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Questioning Deference

Christina E. Wells*

In the world of constitutional adjudication, certain civil liberties—such as the right to freely criticize the government or to be free from racial discrimination—are strongly protected. The Supreme Court generally subjects government (i.e., executive branch) actions interfering with civil liberties to strict scrutiny, requiring the government to show that its reasons for the infringement are compelling and its actions necessary to prevent harm.¹ Although perhaps not “fatal in fact,”² this scrutiny is so difficult to satisfy that it effectively subjects governmental infringements of civil liberties to a presumption of unconstitutionality.

This is the state of things in normal times. But when the nation is at war or faces some similar crisis, the Court (and lower courts applying its jurisprudence) tends to review potential infringements of civil liberties with extreme deference. In such times, the usual presumption of unconstitutionality flips to become a presumption of constitutionality, effectively insulating the government’s claim of necessity from any requirement of factual proof.³ Government officials need merely raise the specter of national security to win their case.

The Court’s decision in *Korematsu v. United States*,⁴ which involved the federal government’s internment of more than one hundred thousand Japanese-Americans⁵ during World War II, best exemplifies this approach. In *Korematsu*, the government argued that mass detention was the only viable

* Enoch N. Crowder Professor of Law, University of Missouri-Columbia School of Law. I wish to thank Kent Gates, Tracey George, Bob Pushaw and Geof Stone for reading and commenting on earlier drafts of this paper. Special thanks go to Jennifer Robbennolt, whose patience in answering my questions was truly limitless. Eric Bohl, Michael Held, Joseph Kuhl, Mark Lyons, and Jennifer Pugh provided valuable and enthusiastic research support for this article. Finally, I am grateful for the generous financial support provided by the University of Missouri Law School Foundation.

1. For a discussion of the Court’s use of strict scrutiny, see Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 158 (2001).

2. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

3. See William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMP. L. 389, 420 (Supp. 1990).

4. 323 U.S. 214 (1944).

5. This article uses the term “Japanese-American” to refer to American citizens of Japanese descent and non-citizen, immigrant Japanese legally residing in the United States at the time of World War II.

method of protecting against espionage and sabotage because Japanese-Americans were racially predisposed toward disloyalty and because distinguishing between loyal and disloyal was too difficult.⁶ Reviewing the constitutionality of the federal government's decision, the Court acknowledged that the government's actions were subject to strict scrutiny.⁷ Yet it did not scrutinize the evidentiary basis for the government's claim of necessity. Rather, after barely glancing at the government's evidence (or lack thereof), the Court held that "we cannot reject as unfounded the judgment of the military authorities and of Congress" that the exclusion order was necessary.⁸

Korematsu is not alone in this pattern of deference. During World War I, the Supreme Court reviewed numerous criminal convictions under the Espionage and Sedition Acts.⁹ The defendants were ostensibly convicted for interfering with the war effort although, in truth, they did little more than criticize the government's war policies.¹⁰ Nevertheless, the Court deferred to the executive. As Justice Holmes noted, "[w]hen a nation is at war many things that

6. For in-depth discussion of the exclusion and internment of Japanese-Americans, see COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982) [hereinafter *PERSONAL JUSTICE DENIED*]; ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (1962); PETER IRONS, *JUSTICE AT WAR* (1983) [hereinafter *IRONS, JUSTICE AT WAR*]; JUSTICE DELAYED: *THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES* (Peter Irons ed., 1989) [hereinafter *JUSTICE DELAYED*]; JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication In Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997).

7. *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [The] courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

8. *Id.* at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)). The *Hirabayashi* Court was even more explicit regarding deference, noting that "the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare . . . [Thus] it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." *Hirabayashi*, 320 U.S. at 93.

9. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

10. For in-depth discussion of the treatment of civil liberties during World War I, see ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976* (1978); RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987); HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES 1917-1921* (1960); Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1578-84 (2003) (reviewing *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)).

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.”¹¹

The Court similarly deferred to the government’s Cold War prosecutions of domestic Communists. In *Dennis v. United States*,¹² the most famous of these cases, the Court upheld the convictions of several leaders of the Communist Party on the theory that the teaching of Marxist-Leninist doctrine presented a “clear and present danger” leading to the overthrow of the United States government. Although the “clear and present danger” test was then applied in a manner similar to strict scrutiny, and despite the utter lack of evidence, the Court nevertheless deferred to the government’s judgment of necessity in light of the ongoing “war” against Communism.¹³

11. *Schenck*, 249 U.S. at 52.

12. 341 U.S. 494 (1951).

13. *Id.* at 509-11. For discussions of the Cold War era and the *Dennis* trial, see MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977); RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* (1990); ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM* (1994) [hereinafter SCHRECKER, *MCCARTHYISM*]; ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998) [hereinafter SCHRECKER, *MANY ARE THE CRIMES*]; PETER L. STEINBERG, *THE GREAT “RED MENACE:” UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS 1947-1952* (1984); Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss*, 33 GA. L. REV. 1, 6-15 (1998).

Commentators agree that this pattern of deference exists.¹⁴ They disagree, however, as to whether it is appropriate. Opponents of judicial deference argue that, historically, the government has overreacted to illusory threats (often out of prejudice) or, worse, has pretextually used national security to consolidate power.¹⁵ Judges are thus a necessary check against executive suppression of civil liberties.¹⁶ For the most part, proponents of deference do not dispute that past government actions have involved tragic mistakes. They argue instead that the sacrifice of civil liberties may be a necessary, even unavoidable, by-product of wartime conditions.¹⁷ Furthermore, they claim, decision making under such conditions requires efficiency, flexibility, and decisiveness, attributes that are largely associated with the executive branch rather than with judges, who are particularly bad at this kind of political calculus.¹⁸ Additionally, they argue that the burdens judicial review im-

14. The literature regarding judicial deference in times of crisis is voluminous. For a sampling, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* (1990); CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1976); Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1 (2002); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840 (1989); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968); Lee Epstein et al., *The Effect of War on the Supreme Court*, 79 N.Y.U. L. REV. (forthcoming 2004) (manuscript on file with author); Fisch, *supra* note 3; Margaret A. Garvin, *Civil Liberties During War*, 16 CONST. COMMENT. 691 (1999); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Grossman, *supra* note 6, at 649-50; Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257; Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1409-12 (1989); Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons From History*, 87 MASS. L. REV. 72 (2002); Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

15. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); Lewis, *supra* note 14; Murray & Wunsch, *supra* note 14; Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

16. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69 (1990); Aharon Barak, *Foreword—A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); Rostow, *supra* note 15, at 515-16.

17. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 292-95 (2003); REHNQUIST, *supra* note 14, at 205-06.

18. REHNQUIST, *supra* note 14, at 205 (“Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as ‘military necessity.’”).

poses upon executive action are unnecessary and unjustified because executive officials have learned from past mistakes and are unlikely to repeat them.¹⁹

There is little chance of resolving this debate soon, primarily because neither side's arguments adequately engage the other's. Opponents of deference, for example, point to past government actions as indicating the likelihood of overreaction in future crises. But history, while instructive, does not necessarily predict future behavior. Thus, opponents' arguments can never fully respond to proponents' claim that executive officials have learned from past errors. Nor do they respond to proponents' normative argument that such past overreactions are a necessary by-product of enhanced security measures. Proponents of deference suffer from similar problems. The notion that judges are particularly bad at decisions involving national security is untested. That the Court has deferred in most of the cases cited above is hardly proof of judges' *inability* to make decisions. If anything, it simply reflects their *desire* not to. Similarly, even if government protection of civil liberties has arguably improved over time, there is little reason to believe that officials will never err in the future.²⁰

Absent something more to bridge the gap, the respective sides of the judicial deference debate seem destined to remain on opposite shores. This article aims to provide that "something more." At its core, the deference debate rests upon fundamental assumptions about which branch of government is the appropriate decision maker regarding civil liberties in times of crisis. Ironically, neither side has explored the psychology of decision making and its relevance to this debate.²¹ This article will examine the judicial deference debate in light of two important phenomena—the psychology of risk assessment and the psychology of accountability.

The psychology of risk assessment—i.e., the study of how people determine the likelihood of uncertain events²²—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 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

19. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285 (2002); Tushnet, *supra* note 14, at 294-98.

20. Cole, *supra* note 15, at 1-2; Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 622-25 (2003).

21. Oren Gross is a notable exception. See Gross, *supra* note 14, at 1038-42.

22. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 3 (Daniel Kahneman et al. eds., 1982).

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. As discussed below, history 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.

The psychology of accountability further suggests that opponents of deference are correct to push for more rigorous judicial review. Psychologists describe the phenomenon of accountability as the expectation that one may have to justify one's actions as sufficiently compelling or face negative consequences.²³ Research shows that people who know they will be accountable reach better-reasoned decisions and avoid many of the problems that lead to skewed risk assessment. Judicial review, with its requirement that officials explain and justify their infringement of civil liberties, can serve as a mechanism of accountability, thus improving executive branch decision making in times of crisis. Furthermore, the contextual nature of civil liberties cases suggests that judicial review may be a necessary aspect of executive accountability.

A few caveats are in order. First, the historical discussion here is necessarily broad and preliminary. Each historical crisis discussed above was unique, and fully understanding the patterns of behavior within each as well as their relationship to each other requires more in-depth study. Nonetheless, this preliminary examination reveals certain striking patterns of behavior that warrant acknowledgement. Second, this Article discusses how the identified historical pattern is consistent with psychological understandings of skewed risk assessment. It does not argue, however, that executive officials will always engage in skewed risk assessment.²⁴ This Article merely suggests that skewed risk assessments may be more likely when national security is at stake and other conditions are present (e.g., the presence of a foreign threat along with domestic counterparts). Finally, there may be many other arguments for deference despite our understanding of cognitive principles—for example, that the Constitution *requires* it in this situation.²⁵ Those arguments are beyond the scope of this Article, which focuses simply on whether cognitive principles support one side of the debate or the other.

Part I of this Article discusses executive branch actions in the crises discussed above and identifies a pattern of response to certain perceived threats.

23. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999).

24. See, e.g., Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131 (2004) (identifying executive officials who did not overreact to perceived threats in times of crisis).

25. See generally John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003).

Part II assesses this historical pattern in light of a psychological understanding of risk assessment, concluding that the pattern is consistent with predictably skewed risk assessment. Part III discusses the psychology of accountability and the possibility that judicial review can serve as a mechanism of accountability and improve executive decision making.

I. HISTORICAL PATTERNS OF GOVERNMENT RESPONSES TO CRISIS

The United States experienced several national security crises in the twentieth century—e.g., World War I, World War II, and the Cold War.²⁶ An examination of these crises reveals the following pattern of government infringement of domestic civil liberties: Faced with a foreign (i.e., external) threat to national security, the government lobbied for and enforced new laws curtailing the civil liberties of certain domestic groups dominated by immigrants, minorities, or people espousing unwelcome political doctrine. To justify its actions, the government linked these groups to the external threat, transforming it into an internal one (i.e., the threat was no longer foreign but came from within the United States). Executive officials had little or no evidence that these domestic groups acted on behalf of foreign interests. Instead, they drew upon racial prejudice, xenophobia, or paranoia to create a vivid and frightening picture of these domestic groups, a picture that resonated with the public and resulted in broad support for the government's actions.

A. The Creation of an "Internal" Threat and the Domestic National Security Agenda

In all of the above crises, the country initially faced an *external* threat to national security—i.e., from Germany during World War I, from Japan during World War II, and from the Soviet Union during the Cold War. These threats were quite real. During World War I, the Germans committed acts of violence and espionage on American soil,²⁷ as did Japan with its attack on Pearl Harbor during World War II.²⁸ The Soviet Union also engaged in Cold

26. The United States has experienced other crises, both earlier and later than those mentioned above, but this Article focuses on these crises for two reasons. First, commentators generally agree that World War I introduced the modern era with respect to national security issues. *See, e.g.*, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at A1, A7 (1997) [hereinafter SECRECY COMMISSION]; Lobel, *supra* note 14, at 1398-99. Second, the above crises resulted in several Supreme Court decisions that serve as primary examples of the judicial deference to which I refer and thus provide a framework for my discussion.

27. *See* SECRECY COMMISSION, *supra* note 26, at A9-10 (recounting German espionage and sabotage during World War I).

28. PERSONAL JUSTICE DENIED, *supra* note 6, at 47, 51 (recounting Japanese attack on Pearl Harbor and incidents of Japanese espionage activities).

War espionage in the United States and committed acts of aggression in Europe and elsewhere.²⁹

Significantly, however, the government characterized these external threats as having significant internal components—i.e., officials claimed American citizens or resident aliens collaborated with foreign enemies. President Wilson, for example, attempted to garner support for the United States' entry into World War I by suggesting disloyalty among German-Americans. In his 1915 State of the Union address he claimed:

[T]he gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States . . . born under other flags but welcomed under our generous naturalization laws . . . who have poured the poison of disloyalty into the very arteries of our national life.³⁰

He repeated that sentiment two years later, claiming that German spies hidden in American communities posed a threat to national security.³¹

Soon after the Pearl Harbor attacks, Secretary of the Navy Frank Knox similarly declared that Japanese-Americans aided the attack on Pearl Harbor.³² General John L. DeWitt, the Army commander responsible for defending the entire West Coast, also claimed that Japanese-Americans were passing information to Japanese submarines stationed just off the coast.³³ Finally, Robert Shivers, an FBI agent in charge of the Hawaii office, claimed that if the Japanese attacked Hawaii, 95 percent of the "alien Japanese [would] glory in that attack and . . . do anything they could to further the efforts of the Japanese forces."³⁴ Shivers also claimed that some American citizens of Japanese descent "would join forces with the Japanese attackers for this and other reasons."³⁵

The Cold War was no different, with executive officials claiming that American citizens belonging to the Communist Party—an entity many considered a legitimate political party—were actually agents of the Soviet government determined to destroy the American way of life. FBI Director J. Ed-

29. SECRECY COMMISSION, *supra* note 26, at A-37 (describing Soviet espionage activities during the Cold War); SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 159-60, 179-80 (same); Wells, *supra* note 13, at 12-13 (describing Soviet acts of aggression in Europe). See generally ALLEN WEINSTEIN & ALEXANDER VASSILIEV, *THE HAUNTED WOOD: SOVIET ESPIONAGE IN AMERICA—THE STALIN ERA* (1999).

30. President Woodrow Wilson, Address to Congress (Dec. 7, 1915), in 53 CONG. REC. 99 (1915).

31. President Woodrow Wilson, Address to Congress (Apr. 2, 1917), in 55 CONG. REC. 104 (1917).

32. PERSONAL JUSTICE DENIED, *supra* note 6, at 55.

33. IRONS, JUSTICE AT WAR, *supra* note 6, at 27.

34. PERSONAL JUSTICE DENIED, *supra* note 6, at 58.

35. *Id.*

gar Hoover, the most ardent of government officials opposing communism, claimed that “every American Communist is potentially an espionage agent of the Soviet Government, requiring only the direct instruction of a Soviet superior to make the potentiality a reality.”³⁶ Other FBI officials similarly claimed that domestic Communists “unquestionably would sabotage this country’s effort in resisting Russia and that this . . . is a great and total danger to the security of this Nation.”³⁷ Government officials also argued that domestic Communists would undermine national security by taking control of labor groups and calling catastrophic strikes.³⁸

This transformation from an external to an internal threat had significant ramifications for civil liberties. Had the threat remained external, most attempts to fight it would have been external as well. That is, the United States would have battled the threat on foreign soil or through foreign policy. But if the threat were internal, officials could justify significant changes in *domestic* laws.

During World War I, President Wilson established registration and internment programs for “enemy aliens,” a loyalty program for federal employees, and various censorship and propaganda programs.³⁹ Most significantly, he lobbied Congress for strict laws “repress[ing] ‘political agitation . . . ,’ particularly ‘disloyal propaganda’ threatening the formation and maintenance of the armed forces.”⁴⁰ Wilson’s efforts ultimately resulted in the Espionage Act of 1917 and the Sedition Act of 1918, which punished expression interfering with the war effort or tending to bring that effort into disrepute.⁴¹ Throughout his lobbying, Wilson claimed that, absent such measures, the United States was “without adequate federal laws to deal with” the “ugly and incredible [truth]” of German-American disloyalty.⁴²

Officials during the Cold War followed a similar pattern, instituting a panoply of new executive powers, including secret surveillance of suspected

36. CLARK CLIFFORD, COUNSEL TO THE PRESIDENT 177 (1991) (quoting passage from a 1946 report written by Hoover for President Truman). Hoover apparently operated “on the assumption that anybody who had been in or near the Communist party and then associated with people who associated with Russians was involved with espionage.” SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 166.

37. SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 184 (quoting Washington field office report) (alteration in original).

38. *Id.*

39. Wells, *supra* note 10, at 1581-82.

40. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 249 (1997) (quoting John Lord O’Brian, Special Assistant Attorney General).

41. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219 (Espionage Act); Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553 (Sedition Act).

42. Wilson, *supra* note 30, at 99. Attorney General Gregory similarly lamented the Justice Department’s “helplessness . . . under existing laws.” *SECRECY COMMISSION*, *supra* note 26, at A9.

Communists or Communist sympathizers,⁴³ loyalty boards,⁴⁴ the prohibition of Communists in government employment,⁴⁵ a requirement that Communists register with the federal government,⁴⁶ and criminal prosecutions under the Smith Act for advocacy of overthrow of the government.⁴⁷ As with President Wilson in World War I, official statements expressly linked the need for such action to the existence of an internal threat. Portions of the Internal Security Act of 1950 illustrate this sentiment. In justifying the Act's draconian measures, the preamble stated that individuals within the United States who were loyal to the "world Communist movement" had devised "clever and ruthless espionage and sabotage tactics" that evaded existing law and necessitated "appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it."⁴⁸

Finally, the government action directed toward the Japanese during World War II was entirely based upon the notion of an internal threat. Executive Order 9066, authorizing the military to exclude Japanese-Americans from areas of military sensitivity and to detain them accordingly, operated on the theory that "the successful prosecution of the war requires every possible protection against espionage and against sabotage."⁴⁹ General DeWitt specifically defended the exclusion order to Congress by claiming that "[t]he danger of the Japanese was, and is now,—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty."⁵⁰

B. The Government Bases for the Image of Internal Threat: Prejudice, Xenophobia, and Conspiracy Theories

The government was not wholly misguided in believing that persons within the United States posed a threat to national security. In all of the above instances there were individuals who posed an internal threat of sabotage,

43. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. No. 94-755, at 393-94 (1976) [hereinafter CHURCH COMM., FINAL REPORT, BOOK III].

44. Exec. Order No. 9806, 3 C.F.R. 183 (Supp. 1946) (establishing loyalty boards to investigate existing and prospective government employees for disloyalty). See generally Lloyd K. Garrison, *Some Observations on the Loyalty-Security Program*, 23 U. CHI. L. REV. 1 (1955).

45. Hatch Act, ch. 410, 53 Stat. 1147 (1939).

46. Voorhis Act, ch. 897, 54 Stat. 1201 (1940).

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

48. Subversive Activities Control Act of 1950, ch. 1024, § 2, 64 Stat. 987.

49. *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943) (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

50. PERSONAL JUSTICE DENIED, *supra* note 6, at 66.

espionage, or subversion. However, despite the government's fear, there was rarely any real evidence that such groups or their members posed a threat. In fact, there was often contemporaneous, affirmative evidence that they did not pose substantial threats to national security.

During World War II, a series of reports prepared by Curtis Munson at President Roosevelt's request indicated that an overwhelming number of Japanese-Americans were loyal to the United States and that those who were not could be easily counteracted by less draconian action than the internment.⁵¹ The Office of Naval Intelligence reached a similar conclusion in a report stating that

the entire "Japanese Problem" has been magnified out of its true proportion, largely because of the physical characteristics of the people . . . [I]t is no more serious than the problems of the German, Italian and Communistic portions of the United States population, and . . . it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis.⁵²

Both FBI Director Hoover and Attorney General Francis Biddle similarly tried to persuade President Roosevelt that the evidence did not support such a measure.⁵³

The government's Cold War pursuit of domestic Communists also suffered from a dearth of evidence linking more than a small percentage of members of the Communist Party—the primary target of government initiatives—to Soviet espionage.⁵⁴ As one government insider noted, "[m]ost members of the American Communist Party had joined out of misplaced idealism or naiveté. Although their views were misguided and served Moscow's political interests, only a small number ever consciously acted against their own government, and even fewer would ever have accepted 'direct instruction of a Soviet superior.'"⁵⁵ There was also little evidence supporting claims that domestic Communists committed sabotage or that they, while admittedly

51. JUSTICE DELAYED, *supra* note 6, at 277-79.

52. *Id.* at 274-75.

53. PERSONAL JUSTICE DENIED, *supra* note 6, at 54-55, 83-84.

54. FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM 16 (1980); Maurice Isserman & Ellen Schrecker, "Papers of a Dangerous Tendency": From Major Andre's Boot to the VENONA Files, in COLD WAR TRIUMPHALISM: THE MISUSE OF HISTORY AFTER THE FALL OF COMMUNISM 149, 152-59 (Ellen Schrecker ed., 2004).

55. CLIFFORD, *supra* note 36, at 177. In addition, much of the espionage committed by Communist Party members occurred during World War II when the USSR was an ally of the United States, thus calling into question notions of Communist Party members' disloyalty. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 181-82; SECRECY COMMISSION, *supra* note 26, at A37.

active in the labor movement, used unions to commit disloyal acts.⁵⁶ Some government officials, including President Truman, knew this to be the case and actively dismissed the idea that the average Communist Party member posed a threat to national security.⁵⁷

The Espionage and Sedition Act prosecutions of World War I were also based on questionable evidence of internal threat. During the war, federal attorneys brought over 2,100 indictments under the Acts, most of which involved speech critical of the war or the government rather than overt acts of disloyalty.⁵⁸ Thus, individuals were indicted for saying such things as “Christians should not kill in wars” and “I am for the people and the government is for the profiteers.”⁵⁹ Significantly, many of those indicted were members of groups heavily dominated by German immigrants and espousing unpopular social and economic doctrines, such as Socialism.⁶⁰ Over half of these “speech” defendants were convicted, though none of them for actual espionage activity under the Espionage Act.⁶¹

Lacking evidence, the government justified its actions against disfavored groups with a particular characterization of the “internal” threat—one based primarily on guilt by association. According to government officials, it was not simply that American citizens or resident aliens engaged in espionage, sabotage, or other actions dangerous to national security. Rather, individuals determined to undermine national security had inserted themselves into important components of American daily life so that they could influence unsuspecting citizens through seemingly innocuous activities. The secretive nature of these spies and their ability to infiltrate seemingly innocent groups, government officials reasoned, made it impossible to seek out and punish individuals; efforts had to focus on eradicating potentially infected groups, innocent though they might seem. Such reasoning thus allowed government officials to use group membership as evidence of disloyalty.⁶²

To battle anti-war sentiment, for example, President Wilson cited German aggression around the world to argue that the “military masters of Germany” were filling “our unsuspecting communities with vicious spies and conspirators” and that they were using “liberals in their enterprise. . . .

56. SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 182.

57. President Truman, for example, dismissed the Communist Party as a “contemptible minority in a land of freedom,” BELKNAP, *supra* note 13, at 44, although he encouraged acceptance of the notion that Party members were dangerous to further other political endeavors. *Id.* at 45.

58. GOLDSTEIN, *supra* note 10, at 113.

59. Wells, *supra* note 10, at 1583; *see id.* for other examples.

60. GOLDSTEIN, *supra* note 10, at 115.

61. *Id.* at 113; JOHN LORD O'BRIAN, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 49-50 (1955).

62. This fear of domestic conspiracies is a common thread in America's counter-subversive tradition. *See* DONNER, *supra* note 54, at 10; JOHN HIGHAM, *STRANGERS IN THE LAND* 4 (1981).

—socialists, the leaders of labor” to sow disloyalty in America.⁶³ Wilson’s statement thus linked labor and other progressive groups, such as the International Workers of the World (“IWW”), the Socialist Party of America (“SPA”), and the Non-Partisan League (“NPL”), to German influence. Since immigrant populations dominated many such groups,⁶⁴ it was reasonably easy for most Americans to accept such a link, especially in light of our largely xenophobic history.⁶⁵ Having established that these groups were subject to foreign influences, Wilson painted them as disloyal by focusing on their vocal opposition to World War I.⁶⁶ Such anti-war rhetoric, he intimated, was part of a larger and more dangerous scheme to destroy America: “It is only the friends and partisans of the German Government whom we have already identified who utter these thinly disguised disloyalties.”⁶⁷ In effect, people who were little more than social activists became potential spies or saboteurs simply because of their association with such groups.⁶⁸

Officials during the Cold War also used images of secretive Soviet spies to justify their persecution of the Communist Party and groups ostensibly related to it. Attorney General McGrath warned that there were Communist spies hiding “‘everywhere—in factories, offices, butcher shops, on street corners, in private business—and each carries in himself the germs of death for society.’”⁶⁹ Later, the Justice Department issued a statement warning that Communist Party members used “cleverly camouflaged movements, such as some peace groups and civil rights organizations, to achieve their sinister purposes.”⁷⁰ Because many people already associated domestic Communists with the worldwide Soviet conspiracy, such statements provided the link necessary to justify draconian government action against anyone remotely suspected of being a Communist regardless of the lack of evidence linking him to the Soviet Union. This reasoning was especially prevalent in government programs designed to “expose” Communists, such as the loyalty review boards and hearings held by the House Un-American Activities Committee

63. President Woodrow Wilson, Flag Day Address (June 14, 1917), in 55 CONG. REC. app. at 332-34 (1917).

64. SCHEIBER, *supra* note 10, at 7.

65. DONNER, *supra* note 54, at 17-19; William M. Wiecek, *The Legal Foundations of Domestic AntiCommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 381-82.

66. Wells, *supra* note 10, at 1580-81.

67. Wilson, *supra* note 63, at 334.

68. Wells, *supra* note 10, at 1581.

69. GOLDSTEIN, *supra* note 10, at 329.

70. ATHAN THEOHARIS, SEEDS OF REPRESSION: HARRY S. TRUMAN AND THE ORIGINS OF MCCARTHYISM 141-42 (1971).

("HUAC"), two of the most egregious, indiscriminate, and stigmatizing programs used by the government.⁷¹

Similar reasoning appeared in government attempts to justify the mass internment of Japanese-Americans during World War II despite the lack of evidence of disloyalty. Here the issue was not one of secretive wrongdoers wielding influence over unsuspecting citizens but of cultural assimilation and racial bias. Some government officials reasoned that Japanese-Americans were loyal to Japan because immigrant communities were closely knit and educated their children in Japanese culture.⁷² General DeWitt went even further, basing Japanese-American disloyalty on the mere fact of their racial identity:

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. . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today.⁷³

In light of these cultural and racial characteristics, government officials concluded that the lack of evidence of disloyalty was not an obstacle to the internment program. Indeed, General DeWitt went so far as to note that the lack of evidence actually supported the notion of Japanese-American disloyalty: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."⁷⁴ Government officials arguing for internment were similarly unpersuaded by affirmative evidence of Japanese-Americans' loyalty to the United States and concluded that cultural characteristics made it impossible to distinguish loyal from disloyal.⁷⁵ Thus, mass internment was the only way to protect against espionage and sabotage by Japanese-Americans.⁷⁶

C. Public and Congressional Acceptance of the Internal Threat Image

The government was not alone in its characterization of the internal threat posed by certain groups. In all of the above crises, substantial public

71. SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 140-41; Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 18-20 (1991).

72. IRONS, *JUSTICE AT WAR*, *supra* note 6, at 196-97.

73. PERSONAL JUSTICE DENIED, *supra* note 6, at 66.

74. *Id.* at 82; *see also* TENBROEK ET AL., *supra* note 6, at 83-84, 92 (discussing views of California Governor Earl Warren and the public that the lack of evidence was actually evidence of disloyalty).

75. *See supra* note 72 and accompanying text.

76. IRONS, *JUSTICE AT WAR*, *supra* note 6, at 198-99.

fear of such groups echoed government paranoia. During World War I, for example, “the people of the United States abandoned themselves to a hysteria of fear of German conspiracies”⁷⁷ leading to repression of, and mob violence against, German-Americans and members of progressive groups:

[S]uspect individuals were subjected to vandalism, beatings, tarring and feathering, shootings, lynchings, and various forms of public humiliation. . . . The Justice Department itself had an auxiliary of hundreds of thousands of citizen-spies known as the American Protective League (APL). Spurred by conspiracy theories, the APL conducted warrantless searches, opened mail, infiltrated radical and labor groups, and roughed up and illegally arrested supposed subversives and “slackers.” State and local defense or “public safety” councils interrogated individuals suspected of disloyalty, pressured people to buy Liberty Bonds, and worked to remove German literature from library shelves and eliminate German language instruction from schools.⁷⁸

World War II saw a similar reaction against Japanese-Americans, especially on the West Coast. Amid the fear and hysteria that prevailed after the Pearl Harbor attacks, people began to see Japanese-American spies and saboteurs everywhere:

Japanese gardeners were said to be equipped with short-wave transmitters hidden in garden hose; Japanese servants and laborers who failed to appear for work on December 7 (a Sunday) were accused of prior knowledge of the Hawaii attack. Japanese farmers were charged with smuggling poison into vegetables bound for market A number of anxious Californians . . . went so far as to plow up a beautiful field of flowers on the property of a Japanese farmer, because [they believed he grew them] in a way that when viewed from a plane formed an arrow pointing the direction to the airport.⁷⁹

Within a month of the attacks, private organizations lobbied the government for removal of all Japanese-Americans, claiming that “the ethnic Japanese are ‘totally unassimilable’” and that “those born in this country are American citizens by right of birth, but they are also Japanese citizens, liable

77. 2 SAMUEL ELIOT MORISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 383 (6th ed. 1969).

78. JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* 135-36 (1999); see also GOLDSTEIN, *supra* note 10, at 125; *SECRECY COMMISSION*, *supra* note 26, at A23.

79. TENBROEK ET AL., *supra* note 6, at 70 (quotations omitted).

. . . to be called to bear arms for their Emperor, either in front of, or behind, enemy lines."⁸⁰

Public hysteria regarding domestic Communists was also a hallmark of the Cold War, a period in which "Americans at every level of society genuinely believed that Communism endangered the nation."⁸¹ Public opinion polls show that by the latter half of the 1940s, much of the public believed that there were "a great many" domestic Communists who were more loyal to the Soviet Union than to the United States.⁸² Many Americans further believed that domestic Communists were gaining power within the United States.⁸³ Commensurate with these beliefs, the public increasingly supported loyalty oaths, registration requirements, laws barring the Communist Party, and restrictions on Communists' employment opportunities and speech rights.⁸⁴ Thousands of people lost their jobs and were shunned from society as a result of tenuous, if not non-existent, links to the Soviet Union.⁸⁵

Congress also succumbed to the notion of an internal threat during these periods. Most of the executive's broad powers came from Congressional enactments such as the Espionage and Sedition Acts, the Internal Security Act, the Smith Act, and legislation ratifying the executive orders interning Japanese-Americans during World War II. In passing these laws, Congress rarely questioned the executive's need for them. Debate with respect to the World War II and Cold War enactments was virtually non-existent, with legislators

80. PERSONAL JUSTICE DENIED, *supra* note 6, at 68 (quoting manifesto of the Joint Immigration Committee); *see also* TENBROEK ET AL., *supra* note 6, at 78-80 (describing characterizations of Japanese-Americans and calls for action).

81. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 154.

82. *See* GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-71, at 639, 690, 736, 752 (1972); PUBLIC OPINION 1935-1946, at 130-32 (Hadley Cantril, ed. 1951); *The Quarter's Polls*, 12 PUB. OPINION Q. 146, 150 (1948); *The Quarter's Polls*, 10 PUB. OPINION Q. 400, 437 (1946).

83. *The Quarter's Polls*, 12 PUB. OPINION Q. 348, 350-51 (1948) (35 percent believed the Communist Party of the United States of America was getting stronger and controlled many industries and unions with an additional 10 percent believing that the CPUSA was almost able to dominate the United States).

84. *See, e.g., The Quarter's Polls*, 14 PUB. OPINION Q. 174, 175-76 (1950) (68 percent believed Communist party should be forbidden and 77 percent favored a registration requirement for Communists); *The Quarter's Polls*, 11 PUB. OPINION Q. 639, 642 (1947) (64 percent of respondents believed Communists should be prevented from holding public office or executive positions in labor unions); *The Quarter's Polls*, 12 PUB. OPINION Q. 754, 756 (1948) (57 percent believed that Communists should not be allowed to speak on the radio). For a more in-depth discussion of public sentiment regarding domestic Communists, see Christina E. Wells, Fear and Loathing in Constitutional Decision-making, 19-20 (June 24, 2004) (manuscript on file with author).

85. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 359-68; Kreimer, *supra* note 71, at 18 n.44; Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061 (2004).

eager to accommodate the executive's request for expanded powers. The bill proposing criminal sanctions for violation of the internment orders during World War II, for example, passed through Congress with almost no opposition in either house; no person objected to the provisions on civil liberties grounds and no legislator questioned the claim that detention was a military necessity.⁸⁶ During the Cold War, Congress passed the Smith Act with little expressed opposition despite the fact that it was the nation's first peacetime sedition law.⁸⁷ Although there was some debate with respect to the propriety of the Espionage and Sedition Acts, they eventually passed with broad support.⁸⁸

There were dissenters during these periods who tried to debunk the myth of the internal threat and decried the government's actions as unreasonable.⁸⁹ But the threatening images of disfavored groups proved too powerful as widespread, negative media coverage reinforced private fears. During World War I, for example, some newspapers published maps of the United States purporting to show where German-Americans were most concentrated, implying that those areas were at greatest risk.⁹⁰ Others incited or excused violence against German-Americans and progressive groups.⁹¹ Similarly, during World War II, influential media figures urged evacuation based upon perceived Japanese-American disloyalty.⁹² Cold War news coverage also pro-

86. See IRONS, JUSTICE AT WAR, *supra* note 6, at 66-67; PERSONAL JUSTICE DENIED, *supra* note 6, at 99.

87. BELKNAP, *supra* note 13, at 23.

88. RABBAN, *supra* note 40, at 250-51; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 352 (2003).

89. The precursor of the modern ACLU, for example, vehemently opposed the government's actions during World War I. DONALD JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION 65-66 (1963). There were also officials within the Wilson administration who wanted to protect civil liberties. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 442. In addition to government officials such as Hoover and Biddle, see *supra* note 53 and accompanying text, others decried the internment of Japanese-Americans and urged the government to preserve their civil liberties. See MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 181-85 (1949). Critics of the government's Cold War actions similarly tried to expose the excesses of McCarthyism. See SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 150, 259.

90. SMITH, *supra* note 78, at 136.

91. John D. Stevens, *Press and Community Toleration: Wisconsin in World War I*, 46 JOURNALISM Q. 255 (1969).

92. TENBROEK ET AL., *supra* note 6, at 73-76; PERSONAL JUSTICE DENIED, *supra* note 6, at 71-72. For example, one prominent commentator claimed that Japanese-Americans posed a national security threat because "[t]heir organization and patient preparation and obedience to unified control could never be possible among the na-

jected negative images of domestic Communists. For example, the HUAC hearings, during which many people and organizations were unjustly accused of being Communists, were highly publicized, with the press focusing on lurid and sensational images rather than facts or evidence.⁹³

Biased press coverage during these periods was not surprising given that executive officials often manipulated the media. During World War I, President Wilson created the Committee on Public Information (“CPI”), a government organization encouraging the press to engage in voluntary self-censorship.⁹⁴ The CPI further promoted films and organized speakers that recounted German atrocities, thus inflaming nativist and anti-immigrant sentiment.⁹⁵ The head of the CPI, George Creel, also worked behind the scenes encouraging pro-war organizations to condemn progressive organizations as subversive and unpatriotic.⁹⁶ Finally, under provisions of the Espionage and Sedition Laws, the postmaster banned much radical literature from the mails, thus rendering the printed debate about the war one-sided.⁹⁷

During the Cold War, J. Edgar Hoover and the FBI similarly manipulated the media. Some of this manipulation took place behind the scenes, with Hoover and others feeding inflammatory information to the media and other outlets.⁹⁸ Hoover leaked information to “anti-Communist writers who [had] proved themselves to” the FBI,⁹⁹ to private anti-Communist groups, such as the Chamber of Commerce, who then disseminated it to their constituents;¹⁰⁰

tionals of any Caucasian people. The Japanese are a far greater menace in our midst than any other axis patriots.” TENBROEK ET AL., *supra* note 6, at 74.

93. WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 30-31* (1968); SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 91.

94. SMITH, *supra* note 78, at 139-40.

95. Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 576-77 (1999).

96. GOLDSTEIN, *supra* note 10, at 121, 124.

97. JOHNSON, *supra* note 89, at 55-58.

98. RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* 85 (1990); CHURCH COMM., *FINAL REPORT, BOOK III*, *supra* note 43, at 430; SCHRECKER, *MCCARTHYISM*, *supra* note 13, at 23. For example, in order to ensure “informed public opinion,” Assistant FBI Director Ladd prepared materials showing that “Communists would abolish or subjugate labor unions and churches if they came to power [which could] undermine Communist influence in unions and support for the Party from ‘persons prominent in religious circles.’” CHURCH COMM., *FINAL REPORT, BOOK III*, *supra* note 43, at 430 (quoting Memorandum from Assistant FBI Director Ladd to J. Edgar Hoover (Feb. 27, 1946)).

99. SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 216.

100. In 1946, the Chamber of Commerce issued a much-publicized report claiming that Communists “had made substantial inroads into governmental agencies, including the State Department, and non-governmental groups, especially unions.” GOLDSTEIN, *supra* note 10, at 295; *see also* Peter H. Irons, *American Business and the Origins of McCarthyism: The Cold War Crusade of the United States Chamber of*

and to HUAC, which disseminated it in its highly publicized hearings.¹⁰¹ At other times, Hoover quite openly publicized his anti-Communist message, traveling across the country delivering speeches warning that “communists were infiltrating every aspect of life in the United States.”¹⁰²

Public stigmatization of dissenters further entrenched the dominant image. Those who questioned the wisdom of the government’s actions during World War I, for example, were labeled as unpatriotic, often facing “vilification by the press and the threat of mob violence.”¹⁰³ Such stigmatization was especially powerful during the Cold War as congressional hearings and review boards publicly investigated suspicious persons. In an era where mere refusal to cooperate with these investigations could generate questions about one’s loyalty and potentially lead to the loss of one’s livelihood, Americans generally remained silent rather than risk speaking out.¹⁰⁴

II. VIEWING HISTORY THROUGH THE LENS OF PSYCHOLOGY

What does this historical pattern tell us? At their core, the government initiatives described above were based on an initial assessment of risk—i.e., a determination of the likelihood of uncertain events, including potential espionage, sabotage, or the overthrow of the government. Psychologists know that individuals are subject to potential skewing effects that can lead them to overestimate the likelihood of certain events.¹⁰⁵ The reactions of executive officials, legislators, and the public described above are consistent with such skewing effects. This section first discusses the mechanism of skewed risk assessment and then applies that mechanism to the historical crises discussed above.

A. Psychology Related to Risk Assessment

1. The Availability Heuristic and Related Biases

Accurate assessment of risk typically requires a complex balancing of the nature of the risk, the probability of its occurrence, and the advantages

Commerce, in THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM 72 (Robert Griffith & Athan Theoharis eds., 1974).

101. GOLDSTEIN, *supra* note 10, at 319.

102. STEINBERG, *supra* note 13, at x.

103. Bobertz, *supra* note 95, at 577; *see also* SMITH, *supra* note 78, at 136.

104. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 368; Kreimer, *supra* note 71, at 22. The oppressive nature of this silence was best captured in an article written by then-Supreme Court Justice William O. Douglas. *See* William O. Douglas, *The Black Silence of Fear*, N.Y. TIMES, Jan. 13, 1952 (Magazine), at 7.

105. Many of these biases can also lead to underestimation of the probability of certain risks. As will become obvious below, this paper focuses on overestimation of risk because of the circumstances in which risk assessment took place.

and disadvantages of acting or failing to act. Because this complex balancing is time-consuming, people use heuristics (i.e., mental shortcuts based upon past experience) in assessing risk.¹⁰⁶ While these shortcuts are generally useful and reasonably accurate, they also can lead to “systematic errors” or “biases” where people overestimate the likelihood of a particular risk.¹⁰⁷

The most relevant of these heuristics for purposes of this paper is the availability heuristic. Individuals assess “the probability of an event by the ease with which instances or occurrences can be brought to mind.”¹⁰⁸ When examples come to mind quickly, people tend to assume that there “must be a lot of them.”¹⁰⁹ In other words, the easier it is to bring something to mind, the more “available” it is, and the more available an incident is, the more likely one is to overestimate its occurrence.

An event’s “salience” is the most significant factor as to its availability and thus one of the biggest aspects of skewed risk assessment.¹¹⁰ Many things can make an event salient. If an event is very familiar to an individual—e.g., due to personal experience—it is more available to her than if she simply heard or read news reports about it.¹¹¹ However, intense media coverage also can make an event salient.¹¹² This is especially true if an event is vivid, such as a terrorist attack, as opposed to mundane, such as a traffic accident.¹¹³ Re-

106. Tversky & Kahneman, *supra* note 22, at 3; see also Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 495 (2002) (“Heuristics provide cognitive shortcuts, based on experiences that most of us share from everyday decisionmaking, that reduce the effort that one must put into decisions and yet still yield sufficient accuracy for such decisions.”).

107. Tversky & Kahneman, *supra* note 22, at 3; see also Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 769-71 (1990).

108. Tversky & Kahneman, *supra* note 22, at 11; see also PAUL SLOVIC, *THE PERCEPTION OF RISK* 14 (2000).

109. Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 22, at 190, 191; see also Tversky & Kahneman, *supra* note 22, at 11 (“[A] class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable.”).

110. Taylor, *supra* note 109, at 192 (“Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionately affect judgments.”).

111. Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 22, at 463, 465.

112. *Id.*; MAX BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 14 (1998) (“The availability of instances in the media frequently biases our perception of the frequency of events.”).

113. Tversky & Kahneman, *supra* note 22, at 11.

cent events also tend to be more salient.¹¹⁴ Finally, events are also more available to an individual the more imaginable they are; that is, people are more likely to overestimate the occurrence of an event the easier it is to conceive of. This can have special ramifications for events with potentially catastrophic but unlikely occurrences. As Professors Kahneman and Tversky illustrate:

The risk involved in an adventurous expedition . . . is evaluated by imagining contingencies with which the expedition is not equipped to cope. If many such difficulties are vividly portrayed, the expedition can be made to appear exceedingly dangerous, although the ease with which disasters are imagined need not reflect their actual likelihood.¹¹⁵

In sum, an event is more available to an individual if she has previously personally experienced it or if it is highly imaginable or the subject of widespread and intense media coverage. Though the probability of that event's occurrence might be quite low, individuals may nevertheless overestimate its likelihood of occurrence.

The confirmation trap bias may also exacerbate biases associated with the availability heuristic. When people make tentative decisions, they tend to seek out confirmatory evidence to the exclusion of disconfirmatory evidence when finalizing that decision.¹¹⁶ For example, when hiring an employee who seems highly desirable, employers may seek out evidence confirming their competence while never questioning possible problems. This bias can have significant implications for risk assessment. If one is predisposed, after relying on the availability heuristic, to believe that an event is likely to occur, she will then seek out confirmatory evidence to solidify her assessment. Falling into this trap can significantly skew risk assessment by overlooking relevant evidence contradicting one's initial determination of risk.

The overconfidence bias similarly may exacerbate skewed risk assessment. Experts know that "people tend to be overconfident of their judgments, particularly when accurate judgments are difficult to make."¹¹⁷ For example, research shows that subjects estimating that they were 65-70 percent confi-

114. SLOVIC, *supra* note 108, at 14; Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 64 (2002).

115. Tversky & Kahneman, *supra* note 22, at 13.

116. BAZERMAN, *supra* note 112, at 35; *see generally* Dieter Frey, *Recent Research on Selective Exposure to Information*, 19 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 41 (Leonard Berkowitz ed., 1986).

117. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 219 (1993). The overconfidence bias is one of several "self-serving" biases in which people engage. Others include over-optimism and egocentrism. For a more in-depth discussion, see Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1172-73 (2003).

dent in the correctness of their answers to a survey were actually correct only about 50 percent of the time.¹¹⁸ Furthermore overconfidence is a “particularly potent [problem] when individuals possess some expertise.”¹¹⁹ Thus, the overconfidence bias may have particular ramifications for government decision making in times of crisis, exacerbating problems resulting from already skewed assessments.¹²⁰

2. The Nature of the Risk

Obviously, the range of all possible harms is quite broad, from minor to significant to catastrophic. How do people discriminate between them? Although risk means different things to different people, Professor Paul Slovic has developed a taxonomy regarding risk attitudes that spans the population, making it possible to assess whether society rates certain harms as minor, major, catastrophic, etc.¹²¹ According to Slovic, individuals perceive risks as more serious the more “dreaded” and “unknown” they are. In this sense, a risk is considered to be “dreaded” if people perceive that (1) it is potentially catastrophic and/or fatal, (2) it is involuntary, and (3) they lack control over it.¹²² A risk is “unknown” if it is (1) new, (2) unobservable, (3) lacking in immediacy, and (4) not understood.¹²³ A terrorist attack, for example, involves a “dreaded” risk because it is potentially catastrophic, we lack control

118. Sarah Lichtenstein & Baruch Fischhoff, *Do Those Who Know More Also Know More About How Much They Know?*, 20 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 159, 164-65 (1977); see also PLOUS, *supra* note 117, at 219.

119. Rachlinski, *supra* note 117, at 1172-73; see also Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 412 (1992).

120. Rachlinski, *supra* note 117, at 1173 (“Overconfidence in one’s own judgment magnifies the undesirable consequences of erroneous judgment. . . . [P]lacing a high degree of confidence in a judgment made in heavy reliance on a misleading heuristic compounds matters.”).

121. SLOVIC, *supra* note 108, at 220-31.

122. *Id.* at 141, 225. See also HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* 111 (1996) (discussing “controllability” of risk as a factor in its acceptability); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1028-29 (1990) (discussing American’s “particular aversion to public risk[s],” which the authors define as “manmade threats to human health or safety that are centrally or mass-produced, broadly distributed, and largely outside the individual risk bearer’s direct understanding and control”) (quoting Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 277 (1985)); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 708-09 (1999) (“In addition to controllability, ordinary people pay special attention to risks that are potentially catastrophic, likely to affect future generations, inequitably distributed, or involuntarily incurred.”).

123. SLOVIC, *supra* note 108, at 141, 226.

over terrorists, and we do not voluntarily become terrorist victims. Such an attack might also represent an “unknown” risk if it involved chemical weapons. The average person lacks knowledge of such weapons, their effects aren’t immediately observable, and the possibility of their use outside of war is reasonably new to us.

Slovic’s taxonomy has significant implications for risk assessment. As risks becoming increasingly dreaded and unknown, people demand that something be done about them regardless of the probability of their occurrence, the costs of avoiding the risk, or the benefits of declining to avoid the risk.¹²⁴ Other research shows that, when an intense emotion such as fear is involved, individuals tend to either overestimate the likelihood of an event’s occurrence¹²⁵ or simply ignore the probability that it will occur, instead focusing on the possible harm from the outcome.¹²⁶

As a result of these findings, we know the perceived magnitude of the harm—which may be associated with an atmosphere of fear—can affect our assessment of its probability and our desire for preventive action. When there is a perceived possibility of a highly dreaded/unknown event, individuals may overestimate its likelihood and demand action to prevent it.

3. Social Dynamics

Risk assessment is as much a social as it is an individual phenomenon. As Kuran and Sunstein explain:

[P]eople consult each other; they learn from each other, they influence one another’s values; they defer to each other, they share sources of public information; they try to mold each other’s beliefs and values, and their social interactions shape their knowledge, perceptions and interpretations. . . .

. . . .

In contexts involving risks, then, both perceptions of a risk and its acceptability are framed socially.¹²⁷

Thus, any discussion of the psychological biases associated with risk perception must account for potential social influences upon decision making. Such

124. *See id.* at 152; *see also* MARGOLIS, *supra* note 122, at 171, 174-75; Gillette & Krier, *supra* note 122, at 1028-29.

125. *See* Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146 (2001).

126. George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267 (2001); Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 PSYCHOL. SCI. 185, 188 (2001).

127. Kuran & Sunstein, *supra* note 122, at 710-11.

influences, generally termed “availability cascades,” take two forms—information and reputational.

Because it is costly to gather information, most risk judgments are based on information from others.¹²⁸ Thus, “[m]ost of us think and fear what we do because of what we think other people think and fear.”¹²⁹ For example, if one person in a social group believes strongly that an event will occur, that belief may influence others in the group who are less sure or who simply trust that individual’s judgment. This phenomenon, known as an “information cascade,” may significantly skew risk assessment on a large scale. If the initial source has overestimated the probability of an event due to its availability or because the risk is highly dreaded, the exaggerated belief can cascade through society becoming widespread and self-reinforcing.¹³⁰

Social dynamics can influence risk perception in another way. Most people care about the ways others view them,¹³¹ which may affect the beliefs they have with respect to the likelihood of a particular risk. For example, an individual member of a social group may not believe in the likelihood of an event; however, if other members think the event will occur, the individual may express a view consistent with the group out of concern for her reputation.¹³² This phenomenon, called a “reputational cascade,” can affect public risk perception by pressuring individuals to realign their public expression of risk with “the dominant view within . . . society.”¹³³ As with information cascades, such events can become self-reinforcing. As individuals self-censor their expression of inconsistent viewpoints, society may come to hold the dominant view even more strongly.

Neither information cascades nor reputational cascades necessarily occur in any particular situation. Rather, they frequently occur because an individual or group instigates them. Such persons, whom Kuran and Sunstein deem “availability entrepreneurs,” often have a political or ideological stake in policy control¹³⁴ and are adept at attracting media coverage and intuiting issues around which their intended audience might rally.¹³⁵ Availability en-

128. *Id.* at 717.

129. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1132-33 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

130. Kuran & Sunstein, *supra* note 122, at 685 (noting that the availability heuristic “interacts with identifiable social mechanisms to generate availability cascades . . . through which expressed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse”). See also SLOVIC, *supra* note 108, at 232.

131. Sunstein, *supra* note 129, at 1133.

132. Kuran & Sunstein, *supra* note 122, at 727-28 (“People ordinarily want to be perceived as standing on high moral ground, so in the presence of sufficiently strong pressures, they adjust their expressions accordingly.”).

133. *Id.* at 729.

134. *Id.* at 727.

135. *Id.* at 713, 733-35.

trepreneurs thus attempt to “shape . . . pressures in order to mold public discourse and control the policy selection process.”¹³⁶ The media often exacerbates a cascade by focusing on dramatic stories likely to attract attention—e.g., stories involving vivid or compelling threats, such as terrorism, child abduction, or shark attacks¹³⁷—and reporting them with little or no investigation of their basis in fact.¹³⁸

When information and reputational cascades occur, they do so on a variety of levels—personal, local, and national. Thus, a cascade can cause a particular fear to grip the nation or it can be localized within a group of people, such as a community or organization. Furthermore, when such cascades occur, they necessarily result in commensurate “unavailability cascade[s] that progressively free[] public discourse of voices out of tune with the evolving chorus,” making it “increasingly difficult for people with stated or unstated reservations about the developing public consensus to retain their misgivings.”¹³⁹

Although availability/unavailability cascades can affect individual decision making, they have particular implications for group deliberations. Research shows that collective decision making that is “predictive or normative in nature”—i.e., decisions made under uncertainty as opposed to those that are easily verified—can be skewed by the very presence of the group.¹⁴⁰ In such circumstances, those groups in which people are predisposed toward a particular position (i.e., fairly homogeneous groups) can be highly sensitive

136. *Id.* at 727; see also Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 77 (noting that in public policy agenda setting “groups, individuals, and government agencies deliberately and consciously design portrayals so as to promote their favored course of action”).

137. See, e.g., Neal R. Feigenson & Daniel S. Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCHOL. PUB. POL’Y & L. 444, 447 (2001) (discussing research on media “melodramatiz[ation]” of accident reporting); Jennifer K. Robbennolt & Christina A. Stuebaker, *News Media Reporting on Civil Litigation and its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5, 9-10 (2003) (discussing research on media bias for reporting news that “will capture news consumers’ attention”).

138. Kuran & Sunstein, *supra* note 122, at 735-36.

139. *Id.* at 730. Such cascades are often closely related to the phenomenon psychologists call “pluralistic ignorance” where individuals incorrectly perceive that the attitudes of others are different from their own, thus causing them to alter their behavior or stated beliefs to more closely approximate the erroneously perceived norm. See Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 541, 541, 547 (1994).

140. Seidenfeld, *supra* note 106, at 535 (describing predictive or normative decisions as those that include determinations of risky versus safe, liberal versus conservative, certain versus uncertain). For a general discussion, see ROBERT S. BARON ET AL., GROUP PROCESS, GROUP DECISION, GROUP ACTION 60-91 (1992).

to information and reputational influences.¹⁴¹ As a result, they “polarize,” taking a more extreme position than any individual member would have taken prior to deliberation.¹⁴² Such polarization is not necessarily a problem in itself, but it can exacerbate biases in individual decision making, leading to extreme positions based upon skewed risk assessment.¹⁴³

Reputational influences can also lead to “groupthink,” a “mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.”¹⁴⁴ In such cases, the pressures of loyalty and conformity can produce such significant, systematic errors in a group’s assessment of risk and moral judgment¹⁴⁵ that researchers have described decisions affected by groupthink as “fiascoes.”¹⁴⁶ Groupthink does not necessarily occur in group deliberations. But researchers have found that the phenomenon is more likely when groups (a) are insulated from outside influence, (b) are relatively homogeneous, (c) lack an impartial leader, (d) lack systematic procedures for evaluating evidence, and (e) make decisions in times of great stress.¹⁴⁷

4. Implications for Law and Policy

The psychological findings above suggest that substantial errors occur in risk assessment during times of intense emotions, such as fear. Individuals are generally likely to overestimate the probability of an event’s occurrence if that event is especially familiar or salient. The presence of an intense emotion can further exacerbate the tendency to overestimate the likelihood of an

141. Seidenfeld, *supra* note 106, at 535-36; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71, 85-90 (2000).

142. Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141, 1141 (1986).

143. Seidenfeld, *supra* note 106, at 536-37 (and sources cited therein).

144. IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (1982).

145. Philip E. Tetlock et al., *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 J. PERSONALITY & SOC. PSYCHOL. 403, 403 (1992). Cognitive errors resulting from groupthink include superficial consideration of the group’s objectives, superficial consideration of alternative courses of action, failure to examine the risks associated with the group’s chosen course of action or failure to reassess rejected courses of action, inadequate search for relevant information and biased processing of information. JANIS, *supra* note 144, at 9-10; Tetlock et al., *supra*, at 404.

146. JANIS, *supra* note 144. Janis studied several governmental policy decisions in the 1960s and 1970s, including the Bay of Pigs invasion and the escalation of the Vietnam War. *See also* James K. Esser & Joanne S. Lindoerfer, *Groupthink and the Space Shuttle Challenger Accident: Toward a Quantitative Case Analysis*, 2 J. BEHAV. DECISION MAKING 167 (1989).

147. JANIS, *supra* note 144, at 176-77, 242-59.

event, either because it makes an event especially available or because people begin to focus on the potentially catastrophic nature of a particularly fearful event, essentially dropping probability out of the equation altogether. Social influences can reinforce this skewed risk assessment through the phenomenon of information and reputational cascades, which can cause a widespread, though erroneous, belief regarding the likelihood of an event.

These findings have substantial implications for law and policy during times of crisis. First, since “[p]ublic officials, no less than ordinary people, are prone to use of the availability heuristic,” they may themselves fall prey to skewed risk assessment.¹⁴⁸ To the extent that government officials often reach such assessments after group deliberation, there is the possibility that such decisions will be skewed even further by polarization or groupthink. Second, the public may fall prey to skewed risk assessment as a result of private availability entrepreneurs’ attempts to fan fear regarding particular threats. As the public becomes excessively “fearful of statistically small risks,” it may demand that government act to prevent that risk regardless of the costs of regulation or the potential harm caused by regulating the risk.¹⁴⁹ To the extent that reputational pressures operate on officials, especially elected ones, they will tend to respond positively to public demands by enacting legislative and regulatory measures regarding small-probability risks.¹⁵⁰ Finally, the government may itself act as an availability entrepreneur, causing the public to call for government action. Once the public’s calls are of sufficient strength, those officials can then pressure others to enact legislation or take action to further their private agendas.

B. Application to Past Crises

As discussed above, the executive branch acted against specific groups of Americans based upon their alleged dangerousness although there was little or no evidence that such groups posed a danger to national security.¹⁵¹ Application of the psychological understandings discussed above suggests that government officials’ assessment of such dangerousness may have resulted from skewed risk assessment. It further suggests that such assessments may have influenced others due to the operation of availability cascades.

There is widespread agreement that the groups targeted during World Wars I and II and the Cold War did not pose a threat to national security *and* that there was substantial evidence at the time from which to adduce this fact.

148. Sunstein, *supra* note 129, at 1127; *see also* Kuran & Sunstein, *supra* note 122, at 691-703.

149. Sunstein, *supra* note 129, at 1127; *see also* MARGOLIS, *supra* note 122, at 174-75; SLOVIC, *supra* note 108, at 152.

150. Sunstein, *supra* note 129, at 1127 (“[I]n a democracy, officials, including lawmakers, will respond to public alarm.”).

151. *See supra* Parts I.A-B.

Nevertheless, Americans came to fear these domestic groups because they associated them with foreign interests posing a genuine threat. Specifically, Americans perceived themselves to be fighting foreign states for the very existence of their country and the maintenance of their way of life. As one government official noted, Communism is “a far greater threat to our existence than any other threat,” and if the United States “does not successfully cope with the communist threat, then it need not worry about any other threat to the internal security of this nation, because it is not impossible that there will be no nation.”¹⁵² As domestic groups came to be closely associated with foreign interests, they too became a threat to our existence.

Such a threat ranks high on Professor Slovic’s scale of “dreaded” and “unknown” threats. As discussed above, “dreaded” threats include those that are catastrophic, involuntary, and outside of an individual’s control. Americans would have perceived loss of their way of life as catastrophic given that such loss would curtail freedom and enforce cultural regimes abhorrent to most Americans. Several psychological theories support such a notion. For example, psychologists have noted that threats to a group’s social identity¹⁵³ or cultural worldview¹⁵⁴ are substantial sources of anxiety and fear. The

152. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 48 (quoting FBI official).

153. Social Identity Theory posits that an individual’s social identity “consists . . . of those aspects of an individual’s self-image that derive from the social categories to which he perceives himself as belonging.” Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 16 (Stephen Worchel & William G. Austin eds., 2d ed. 1986). When perceived threats to that social identity are significant, members of a dominant group will become hostile to a threatening group as part of their effort to maintain positive social identity. RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 174-76 (1995). When perceived instability in an existing power hierarchy threatens the positive social identity of a dominant group, it actively seeks to maintain status/power distinctions, increasing the likelihood of discrimination toward a low-status group. Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in *2 THE HANDBOOK OF SOCIAL PSYCHOLOGY* 554, 570-71 (Daniel T. Gilbert et al. eds., 1998).

154. According to Terror Management Theory, human beings develop a “cultural anxiety buffer” to protect ourselves from the anxiety/terror associated with our capacity to imagine our own vulnerability and death. Sheldon Solomon et al., *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-esteem and Cultural Worldviews*, in *24 ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 93, 101 (1991). “[A] conception of reality espoused by [a] given culture,” the cultural anxiety buffer protects against anxiety by providing a context in which people perceive of themselves as valuable participants in a meaningful world. Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 681, 681 (1989). In a diverse world with widely ranging and competing beliefs, each individual’s cultural anxiety buffer is fragile and requires constant bolstering against threats; thus people respond negatively to those who threaten their cultural worldview. *Id.* at 682. This is especially true when one’s worldview is threat-

threats ostensibly posed by domestic groups allied with hostile foreign powers would seem to fit well within such a conception. Indeed, the fact that the targeted domestic groups were often labeled as “un-American” suggests that Americans perceived them as threatening their cultural, political, and social existence.¹⁵⁵

Such a threat is also involuntary and beyond individual control. The very fact that Americans perceived themselves to be at war suggests that the threat was involuntary—few people choose to fight a war simply because they want to; rather they generally do so because they believe they have no other way to defend themselves. Furthermore, the perception that domestic groups were the secretive agents of foreign power—puppets biding time at their masters’ behest¹⁵⁶—emphasized Americans’ lack of control over the threat,¹⁵⁷ as did the constant refrain of government officials that existing legal tools were incapable of dealing with the problem.¹⁵⁸

Loss of our democratic way of life similarly qualifies as an “unknown” risk—i.e., one that is new, unobservable, not having immediate effects, and not easily understood. The threats posed by the disfavored domestic groups were new in some sense. Prior to World War I, for example, German culture was much admired in the United States.¹⁵⁹ The government’s characterization of German-American groups as traitors would thus have been a jarring one. Although there was a significant amount of racist sentiment against Japanese-Americans prior to World War II, much of it lay dormant by 1930.¹⁶⁰ The Japanese attack on Pearl Harbor, however, triggered a new fear of Japanese-Americans.¹⁶¹ Finally, Americans’ fear of Communism during the Cold War was also somewhat new in that it was immediately preceded by our alliance with the Soviet Union during World War II.¹⁶²

ened by people who violate cultural norms, people who hold discrepant ideas, and people who are dissimilar. Solomon et al., *supra*, at 125-31.

155. For example, the committee primarily responsible for investigating Communism was known as the House Un-American Activities Committee. Frank Donner notes that terms like “un-American” were a product of Americans’ “early search for positive communal values and self-definition with which to confront Bolshevism.” DONNER, *supra* note 54, at 15 n.†. William Wiecek further notes that almost all scares in American history involved a threat from either a hostile power or un-American belief system. Wiecek, *supra* note 65, at 381.

156. See *supra* notes 62-73 and accompanying text.

157. According to some scholars, the very concept of the secret conspiracy is a product of paranoid fear in individuals. See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* (1966).

158. See *supra* notes 39-50 and accompanying text.

159. SECRECY COMMISSION, *supra* note 26, at A9.

160. TENBROEK ET AL., *supra* note 6, at 11-67.

161. *Id.* at 68 (noting that the Pearl Harbor attack “revived” old prejudices and stereotypes regarding Japanese-Americans).

162. As with anti-Japanese sentiment, antipathy toward domestic Communists existed as early as the 1920s and increased throughout the 1930s. See generally

One can also characterize the perceived threat posed by such groups as latent and unobservable. The characterization of domestic groups as consisting of secretive agents of foreign countries fits well within the classification of an unobservable threat. Furthermore, because such groups were, allegedly, to act when the time was appropriate, the threat they posed was latent and liable to occur unexpectedly. Finally, Americans would have had difficulty understanding the threat posed by domestic groups because they were, by definition, un-American in nature.

In light of the perceived magnitude of the threat according to Slovic's threat taxonomy, Americans' demands for action against domestic groups are unsurprising. Other cognitive biases also potentially distorted individual perceptions of the danger. The perceived threat of domestic groups was highly available. In all instances, there was widespread, negative media coverage regarding their hostile intent and threatening nature. Such coverage painted lurid images of potential traitors, the vivid nature of which must have stayed with the public.¹⁶³ The contemporaneous nature of media coverage and attempts to personalize the threat by characterizing one's neighbors or friends as potential traitors also would have increased the salience of these images. Reliance on the availability heuristic could easily have led to the overestimation of the domestic groups' dangerousness.

The egocentric and confirmation trap biases may have exacerbated problems associated with use of the availability heuristic. For individuals with access to factual information—usually government officials, given their position as the gatekeepers of national security information—there was often evidence suggesting that the disfavored groups did not pose a threat or a lack of evidence suggesting that they did. Nevertheless, many officials ignored such evidence or incorporated it in a manner consistent with their image of the groups as threatening. General DeWitt, for example, managed to convert the fact that there had been no sabotage by Japanese-Americans into support for his claim that there soon would be.¹⁶⁴ Similarly, J. Edgar Hoover, faced with the fact that the ranks of domestic Communists were rapidly dwindling, claimed that their size was misleading, as there existed many more "secret" Communist Party members.¹⁶⁵ Such manipulation is consistent both with individual tendencies to seek out confirmatory evidence at the expense of

ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920* (1955); Wiecek, *supra* note 65, at 395-96. During World War II, however, the United States was allied with the Soviet Union, bringing about increased toleration of domestic Communists. *Id.* at 403.

163. See *supra* notes 90-93 and accompanying text.

164. See *supra* note 74 and accompanying text.

165. J. Edgar Hoover, Testimony before HUAC, March 26, 1947, in SCHRECKER, *MCCARTHYISM*, *supra* note 13, at 114-20.

disconfirmatory evidence and to be overly sure of one's judgment regarding particular people or events.¹⁶⁶

Most Americans did not have access to specific, factual information regarding the allegedly threatening groups. Rather, various sources presented the public with a one-sided image. While some Americans dissented, those images eventually took hold,¹⁶⁷ suggesting the presence of availability cascades. This is most obviously true with respect to information cascades, which begin as a result of indirect information gathering. The salience of public images involved would have primed the triggering of a social cascade. Similarly, because the sources of information were often seemingly reliable government officials, they would have been difficult to ignore.¹⁶⁸

To the extent availability cascades were triggered, it is reasonably apparent that availability entrepreneurs acted to ensure that their image of the threat dominated. Such entrepreneurs involved government actors—e.g., Hoover, DeWitt, Wilson, Truman, Creel. But private organizations also acted as availability entrepreneurs. During World War I, for example, the American Protective League (“APL”), a private vigilante group organized to prevent German sabotage and espionage in American industry, sold subscriptions to its newspaper, *Spy Glass*, that detailed its operations.¹⁶⁹ Numerous patriotic and business groups during World War II lobbied for restrictions on Japanese-Americans, relying heavily on the prejudiced image described above.¹⁷⁰ Similarly, during the Cold War a private anti-Communist network consisting of individuals from the Catholic Church, labor organizations, business, and journalism began to crusade against Communism, publishing their own reports or feeding information to the media in the guise of expert opinion.¹⁷¹

Entrepreneurs' motives ranged widely. Some truly believed in the threat domestic groups posed. J. Edgar Hoover, for example, believed that Commu-

166. The confirmation trap and overconfidence biases are closely related in that “overconfidence derives in part from the tendency to neglect contradicting evidence.” Asher Koriat et al., *Reasons for Confidence*, J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 113 (1980). It is thus no surprise that DeWitt and Hoover, both of whom were quite convinced of their rightness, neglected contradictory evidence.

167. See *supra* Part I.C.

168. For example, the public held J. Edgar Hoover in extremely high esteem. DONNER, *supra* note 54, at 80-81. Most Presidents enjoy increased public support during crisis periods, suggesting that words and actions of Presidents Wilson, Roosevelt, and Truman would have made a significant impression on the public. See, e.g., Samuel Kernell, *Explaining Presidential Popularity*, 72 AM. POL. SCI. REV. 506, 521 (1978). One can imagine that military officials, such as General DeWitt, also would enjoy respect during a popular war.

169. HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 279 (1959). For a general description of APL activities, see *id.* at 272-92.

170. TENBROEK ET AL., *supra* note 6, at 76-80.

171. SCHRECKER, MANY ARE THE CRIMES, *supra* note 13, at 43-45; see also *supra* note 100.

nism was “the most evil, monstrous conspiracy against man since time began.”¹⁷² General DeWitt also appears to have firmly believed in the danger posed by Japanese-Americans.¹⁷³ Political interests apparently motivated other availability entrepreneurs. Thus, observers argue that the APL was less interested in national security than it was in protecting business from labor agitation by immigrant-laden organizations.¹⁷⁴ Business interests also spurred many private organizations’ advocacy of the internment of Japanese-Americans during World War II.¹⁷⁵ During the Cold War, President Truman encouraged the view of domestic Communists as dangerous primarily to further his foreign policy agenda rather than out of real fear of them.¹⁷⁶ Others used domestic Communism as an excuse to promote anti-New Deal legislation¹⁷⁷ or to gain election victories for their political party.¹⁷⁸

In addition to information cascades, the stigmatization of dissenters likely caused reputational cascades during these periods. As noted above, the risk of being labeled unpatriotic or becoming a social pariah or victim of mob violence silenced many critics of the government’s actions.¹⁷⁹ Consequently, intense pressure for national conformity marked these crisis periods, especially World War I and the Cold War, making it difficult for any single person to speak out. Public discussion became so one-sided as to be self-reinforcing. This was true on a broad societal level, but it also may have been true within smaller groups, such as government or private organizations. Such reputational cascades could have dramatically affected collective decisions of such organizations, exacerbating the perceived threat posed by domestic groups.

For example, the FBI’s extreme view of domestic Communists’ dangerousness may have resulted partly from groupthink or group polarization. With respect to groupthink, J. Edgar Hoover’s antipathy toward domestic Communists and his total control over decision-making processes easily satisfies the requirement that the group lack an impartial leader. Further, the FBI was an

172. DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE* 41, 43 (1956). See also DONNER, *supra* note 54, at 83; CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 81 (1991).

173. DeWitt’s apparent racism does not detract from this statement. Such racism could have resulted from the threat that Japanese beliefs and practices posed to DeWitt’s cultural worldview. See *supra* notes 153-54. That threat, combined with the potential violence and upheaval caused by an American defeat in World War II, would have been likely factors in DeWitt’s assessment of Japanese-Americans’ dangerousness.

174. JOAN M. JENSEN, *THE PRICE OF VIGILANCE* 32 (1968).

175. TENBROEK ET AL., *supra* note 6, at 76-80.

176. See *supra* note 57.

177. SCHRECKER, *MANY ARE THE CRIMES*, *supra* note 13, at 90-91.

178. Wiecek, *supra* note 65, at 414 (discussing Republican’s use of the Communist issue).

179. See *supra* notes 103-04 and accompanying text.

extremely homogenous organization as Hoover exercised meticulous control over the hiring and training of his employees in an attempt to make them “interchangeable units.”¹⁸⁰ FBI personnel were further insulated from outside influence as much of their planning and activity was done in total secrecy.¹⁸¹ Finally, FBI decision making often took place under conditions of great stress. Since the FBI believed itself to be the country’s main defender against a great evil, its every action would have seemed especially significant. One can see how FBI employees would quell dissenting viewpoints and feel great pressure to conform their decisions to Hoover’s will, ultimately resulting in a greatly skewed image of domestic Communists. Even absent groupthink, the structure of the FBI and the reputational pressures at work would likely have caused officials’ collective decisions to polarize more than if made by individuals. Given that the FBI often operated as an availability entrepreneur, this extreme version of the threat posed by domestic Communists would have spread on a societal level.

Ultimately, one can present a reasonable argument that skewed risk assessment was at the heart of the executive’s decisions to prosecute seditious utterances during World War I, to intern Japanese-Americans during World War II, and to pursue domestic Communists with a variety of legal tools during the Cold War. In some cases, individual executive officials may have overestimated the dangerousness of such groups, later acting as availability entrepreneurs to gain public support for their actions. In other cases, individual officials apparently acted as availability entrepreneurs for political reasons. Finally, officials may simply have bowed to public pressure arising from distorted images of domestic groups publicized by others, including private organizations, Congress, or other executive officials. Regardless of the source, the decisions to act against specific domestic groups are consistent with psychological understandings of skewed risk assessment.

III. DECISION MAKING, ACCOUNTABILITY, AND THE JUDICIAL DEFERENCE DEBATE

This discussion has substantial implications for the judicial deference debate. Both sides of the debate argue from fundamental assumptions about various decision makers’ capabilities, and the historical pattern above sheds light on some of those assumptions. First, that pattern casts doubt on judicial deference proponents’ claim that executive officials are particularly adept at

180. GENTRY, *supra* note 172, at 131.

181. Hoover was a fanatic with respect to secrecy regarding the FBI’s activities, convincing his superiors that it was necessary to national security. *See, e.g.*, CHURCH COMM., FINAL REPORT, BOOK III, *supra* note 43, at 392-93 (discussing Hoover memo expressing the need for the “utmost degree of secrecy in order to avoid criticism or objections [to expansion of FBI powers] by either ill-informed persons or individuals having some ulterior motive[s]”).

making decisions involving threats to national security. People generally are not adept at assessing risk in times of great fear, and history shows executive officials are no different, at least when national security decisions affect civil liberties at home. Moreover, reputational concerns may pressure officials into catering to public hysteria. Worse, executive officials are sometimes willing to act as availability entrepreneurs, instigating public hysteria for political ends.

Second, this historical pattern also suggests that proponents of judicial deference overstate their case in claiming executive officials have learned from past “tragic mistakes.” While skewed risk assessment does not necessarily occur in any given crisis, we know that it can occur and, further, we know the mechanism by which it usually does occur. Thus far, little has been done to counteract the elements—e.g., vivid images, fear or anxiety, substantial media coverage, reputational pressures to conform—that lead to skewed assessments. Given that conditions in national security crises typically involve such elements, there is reason to believe that skewed assessments will again be the basis for unwarranted infringements on civil liberties in similar crises. Government actions and public attitudes after September 11th support this proposition.¹⁸²

A. Accountability as a Mechanism for Improving Decision Making

Can anything be done to improve executive officials’ decision making and to avoid the civil liberties debacles of past crises? Psychological research on “accountability” offers some general answers and further provides support for the argument that rigorous judicial review can deter skewed risk assessment. As with the general dictionary definition of accountability,¹⁸³ psy-

182. Many of the government’s actions since September 11th potentially violate civil liberties. See Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. (forthcoming 2004) (manuscript on file with author). A study performed soon after the September 11th terrorist attacks showed increased willingness of individuals to trade civil liberties for security based upon the perceived threat. Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28 (2004). Other studies have shown that post-September 11th Americans tend to overestimate the likelihood of future terrorist attacks. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003); Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144 (2003). Taken together, these studies suggest that future civil liberties incursions based upon errors in risk assessment are entirely possible.

183. Accountability is generally defined as “liability to give account of, and answer for, discharge of duties or conduct.” Oxford English Dictionary, available at http://dictionary.oed.com/cgi/entry/00001361?single=1&query_type=word&queryword=accountability&edition=2e&first=1&max_to_show=10 (last visited July 1, 2004).

chologists typically define that term to mean “the implicit or explicit expectation that one may be called on to justify one’s beliefs, feelings, and actions to others.”¹⁸⁴ That term “also usually implies that people who do not provide a satisfactory justification for their [own] actions will suffer negative consequences . . . [and that] people who do provide compelling justifications will experience positive consequences.”¹⁸⁵ By serving as a constraint on behavior, “[a]ccountability is a critical norm-enforcement mechanism—the social psychological link between individual decision makers on the one hand and social systems on the other.”¹⁸⁶

Research shows that accountability can improve judgment and decision making. This improvement comes about because people subject to account want to avoid embarrassment in front of their audience.¹⁸⁷ According to a

Although this definition may seem obvious, the term “accountability” has an amorphous cast to it when discussed in the context of political institutions. See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1994) (noting that much literature in administrative and constitutional law “gives little sustained attention to what ‘accountability’ means”). Use of the term in law review literature has typically meant “vesting of ultimate decisional authority in a person who is elected.” *Id.*; Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 533 (1998) (noting that political accountability is typically understood as the “requirement that public officials stand periodically for election”). Even with this common understanding, it is not altogether clear which political actors must be accountable or to whom. Shane, *supra*, at 196. Furthermore, some authors suggest entirely different meanings of accountability. See, e.g., Brown, *supra*, at 535 (“[A]ccountability is best understood, not as a utilitarian means to achieve maximum satisfaction of popular preferences, but as a structural feature of the constitutional architecture, the goal of which is to protect liberty.”). It is thus worth emphasizing that the psychological definition—even when used in the context of explaining behavior by political actors and institutions—is closely related to the original dictionary meaning.

184. Lerner & Tetlock, *supra* note 23, at 255. Because psychological experiments take place in many contexts, psychologists do not necessarily use a uniform definition of accountability. However, the above definition represents the “core concept” of psychological research on accountability. Seidenfeld, *supra* note 106, at 509.

185. Lerner & Tetlock, *supra* note 23, at 255.

186. Philip E. Tetlock, *Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 582, 583 (Thomas Gilovich et al. eds., 2002).

187. Lerner & Tetlock, *supra* note 23, at 263 (“When participants expect to justify their judgments, they want to avoid appearing foolish in front of the audience.”); Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 416, 441 (1992) (noting the “desire of accountable decision makers to be favorably evaluated and decrease the likelihood of criticism”).

comprehensive review of accountability research performed by Jennifer Lerner and Philip Tetlock, such motivation causes decision makers to

prepare themselves by engaging in an effortful and self-critical search for reasons to justify their actions. This search leads participants to (a) survey a wider range of conceivably relevant cues; (b) pay greater attention to the cues they use; (c) anticipate counter arguments, weigh their merits relatively impartially, and factor those that pass some threshold of plausibility into their overall opinion or assessment of the situation; and (d) gain greater awareness of their cognitive processes by regularly monitoring the cues that are allowed to influence judgment and choice.¹⁸⁸

Because accountability is a complex phenomenon dependent on many factors, one cannot assert that it necessarily alleviates all decision-making errors or biases.¹⁸⁹ However, specific studies show that accountability can attenuate many of the errors and biases apparently involved in the skewed risk assessment described above. Thus, research shows that accountability can cause decision makers to be more self-critical, more willing to consider alternative points of view, and more willing to anticipate possible objections to proposed courses of actions.¹⁹⁰ Accountability also can attenuate biases related to the availability heuristic¹⁹¹ and the overconfidence bias.¹⁹² Further, requiring a group to account for its decisions can mitigate some of the reputational influences that result in groupthink by decreasing mindless attempts at

188. Lerner & Tetlock, *supra* note 23, at 263 (citations omitted).

189. Research shows that accountability can improve some aspects of decision making, have no effect on others, and exacerbate some biases. For a general discussion, see Tetlock, *supra* note 186, at 590-92.

190. Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 81 (1983); Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 639-40 (1989).

191. Diederik A. Stapel et al., *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy X Knowledge Accessibility Effects*, 74 J. PERSONALITY & SOC. PSYCHOL. 878, 891 (1998); Erik P. Thompson et al., *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 J. PERSONALITY & SOC. PSYCHOL. 474, 484 (1994). Professor Seidenfeld posits that mitigation of these biases occurs because “[p]resumably, the knowledge that one will be accountable leads a decisionmaker to work harder at generating information that bears on the decision and that is not easily accessible through memory.” Seidenfeld, *supra* note 106, at 523.

192. Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700, 706-07 (1987). See also Koriart et al., *supra* note 166, at 116-17 (1980) (noting that requiring decision makers to generate reasons opposing their course of action decreased overconfidence).

uniformity and the influence of a partial leader.¹⁹³ Finally, while accountability can exacerbate individuals' tendency to seek out confirmatory evidence to the exclusion of disconfirmatory evidence, explicit instructions to consider alternatives urge individuals to correct for this bias.¹⁹⁴

These findings suggest that accountability may deter government decisions based upon skewed risk assessment in times of crisis. To the extent that executive officials themselves overestimate a potential threat, requiring them to account for their decision in a formal way—by identifying the alleged threat and explaining why that threat is substantial and the government's action necessary—could lead to improved initial decision making. Accountability, by reducing pressure toward uniformity, may also enable public officials to resist reputational pressures causing them to bow to public hysteria.¹⁹⁵ Furthermore, accountability may rein in government officials who act as availability entrepreneurs because such officials, presumably desiring to avoid embarrassment, would more carefully evaluate the wisdom of purely political actions.¹⁹⁶

B. Judicial Review as a Mechanism of Accountability

One can make a strong argument that judicial review is generally a viable mechanism for executive branch accountability during national security crises.¹⁹⁷ The judicial forum, with its fact-finding capabilities, requirements of proof, and requirement that the government justify incursions on civil liberties, fits well within the general definition of accountability as requiring a specific, public accounting of one's decisions. Consistent with the psychological definition, positive or negative consequences attach to executive offi-

193. Marceline B.R. Kroon et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. CONFLICT MGMT. 91, 109-110 (1991).

194. David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 894-99 (1993).

195. See Kroon et al., *supra* note 193. Kroon's research involved group accountability and it is entirely possible that individual officials may act due to reputational pressures outside of a group context. Nevertheless, the reputational pressures operating in groupthink situations similarly operate on individuals. See Kuran & Sunstein, *supra* note 122 (suggesting that accountability will alleviate such pressure on individual officials to conform to public opinion).

196. This is the classic area in which a decision maker might fall into a confirmation trap, seeking to bolster their decision before an audience. As mentioned above, mechanisms of accountability can alleviate this problem.

197. For arguments that judicial review can provide accountability for government decisions in another context, see Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 587-89 (2002); Seidenfeld, *supra* note 106, at 508-26.

cials' accounting of their behavior in the form of a judicial ruling for or against the government.

That said, psychologists know that not all forms of accountability improve decision making. Rather, to improve judgment and decision-making, systems of accountability must satisfy specific prerequisites: (1) the decision makers must know in advance of their decision that they will be accountable to an audience; (2) the audience's views on the topic must be unknown; (3) the audience must be interested in process rather than outcome; and (4) the audience must be perceived as legitimately inquiring into the decision makers' judgments.¹⁹⁸ Judicial review can provide a mechanism of accountability for executive decision making, although perhaps not in the form in which it currently exists. What follows is a brief discussion regarding judicial review and its relationship to the prerequisites listed above.

1. Pre-decisional Awareness of Judicial Review

Research shows that persons who discover they are accountable after having committed to a position tend to bolster their original position rather than reconsider it; thus, pre-decisional awareness of accountability is an important element necessary to improved decision making.¹⁹⁹ Judicial review fits within this prerequisite. Government decisions affecting individual constitutional rights are routinely subject to binding judicial review.²⁰⁰ Government officials know this. Since *Marbury v. Madison*,²⁰¹ the Supreme Court has made clear that courts are entitled to review, indeed are the ultimate arbiter of, challenges to the constitutionality of government action.²⁰² Furthermore, despite a significant scholarly debate regarding the judiciary's appro-

198. Lerner & Tetlock, *supra* note 23, at 256-59.

199. *Id.* at 257.

200. The concept of judicial supremacy privileges courts' interpretation of the Constitution and "requires deference by other government officials to the constitutional dictates of the Court, even when [they] think that the court is substantively wrong about the meaning of the Constitution." Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 784 (2002).

201. 5 U.S. (1 Cranch) 137 (1803).

202. Although *Marbury* did not explicitly discuss the notion of judicial supremacy, later cases interpret it to stand for that proposition. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (arguing that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"); see also Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case"*, 38 WAKE FOREST L. REV. 375, 409-10 (2003).

priate role in constitutional adjudication,²⁰³ scholars largely agree that “judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.”²⁰⁴ The possibility of judicial review of government actions thus satisfies the requirement of pre-decisional awareness of accountability.

One could argue that courts’ pattern of deference in times of crisis indicates that the executive has no expectation of accountability with respect to its decisions. Government officials may know that they will *not* be held accountable even if courts exercise judicial review over constitutional questions. Thus, judicial review cannot be an adequate mechanism of improving executive decision making. The easy response to this argument is that judges *should* exercise more rigorous review even if historically they have not. The harder issue is whether judges actually *will* exercise such review even if encouraged.

Judges might choose to defer to executive decisions for two reasons. First, they might do so in order to preserve judicial capital. That is, they might defer rather than risk executive refusal to comply with, or public outrage regarding, a decision ruling executive action unconstitutional. Officials aware of this fact may see judicial review as no threat at all to their decision making. Surely, judges engage in motivated reasoning. They may even have done so in cases such as *Korematsu* and *Dennis*, as some scholars argue.²⁰⁵ However, it is difficult to predict the extent to which a judge will act to protect political capital in any specific case. The Court’s occasional willingness to issue opinions protecting civil liberties during times of stress suggests that

203. See, e.g., Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); Larry Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Whittington, *supra* note 200.

204. Kramer, *supra* note 203, at 6-7; see also Friedman, *supra* note 203, at 168. For example, broad support for institution of judicial review exists among both opinion leaders and the mass public. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 639-41 (1992); William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 762-65 (2003).

205. See, e.g., Grossman, *supra* note 6, at 682 (arguing that *Korematsu* reflected the Court’s decision to “protect itself as an institution by supporting popular government policies, and . . . avert a clash with a popular president who might decline to follow an adverse judicial ruling”); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002) (arguing that the fear of domestic Communists, though exaggerated, was “a brute fact that [the *Dennis*] judges who wanted to preserve their power had to consider”).

preservation of political capital by avoiding politically unpopular decisions does not necessarily occur with all judicial decisions in times of crisis.²⁰⁶ This lack of predictability regarding a court's approach, combined with a court's unwillingness to admit that political motives drive national security decisions,²⁰⁷ should force the executive to consider that the possibility of rigorous judicial review is very real.

Second, judges might defer to executive branch estimations of the dangerousness of particular groups because they fall prey to the same psychological phenomena that affect executive officials and the public.²⁰⁸ Research suggests that judges suffer from many of the same biases as laypersons,²⁰⁹ and I have noted elsewhere the potential effect that fear had on judicial decision making during the Cold War.²¹⁰ Significantly, however, research shows that "accountability can improve the care that decisionmakers take and alleviate decisionmaking biases—even if the audience is less knowledgeable and subject to the same biases that plague the decisionmaker."²¹¹ Thus, the mere fact that judges are subject to the same psychological biases does not negate the potential effectiveness of judicial review. Furthermore, to the extent that such biases reflect themselves in particular judicial actions such as deference, one can attempt to counteract that problem by using different constitutional standards designed to de-bias judicial decision making.²¹² Overall, then, judicial review can apparently fit within the requirement of pre-decisional awareness of accountability.

206. Stone, *supra* note 24, at 1153-55. The Supreme Court's recent decisions pronouncing that terrorism detainees must have some access to the courts reinforce this fact. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004).

207. In all of the instances of judicial deference referred to above, the Court, while perhaps motivated by political concerns, nevertheless crafted its decisions as the result of judicial doctrine. Thus, the Court applied such tests as strict scrutiny or clear and present danger, but it manipulated them to reach a particular outcome. The Court's unwillingness to admit that it acts out of political expediency, even when it does, suggests that the executive cannot, or should not, count on judicial deference in all cases.

208. *See, e.g.*, Posner & Vermeule, *supra* note 20, at 641-42.

209. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

210. *See generally* Wells, *supra* note 84.

211. Seidenfeld, *supra* note 106, at 509.

212. For an argument that certain judicial standards reflect an attempt to counter psychological biases, see Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1 (2003). For more discussion regarding the need to change judicial standards to meet accountability requirements, see *infra* notes 218-19 and accompanying text.

2. Audience Views of Topic are Unknown

Research shows that decision makers who believe they know their audiences' preferences do not engage in more self-critical, complex thoughts but instead alter their decisions to conform to what they perceive to be the preferred outcome.²¹³ In contrast, decision makers who are unaware of their audiences' preferences "think in more self-critical, integratively complex ways in which they consider multiple perspectives on the issue and try to anticipate the objections that reasonable others might raise to positions that they might take."²¹⁴ Thus, accountability can improve decision making only if the expected audience's views are unknown.

Judicial review fits well within this prerequisite. When making decisions, it is rarely, if ever, possible for executive officials to know which judges might hear particular constitutional challenges. Most judges are randomly assigned to such cases at the trial and appellate level. Obviously, executive officials know the identities of Supreme Court Justices and arguably may bolster decisions based upon the Justices' perceived preferences. This argument assumes, however, that executive officials know, at the time of their decisions, that the Court will review them—an unlikely event given the Court's small case load. Even if executive officials make decisions on the assumption of Supreme Court review, the Justices' pronounced views on topics do not necessarily govern decision's in particular cases. Political science research shows that ideology is only one of many complex factors affecting judicial decisions.²¹⁵ Accordingly, judicial review appears to satisfy the prerequisite that audience views be unknown.

213. Lerner & Tetlock, *supra* note 23, at 256; Tetlock, *supra* note 190, at 80-81; Tetlock et al., *supra* note 190, at 638.

214. Lerner & Tetlock, *supra* note 23, at 257; Tetlock, *supra* note 190, at 80-81.

215. Professors Greg Sisk and Michael Heise note, for example, that while the ideological dimension of judicial decision making

is . . . an inescapable element in understanding judicial behavior[,] . . . one cannot extrapolate from a general observation that an ideological element is present in a collective evaluation of a subset of cases . . . to the specific verdict that ideology is the animating, pervasive, and commanding influence in resolution of lawsuits. . . . Ideology does not cover everything (or even most things) nor does it explain everything (or even most things) where it does appear. . . . Rather, . . . researchers find that these jurists "are driven by a complex mix of factors—legal, ideological, and strategic."

Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 29-30 (Mar. 12, 2004), 99 NW. U. L. REV. (forthcoming 2005) (manuscript on file with author) (quoting Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects in Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1492 (2001)). See also Theodore Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1187-88 (2004) (noting that the

3. Audience Interested in Process Not Outcome

In order to improve decision making, the decision makers must believe that their audience evaluates them based upon the process used and not the outcome reached.²¹⁶ Judicial review can serve as a process-based evaluation, although this particular prerequisite poses more of a challenge than the others. Judicial review of constitutional challenges is at least partly outcome-based—i.e., government actors are ultimately told that their actions do or do not violate the Constitution. One would thus expect government officials to go to great lengths to justify their actions to avoid a finding of unconstitutionality. Such efforts would be consistent with research showing that outcome-based judgments cause people to increase their efforts at self-justification rather than search for viable alternatives.²¹⁷

To describe constitutional adjudication as only outcome-based, however, is simplistic. The Constitution itself rarely mandates outcomes in particular cases. Rather, in the civil liberties context (i.e., due process, equal protection, and free speech), the Court decides the constitutionality of government action after applying balancing tests that explicitly acknowledge the possibility that government actions are constitutional. For example, strict scrutiny requires that the government justify its action by identifying the interest involved (i.e., it must be compelling) and explaining why the action is necessary (i.e., why no other alternatives work). In this sense, constitutional adjudication is also process-based because it requires the government to account for its behavior. Presumably, if government officials know that they must explain their reasoning, they will think more carefully about what they do, explore other viewpoints, and seek out possible alternatives.

I use the term “presumably” in the last sentence because, although I think the Court’s balancing tests may indicate a desire to judge based upon process, I am not altogether sure they succeed. Scholars have rightly criticized the Court’s constitutional standards in civil liberties cases as being far too malleable, essentially little more than empty formulas.²¹⁸ In application, courts rarely use those formulas themselves but instead rely on background understandings of their application. Thus, we know that strict scrutiny means the government loses not so much because the Court reaches that decision

authors’ predictive model of Supreme Court behavior “capture[d] the influence of ideology in a more subtle way than simply predicting that conservative Justices will seek conservative outcomes and vice versa” and that various factors interacted with ideology to affect Justices’ decisions).

216. Lerner & Tetlock, *supra* note 23, at 258.

217. See Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419 (1992).

218. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 992-93 (1987); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 188-200 (1985).

after a thorough review of government interests, justifications, and evidence, but because that review starts out with a thumb on the scale against the government.²¹⁹ That thumb on the scale approach detracts from the notion of judicial review as process-based and suggests that, to serve as an effective mechanism of accountability, such standards must be revisited.

While a thorough explication of potential standards is beyond the scope of this Article, it is worth noting that there already exist judicial tests consistent with a process-based approach. Judges engage in “hard look” review of administrative policy decisions, for example, a standard that requires agencies “to articulate the factors it considers relevant to its decision, engage in some perceptible assessment of alternative courses of action, and respond to meaningful comments by outsiders.”²²⁰ Mark Seidenfeld has argued quite convincingly that such review satisfies the prerequisites of accountability, including the notion that it is process-based in nature.²²¹

Similarly, in refining the “clear and present danger” standard of its early free speech jurisprudence, the Court adopted the test announced in *Brandenburg v. Ohio*.²²² That test allows punishment of speech only when it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²²³ Such specific criteria force the government to reason through its decision to punish speech in a particular circumstance, to explain itself, and to provide a solid evidentiary foundation for its decision. Furthermore, the Court requires that, prior to punishing dangerous speech, government officials seek alternatives other than arresting the speaker, such as adding more police to keep order.²²⁴ Read together, these cases forewarn government officials that the processes used must satisfy the Court that everything possible was done to protect the speaker’s right. In light of these examples, the Court can likely develop other constitutional standards of review to satisfy accountability requirements.

4. Decision Maker Must Perceive Audience as Legitimate

To improve decision making, the decision maker must perceive that the audience to which she is accountable has a legitimate reason to inquire into

219. See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992); Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 36 (2000).

220. Rachlinski & Farina, *supra* note 197, at 588. See also *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Corp.*, 463 U.S. 29, 42-45 (1983).

221. Seidenfeld, *supra* note 106, at 508-25; see also Rachlinski & Farina, *supra* note 197, at 588-89.

222. 395 U.S. 444 (1969).

223. *Id.* at 447-48.

224. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

her judgment. Accountability perceived as illegitimate—i.e., intrusive or insulting—has no beneficial effect and may even backfire.²²⁵ Important factors here may include that the audience be as or more powerful than the decision maker and that the audience be well-informed.²²⁶

The judicial system is a powerful institution. In the context of resolving constitutional issues, many people, the Court included, believe that the judicial system has the final (and, thus, most powerful) say.²²⁷ To be sure, executive officials, past and present, have asserted that national security matters are particularly within the executive branch's ambit, suggesting that they do not share this view of the Court's legitimacy.²²⁸ Even so, executive officials rarely flout the Court's authority, instead preferring to enlist the Court's support (which the Court often willingly provides). Executive officials might prove more willing to deny the Court's authority if it engaged in more rigorous review of executive decisions regarding national security. However, popular support for the institution of judicial review would likely preclude outright executive defiance²²⁹ and could eventually spur acceptance. This might be especially true if the Court's constitutional standards of review focused more explicitly on decision-making processes, thus avoiding the impression that the Court was substituting its judgment for the executive's.²³⁰

The Court is also well-informed within the meaning of accountability literature. Importantly, being well-informed does not require expert knowledge on particular issues but simply that the audience be not easily tricked.²³¹ Thus, judges need simply be able to inform themselves to the point where they understand generally the issues involved. Briefs, oral argument, and other evidentiary devices already aid courts in educating themselves and should be able to do so for accountability purposes as well.

225. Lerner & Tetlock, *supra* note 23, at 258-59.

226. Tetlock, *supra* note 186, at 585-86.

227. *See supra* notes 202, 204 and accompanying text.

228. *See, e.g.*, Brief for Respondents at 16-18, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (arguing that the designation of an individual as an "enemy combatant" was particularly within the war powers of the executive branch and subject only to deferential review); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (noting executive contention that President Truman's seizure order was justified as lawful exercise of the president's military power).

229. *See supra* note 204.

230. As noted above, judicial interpretation of constitutional law will always be somewhat outcome-based in that judge's must find executive action to be constitutional or unconstitutional. Such a determination has aspects of judge's substituting their judgment for executive branch decision makers. However, if the Court were to use more process-oriented tests, the focus of judicial review would more obviously be on judicial review as a mechanism for accountability.

231. Tetlock, *supra* note 186, at 585-86. As noted above, accountability to the judiciary can improve executive decisionmaking "even if the audience is less knowledgeable." Seidenfeld, *supra* note 106, at 509.

C. Additional Thoughts Regarding Accountability and Judicial Review

The previous Section argues that judicial review can meet the prerequisites of effective accountability. A few additional arguments regarding the relationship between judicial review and executive branch accountability, however, deserve further discussion. First, why is it obvious that one should use the court system as a mechanism of accountability as opposed to Congress? After all, Congress, an arguably more democratic institution, could serve as such a mechanism.²³² Furthermore, one could argue, since most executive overreaching occurs as a result of powers granted in legislative enactments, Congress is uniquely poised to stop such behavior.

Certainly, we should also pursue mechanisms of accountability via Congress. Two voices are better than one when asking the executive to justify its actions. There are reasons, however, to question whether Congress can adequately serve as such a mechanism. While the Court is not free from reputational influences,²³³ Congress, as an elected body, is far more subject to them. Accordingly, it may be asking too much to require that Congress serve as the primary institution calling upon the government to “justify [its] beliefs, feelings, and actions” in national security matters.²³⁴ In times of crisis, the desire to conform to the dominant belief may simply be too great for the legislature to counteract.²³⁵ Although this has not always been true,²³⁶ research on repu-

232. See CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 309-12 (Harcourt, Brace & World 1963) (1948) (discussing Congress’s potential role in policing executive action). As discussed *supra* note 203, there has been much debate regarding the judiciary’s lack of accountability in the political sense. Indeed, there is a huge literature on this topic alone. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Friedman, *supra* note 203; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997); Anthony T. Kronman, *Anthony Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997). Such arguments, while provocative, are beyond the scope of this Article. I assume that courts have a legitimate role and seek only to provide insight into whether and how that role should be implemented in times of crisis.

233. See *supra* notes 208-09 and accompanying text.

234. Lerner & Tetlock, *supra* note 23, at 255.

235. Sunstein, *supra* note 129, at 1127 (“[I]n a democracy, officials, including lawmakers, will respond to public alarm.”).

236. Congress has occasionally refused to give executive officials all that they requested. During World War I, for example, Congress refused to pass laws allowing

tational cascades suggests that it may be particularly difficult for elected officials to serve as a mechanism of psychological accountability.

Furthermore, although Congress might provide some measure of accountability by refusing to enact or carefully limiting legislation, judicial review may still be necessary to fully implement accountability. Many constitutional challenges arise because executive officials have applied an otherwise legitimate law in a manner that overreaches. The contextual nature of such constitutional inquiries makes them particularly suited to judicial review. Congress, on the other hand, cannot anticipate all such overreaching when drafting laws.²³⁷ The point of legislation is generality. Repeated congressional attempts to deal with inconsistent applications of otherwise neutral laws would eviscerate that purpose. Thus, the threat of judicial review is still a necessary component of making executive actors accountable.

Second, one could argue that judicial review unreasonably burdens the executive's ability to act quickly and decisively in response to an emergent situation.²³⁸ National security emergencies are presumably the last instance in which we want such burdens on executive decision making.²³⁹ While this argument is reasonable as it pertains to executive decisions regarding the actual prosecution of a war—i.e., decisions to invade a country, troop movements—the historic patterns described above never involved such decisions. Rather, they involved decisions to pursue groups or individuals via domestic criminal or administrative measures, decisions made over long periods of time. Such actions taken in the name of national security rarely require quick and decisive action.²⁴⁰ The argument for executive flexibility thus carries less weight in this context than when military decisions are involved. Furthermore, given what we know of past skewed decision making, we may actually want to slow down that decision-making process when restricting civil liberties.

President Wilson to censor the press, instead compromising by passing laws that punished interference with the war effort. Wells, *supra* note 10, at 1582.

237. Rachlinski & Farina, *supra* note 197, at 587.

238. *See supra* note 18.

239. Similar arguments have been made in the administrative law context. Thus, some scholars claim that hard look review of agency policy making results in ossification of agency action because the increasing costs associated with anticipating rigorous judicial review divert valuable resources, inhibit agency productivity, and cause agencies to forego bold and creative decisions out of fear of reversal. *See, e.g.*, Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 525-30 (1997).

240. *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962) (distinguishing between military actions taken in the name of national security and actions taken by other government actors in the name of "military necessity").

CONCLUSION

Fear and paranoia are powerful motivators. Anyone—executive officials, Congress, the public, even judges—can fall sway to them. History supports this notion. It is precisely for this reason that judicial review is necessary in times of crisis. Absent such review, executive officials have no incentive to refrain from acting at the expense of disfavored domestic groups. This preliminary analysis suggests that judicial review can improve executive decision making, but it is not a panacea. Decision makers' responses to such review will differ depending upon their own personal characteristics, their views of the judicial system, and the particular crisis at hand. Furthermore, we may need to rethink current approaches to judicial review to fully realize its potential as a mechanism of accountability. But understanding the role that judicial review can play and attempting to craft judicial standards in line with that understanding may prevent some repetition of past mistakes.

