. SIMS ET AL.
472 U.S. 511	1984	MITCHELL V. FORSYTH
481 U.S. 465	1986	MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. V. KEENE
484 U.S. 518	1987	DEPARTMENT OF THE NAVY V. EGAN
486 U.S. 592	1987	WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE V. DOE
488 U.S. 93	1988	CARLUCCI, FRANK C., SECRETARY OF DEFENSE, ET AL. V. DOE, JOHN
490 U.S. 153	1988	AMERICAN FOREIGN SERVICE ASSOCIATION ET AL. V. GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, ET AL.
525 U.S. 471	1998	JANET RENO, ATTORNEY GENERAL, ET AL. V. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL.
530 U.S. 363	1999	STEPHEN P. CROSBY, SECRETARY OF ADMINISTRATION AND FINANCE OF MASSACHUSETTS, ET AL., V. NATIONAL FOREIGN TRADE COUNCIL
542 U.S. 426	2003	DONALD H. RUMSFELD, SECRETARY OF DEFENSE V. JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA

542 U.S. 466	2003	SHAFIQ RASUL, ET AL. V. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.
542 U.S. 507	2003	YASER ESAM HAMDI AND ESAM FOUAD HAMDI AS NEXT FRIEND OF YASER ESAM HAMDI V. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.
544 U.S. 1	2004	GEORGE J. TENET, INDIVIDUALLY, PORTER J. GOSS, DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES V. JOHN DOE, ET UX.
548 U.S. 557	2005	SALIM AHMED HAMDAN V. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.
	2007	BOUMEDIENE V. BUSH
	2008	DONALD C. WINTER, SECRETARY OF THE NAV., ET AL. V. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.
	2008	JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL. V. JAVAID IQBAL ET AL.
	2010	GLEN SCOTT MILNER, PETITIONER V. DEPARTMENT OF THE NAVY
	2010	JOHN D. ASHCROFT, PETITIONER V. ABDULLAH AL-KIDD
	2010	GENERAL DYNAMICS CORPORATION, PETITIONER, V. UNITED STATES
	2008	REPUBLIC OF IRAQ V. JORDAN BEATY ET AL.
	2009	ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL. V. HUMANITARIAN LAW PROJECT ET AL.

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