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SHAFIQ RASUL ET AL.,  
*Petitioners,*  
v.  
GEORGE W. BUSH, ET AL.,  
*Respondents.*

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YASIR ESAM HAMDI,  
*Petitioner,*  
v.  
DONALD RUMSFELD,  
*Respondent.*

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**On Petitions for Writs of Certiorari to the United  
States Courts of Appeals for the District of Columbia  
Circuit and the Fourth Circuit**

**BRIEF OF AMICUS CURIAE FRED KOREMATSU  
IN SUPPORT OF PETITIONERS**

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was at war the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half-a-century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that “We should be vigilant to make sure this will never happen again.” He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed, unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

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<sup>1</sup> This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief. Filing and printing costs were paid by the MacArthur Justice Center at The University of Chicago Law School.

<sup>2</sup> 323 U.S. 214 (1944).

was at least permitted to challenge in court the constitutionality of his internment, the Petitioners have been denied even that fundamental right. The United States insists that this denial of even minimal due process is constitutional and federal courts lack jurisdiction to review that determination because the United States is at war.

Although the specific legal issues presented in these cases differ from those the United States has faced in the past, the extreme nature of the government's position is all-too-familiar. It may be that it is essential in some circumstances to compromise civil liberties in order to meet the necessities of wartime, but history teaches that we tend too quickly to sacrifice these liberties in the face of overbroad claims of military necessity. Fred Korematsu's experience is but one example, of many.

In this instance, the claim, accepted by the courts below, that the government may detain individuals indefinitely without any fair hearing overreaches the bounds of military necessity. To avoid repeating the mistakes of the past, this Court should make clear that the United States respects fundamental constitutional and human rights – even in time of war.

damage to civil liberties. Typically, we come later to regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of *habeas corpus* during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.

### **A. THE ALIEN AND SEDITION ACTS OF 1798**

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.<sup>3</sup>

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<sup>3</sup> James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (New Haven: Yale, 1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of*

applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.<sup>5</sup> Congressman Edward Livingston aptly observed in opposition to the Act that with “no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion.”<sup>6</sup> The Alien Friends Act expired on the final day of President Adams’s term of office, and has never been renewed.

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*the Military Establishment in America, 1783-1802* 195 (New York: Free Press, 1975).

<sup>4</sup> Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont, June 25, 1798, in Charles Francis Adams, ed., *9 The Words of John Adams* 202 (Boston: Little, Brown, 1854).

<sup>5</sup> See An Act Concerning Aliens, 5<sup>th</sup> Cong., 2d Sess., in *1 The Public Statutes at Large of the United States of America* 570-72 (Boston: Little, Brown, 1845). The Alien Enemies Act, which was adopted at the same time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy.

<sup>6</sup> *8 Annals of Congress* 2006-11 (Gales and Seaton 1851).

under the Act, and forty years later Congress repaid all the fines.<sup>9</sup> The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has often reminded us in the years since that the Sedition Act of 1798 has been judged unconstitutional in the “court of history.”<sup>10</sup>

## **B. THE CIVIL WAR: THE SUSPENSION OF *HABEAS CORUPS***

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and

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<sup>7</sup> See An Act for the Punishment of Certain Crimes against the United States, 5<sup>th</sup> Cong., 2d Sess., in 1 *Public Statutes at Large* 596-97.

<sup>8</sup> See John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956).

<sup>9</sup> Cong. Globe, 26<sup>th</sup> Cong, 1<sup>st</sup> Sess. 411 (May 23, 1840). See 26<sup>th</sup> Cong., 1st Sess., Doc. 86, House Rep.

<sup>10</sup> See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

arrested and imprisoned as many as 38,000 civilians, with no judicial proceedings and no judicial review.<sup>12</sup>

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*<sup>13</sup> that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. As Chief Justice Rehnquist has observed, *Milligan* “is justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime.”<sup>14</sup>

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<sup>11</sup> Roy P. Basler, ed., *5 The Collected Works of Abraham Lincoln* 436-437 (New Brunswick, N.J.: Rutgers University Press, 1956).

<sup>12</sup> See Daniel Farber, *Lincoln’s Constitution* (Chicago: University of Chicago Press, 2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York and Oxford: Oxford University Press, 1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998).

<sup>13</sup> 4 Wall. (71 U.S.) 2 (1866).

<sup>14</sup> William H Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (New York: Vintage Books, 1998).

. . . not a subject on which there was room for . . . debate.” Disloyal individuals, he explained, “had sacrificed their right to civil liberties.”<sup>16</sup>

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.<sup>17</sup> Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.<sup>18</sup> The Wilson administration’s intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”<sup>19</sup>

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<sup>15</sup> Woodrow Wilson, “Third Annual Message to Congress,” quoted in David M. Kennedy, *Over Here: The First World War and American Society* 24 (New York: Oxford University Press, 1980).

<sup>16</sup> Quoted in Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (New York: Norton, 1979).

<sup>17</sup> Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

<sup>18</sup> See Geoffrey R. Stone, *Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, *The Origins of the “Bad Tendency Test”:* *Free Speech in Wartime*, 2003 Sup. Ct. Rev. 411

<sup>19</sup> New York Times 3 (Nov. 21, 1917).



motion pictures, all designed to instill a hatred of all things German and of all persons whose “loyalty” might be open to doubt.<sup>20</sup>

The government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft, and in an atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment – often 10 to 20 years in prison – to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.<sup>21</sup> But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.<sup>22</sup>

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail.

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<sup>20</sup> See Harry N Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (Ithaca: Cornell University Press, 1960).

<sup>21</sup> See Zechariah Chafee, *Free Speech in the United States* 52 (Cambridge: Harvard University Press, 1941)

<sup>22</sup> Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

Court's performance was "simply wretched."<sup>26</sup>

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.<sup>27</sup> Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.<sup>28</sup>

#### **D. THE RED SCARE: 1919-1920**

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and

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<sup>23</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>24</sup> *Debs v. United States*, 249 U.S. 211 (1919).

<sup>25</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>26</sup> Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (New York: Harper & Row, 1988).

<sup>27</sup> Cong. Rec. 66<sup>th</sup> Cong., 2d Ses.s 293-94 (Dec. 13, 1920).

<sup>28</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the “alien filth” captured in these raids as creatures with “sly and crafty eyes, lopsided faces, sloping brows and misshapen features” whose minds were tainted by “cupidity, cruelty, and crime.”<sup>30</sup> More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the government had acted without legal authorization and without complying with the minimum standards of due process.<sup>31</sup> This report marked the beginning of the end of this era. As the *Christian Science Monitor*

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<sup>29</sup> Quoted in Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920*, 9 (New York: McGraw-Hill, 1955).

<sup>30</sup> “Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others,” Hearings before the Comm. on Rules, House of Representatives 27 (1920).

<sup>31</sup> See National Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (1920).

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to “designate military areas” from which “any persons may be excluded.”<sup>34</sup> Although the words “Japanese” or “Japanese American” never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or

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<sup>32</sup> Christian Science Monitor (June 25, 1920).

<sup>33</sup> Quoted in Max Lowenthal, *The Federal Bureau of Investigation* 298 (New York: Sloane, 1950).

<sup>34</sup> Executive Order No 9066, 7 Fed. Reg. 1407 (1942). On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified as 18 U.S.C. § 1383 (1974) (repealed 1976)).

six-to-three decision, upheld the President's action. The Court offered the following explanation:<sup>37</sup>

[We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . .

Korematsu was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the [ ] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot – by availing ourselves of the calm perspective of

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<sup>35</sup> See Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington D.C.: Government Printing Office, June 1983); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (Seattle: University of Washington Press, 2003).

<sup>36</sup> 323 U.S. 214 (1944). See also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); *Yasui v. United States*, 320 U.S. 114 (1943) (same).

<sup>37</sup> 323 U.S. at 219-20, 223-24.

was “on that date in 1942 . . . that Executive Order 9066 was issued.” President Ford observed that “we now know what we should have known then” – that the evacuation and internment of these individuals was “wrong.” Ford concluded by calling “upon the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience” and “resolve that this kind of action shall never again be repeated.”<sup>38</sup>

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1983, the Commission unanimously concluded that the factors that shaped the internment decision “were race prejudice, war hysteria and a failure of political leadership,” rather than military necessity.<sup>39</sup>

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<sup>38</sup> Presidential Proclamation 4417, “An American Promise,” February 19, 1976, quoted in Eric K. Yamamoto, et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 400 (Gaithersburg, Md.: Aspen, 2001).

<sup>39</sup> Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 5, 8 (Washington D.C.: Government Printing Office, June 1983).

[*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. . . .

In 1988, President Reagan signed the Civil Liberties Restoration Act, which officially declared the Japanese internment a “grave injustice” that had been “carried out without adequate security reasons,” and offered a formal presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of

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<sup>40</sup> *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Gordon Hirabayashi also successfully filed a petition for a writ of *coram nobis*. See *Hirabayashi v. United States*, 828 F.2d 591 (9<sup>th</sup> Cir. 1987). See also Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 *Amerasia Journal* 51 (2002).

<sup>41</sup> *Korematsu*, 584 F. Supp. at 1420.

the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of “loyalty” quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the “Free World.”<sup>44</sup>

But there were limits to Truman’s anti-communism. In 1950, he vetoed the McCarran Act, which required the registration of all Communists. Truman explained that the Act was the product of “public hysteria” and would lead to “witch hunts.”<sup>45</sup> Congress passed the Act over Truman’s veto.<sup>46</sup>

In 1954, Congress enacted the Communist Control Act,<sup>47</sup> which stripped the Communist Party

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<sup>42</sup> 102 Stat. 903, Public Law 100-383 (Aug. 10, 1988) (codified at 50 U.S.C. § 1989(b) (1996).

<sup>43</sup> See Dennis J. Hutchinson, *“The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 Sup Ct Rev 455, 485 n 99.

<sup>44</sup> See David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (New York: Simon and Schuster 1978).

<sup>45</sup> New York Times (Sept 21, 1950).

<sup>46</sup> 64 Stat. 987, 50 U.S.C. § 67.

<sup>47</sup> 68 Stat. 775, 50 U.S.C. § 841.



designed to punish by exposure; public and private blacklists of those who had been “exposed”; and criminal prosecutions of the leaders and members of the Communist Party of the United States.<sup>49</sup>

This Court’s response was mixed. The key decision was *Dennis v. United States*,<sup>50</sup> which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard – even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.<sup>51</sup>

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<sup>48</sup> Irving Howe, “The Shame of U.S. Liberalism,” 1 Dissent 308 (Autumn, 1954).

<sup>49</sup> See generally Ralph S. Brown, *Loyalty and Security* (New Haven: Yale University Press, 1958); Cauter, supra note 43; Frank Donner, *The Age of Surveillance: The Aims and Methods of America’s Political Intelligence System* (New York: Alfred A. Knopf, 1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).

<sup>50</sup> 341 U.S. 494 (1951).

<sup>51</sup> See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 211 (New York: Harper & Row, 1988); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375.

**II. TO AVOID A REPETITION OF PAST MISTAKES, THIS COURT SHOULD CLOSELY SCRUTINIZE THE GOVERNMENT’S CLAIMS OF “MILITARY NECESSITY” IN THESE CASES TO ENSURE THAT CIVIL LIBERTIES ARE NOT UNNECESSARILY RESTRICTED**

As in past episodes, the issues raised in these cases involve a direct conflict between our most precious civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make mistakes in the present. We should learn from our experience.

During World War I, John Lord O’Brian served as Special Assistant Attorney General in charge of the War Emergency Division of the Department of

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<sup>52</sup> See, e.g., *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1949).

<sup>53</sup> See, e.g., *Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

nation's commitment to civil liberties.<sup>54</sup>

As Chief Justice Rehnquist has written, “[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent.”<sup>55</sup> It is, he added, “both desirable and likely that more careful attention will be paid by the courts to the . . . government’s claims of necessity as a basis for curtailing civil liberty.”<sup>56</sup>

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.<sup>57</sup> *Korematsu* and *Dennis* are examples of this phenomenon.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather,

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<sup>54</sup> John Lord O’Brian, *New Encroachments on Individual Freedom*, 66 Harv L Rev 1, 3-4, 26 (1952). See John Lord O’Brian, *Changing Attitudes toward Freedom*, 9 Wash. & Lee L. Rev. 157 (1952).

<sup>55</sup> Rehnquist, *supra* note 12, at 224.

<sup>56</sup> *Id.*, at 225.

<sup>57</sup> See *id.*, at 222.

are demonstrated in fair hearings, in which they can be tested with the assistance of counsel.

This Court should make clear that, even in wartime, the United States does not abandon fundamental liberties in the absence of convincing military necessity. Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

### **CONCLUSION**

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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