

# INTERNMENT, CIVIL LIBERTIES, AND A NATION IN CRISIS

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## I. INTRODUCTION

Historically, the United States has possessed a keen awareness of the precarious position civil liberties occupy in the government's pursuit of a nobler end. As inscribed on the Statue of Liberty, Benjamin Franklin notes, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."<sup>1</sup> In 1928, Justice Louis Brandeis dissented against the Court's decision to uphold the police's use of evidence obtained by wire-tapping: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."<sup>2</sup> Pondering the country's response to the tragic terrorist attacks of September 11, 2001, President George W. Bush recently reiterated these sentiments, declaring, "we will not allow this enemy to win the war by changing our way of life or restricting our freedoms."<sup>3</sup> Though the government has acknowledged the need to delicately handle our crystalline civil liberties, its response to terrorism has ostensibly jostled the fragile package. Recent executive orders and the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("Patriot Act") expand the scope of the government's powers in fighting terrorism by streamlining government operations, increasing surveillance capabilities, and providing preventative anti-terrorism measures.<sup>4</sup> In spite of the Bush Administration's good intentions, these laws have spawned a wave of critiques and editorials attacking their constitutionality as well as their necessity.<sup>5</sup> Of particular

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<sup>1</sup> JOHN BARTLETT, JOHN BARTLETT'S FAMILIAR QUOTATIONS 320 (Justin Kaplan ed., Little, Brown and Company 17th ed. 2002).

<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

<sup>3</sup> Press Release, The White House, Remarks by the President in Photo Opportunity with the National Security Team, (Sept. 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>.

<sup>4</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

<sup>5</sup> See generally John H. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002) (discussing selected provisions of the Act that have potentially negative impacts on constitutionally protected rights). See also John Seiler, EDITORIAL, *Preserving our freedoms Series*, ORANGE COUNTY REG. (Cal.), Mar. 21, 2003, available at

concern are sections which detain non-citizens reasonably suspected of engaging in, aiding in, or in some cases even associating with terrorism.<sup>6</sup> Parties being held have vigorously challenged these laws, claiming, among other things, a violation of their constitutional rights to due process.<sup>7</sup>

Before one vilifies these anti-terrorist enactments as a blatant affront to jurisprudence and traditional values, however, it is important to recognize that the United States also possesses an equal tradition of validating the temporary suspension of civil liberties to achieve a net good. Describing the checks and balances necessary in a democratic government, James Madison stressed that greater ends can outweigh the protection of civil liberties: “[J]ustice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”<sup>8</sup> Chief Justice William H. Rehnquist has also recognized the special circumstances of war and their negative effects on domestic freedoms: “[i]t is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.”<sup>9</sup> Legal precedent supports this view as well. During World War II, the Supreme Court approved the balancing of citizens’ constitutional rights.<sup>10</sup> This holding poses a strong retort to any party claiming the invulnerability of their civil liberties to government encroachment.

The precedential and social value of *Hirabayashi v. United States* (“*Hirabayashi*”) and *Korematsu v. United States* (“*Korematsu*”), collectively referred to as the “Internment Cases,” respectively expand and limit the government’s discretion in withholding civil liberties for the sake of national security. As legal precedents, they greatly expand the government’s power and represent the outer limits by which the Court has been willing to sacrifice civil liberties. In the Internment Cases, the Court upheld curfew and removal orders for over 100,000 Japanese American citizens and resident aliens in deference to the government’s interest in preventing internal subversion of the war effort.<sup>11</sup> If applicable, these precedents bestow the present government with virtually unrestricted discretion to suspend constitutional rights on a mere suspicion of a national security threat.

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2003 WL 6990205 (commenting on remarks by Justice Antonin Scalia regarding judicial protection of constitutional rights during times of war); Jess Bravin, *Senate Sends Antiterrorism Bill to Bush*, WALL ST. J., Dec. 26, 2001, at A3, available at 2001 WL-WSJ 29676046 (“In the past, Congress has done much more in respect to privacy than the Constitution requires. But we’re under a serious attack.” (quoting constitutional law scholar Jesse Chopper)).

<sup>6</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

<sup>7</sup> See generally *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

<sup>8</sup> JAMES MADISON, THE FEDERALIST PAPERS No. 51 (1788).

<sup>9</sup> WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (1998).

<sup>10</sup> See generally *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>11</sup> *Id.*

Despite the discretion they provide, the Internment Cases also stand for why the government should not resort to such authority in pursuing its interests. Indeed, a mysterious enemy from the Far East had just decimated a major American naval outpost. Fears of the possibility of local Japanese Americans serving as spies abounded. Nonetheless, the internment of Japanese Americans must be seen for what it was: the mass imprisonment of American citizens on the basis of their ethnicity. Consumed with fears of enemy sabotage, the United States government removed an entire ethnic group just to satiate its paranoia. Although the Supreme Court decided that such fears were genuine, later investigations revealed that they were wholly unfounded.<sup>12</sup> The social consequences of such drastic measures far outweighed whatever benefits the government received from them.

This note examines the precedential and social effect of the Internment Cases on the constitutional scope of the government's counter-terrorism abilities. I will conclude that despite shifts in constitutional analysis and subsequent cases mollifying their holdings, the Internment Cases represent viable legal precedents. Because of the wide berth they gave the government in protecting national security interests during World War II, they expand government authority even beyond what the current courts grant. It is in light of this danger to individual liberties that I will argue and conclude that the Internment Cases are too socially destructive and controversial to use as legal authority. Finally, I will suggest a constitutional strategy under which courts may properly protect individual liberties without unduly hindering the fortification of national security in this time of crisis.

## II. SEPTEMBER 11, 2001 AND CIVIL LIBERTIES

### A. EXECUTIVE ORDERS AND THE PATRIOT ACT

Characterized as "the most devastating terrorist onslaught ever waged against the United States," the events of September 11, 2001 shocked the world when hijackers crashed two airliners into the World Trade Center, obliterating the Twin Towers and killing thousands.<sup>13</sup> The hijackers also crashed a third plane into the Pentagon and a fourth just outside of Pittsburgh.<sup>14</sup> With a death toll of almost 3,000, the World Trade Center attacks supplant even the bombing of Pearl Harbor as the incident resulting

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<sup>12</sup> See ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, *RACE, RIGHTS, AND REPARATION* 279 (Aspen Law & Business 2001) (mentioning the Commission on Wartime Relocation and Internment of Civilians and its 1983 report, "Personal Justice Denied," which illuminated the racism that tainted the military's determination of the Japanese Americans as a threat to national security).

<sup>13</sup> Associated Press, *Terrorists Attack New York, Washington* (Sept. 11, 2001), available at 2001 WL 27335842.

<sup>14</sup> *Id.*

in the highest number of casualties inflicted on Americans on American soil by a foreign enemy.<sup>15</sup>

Immediately in response to the attacks, the President declared a state of national emergency from which a stream of anti-terrorism regulations effused.<sup>16</sup> Most importantly, Congress laid the groundwork for presidential authority by passing a joint resolution on September 18, 2001, which authorized the President to use all “necessary and appropriate force” against those nations, organizations or persons he determines were involved with or harbored those who were involved with the September 11th terrorist attacks.<sup>17</sup> With its sweeping language, the joint resolution gave free reign to the administration in countering the terrorist threat. Noting the “pervasiveness and expansiveness” of terrorist organizations’ financial foundations, the President issued an executive order on September 23, 2001, blocking all property and interests in property of designated terrorist organizations.<sup>18</sup> On November 13, 2001, he issued another executive order asserting the authority to use military commissions to try individual terrorism suspects who are not United States citizens.<sup>19</sup>

Simultaneously, lawmakers rushed to the scene to realign current law enforcement structures to counter the threats of global terrorism.<sup>20</sup> Many in the administration and in Congress felt that the attacks could have been prevented had it not been for the existing restraints on government surveillance.<sup>21</sup> Prior to September 11th, statutes such as Title III of the Omnibus Crime Control and Safe Streets Act and the Foreign Intelligence Surveillance Act (“FISA”) tightly reigned in the government’s “snooping” abilities — a framework put into place to protect individuals from prior privacy abuses by the Central Intelligence Agency (“CIA”) and the Federal Bureau of Investigation (“FBI”).<sup>22</sup> Now, in the context of the terrorist attacks, the administration felt their doubling down on individual liberties had come full-circle to “rear-end” national security.<sup>23</sup> The time to reemphasize national security and avoid further collisions had come, and Congress followed through by passing the Patriot Act. Expanding the purposes listed in FISA for which the government can wiretap citizens and

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<sup>15</sup> Compare *Ceremony Closes ‘Ground Zero’ Cleanup*, CNN.COM (May 30, 2002), at <http://www.cnn.com/2002/US/05/30/rec.wtc.cleanup/> and *Pearl Harbor*, TERRORISM REPORTER, at <http://www.terrorismreporter.com/pearl-harbor.html> (last visited Feb. 5, 2003) (2,335 military personal and 68 civilians dead).

<sup>16</sup> See Proclamation No. 7463, 66 Fed. Reg. 48, 199 (Sept. 14, 2001).

<sup>17</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>18</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>19</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

<sup>20</sup> See Robert O’ Harrow Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002, at W06.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

resident aliens, the Patriot Act rehashed the previous balance between privacy rights and national security to address the crisis at hand.<sup>24</sup>

## B. THE TERRORIST CASES

The judiciary has also acted to counter the threat to national security by dismissing due process challenges to the executive orders pertaining to military detainment. Yaser Esam Hamdi (“Hamdi”)<sup>25</sup> and Jose Padilla (“Padilla”)<sup>26</sup> filed habeas corpus petitions attacking their detention under the executive order handing suspected terrorists to the military for detention and, if necessary, trial and punishment. The military captured Hamdi and held him as an enemy combatant during its campaign in Afghanistan.<sup>27</sup> Conversely, authorities arrested Padilla under a material witness warrant related to grand jury proceedings.<sup>28</sup> Upon determining that Padilla might have been involved with a terrorist plot, the government later petitioned the court to vacate the material witness warrant, which it did, and subsequently transferred him to military control for detainment.<sup>29</sup> Although Hamdi and Padilla were apprehended on opposite sides of the globe in dissimilar circumstances, they were both American citizens and contested their detention largely on that basis.<sup>30</sup> They noted that their status as citizens entitled them to procedural due process, directly addressing the fact that the executive order only applies to non-citizens.<sup>31</sup>

Following the legislative and executive branches’ firing of the first shots in the “War Against Terrorism,” the courts have granted the Bush administration broad authority to preserve national security. In addition to dismissing Padilla and Hamdi’s constitutional challenges of their detainment,<sup>32</sup> the courts have gone even further and have given the President more discretion than that outlined in the executive orders and the Patriot Act. While the law limited his detainment authority to non-citizens, the two decisions approved his detainment of American citizens suspected of terrorist involvement.<sup>33</sup> From a bird’s eye perspective, the courts are repeating the trend of previous judicial decisions in times of national crises: balancing out civil liberties for some greater good.

Unfortunately, the courts also may be repeating the same trend of allowing the government to prop up national security as a shield to repel even legitimate claims of government constitutional abuse. *Padilla* represents a particularly egregious example of upholding the detainment of an American citizen without due process. Moreover, Padilla was not

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<sup>24</sup> See *id.* See also Patriot Act § 218.

<sup>25</sup> See generally *Hamdi*, 316 F.3d 450.

<sup>26</sup> See generally *Padilla*, 233 F. Supp. 2d 564.

<sup>27</sup> Appellant’s Opening Brief at 3, *Hamdi* (No. 02-6895).

<sup>28</sup> Motion to dismiss amended petition for writ of habeas corpus at 4, *Padilla* (No. 4445).

<sup>29</sup> *Id.*

<sup>30</sup> See *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 316 F.3d at 460.

<sup>31</sup> See *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 316 F.3d at 460.

<sup>32</sup> *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 316 F.3d at 459.

<sup>33</sup> *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 316 F.3d at 459.

captured on the front lines of a foreign battlefield, but on American soil. He argued that the President could not resort to his war authority to detain him because the United States was not officially at war. The court, however, rejected this argument, asserting that the President may exercise his war powers without a formal declaration of war by Congress.<sup>34</sup> National security concerns stood at the forefront of the court's rationale. In its decision, the court reasoned that as long as the United States is "attacked," the President's war powers could be invoked.<sup>35</sup> The word "attacked" encompasses a broad range of scenarios; thus, the court's holding seemingly allows the President to call upon his war powers whenever he feels national security is threatened.

Given such freedom to invoke the war power, the President has greater leeway to protect the United States from terrorist attacks without having to worry about basic civil liberty guarantees. *Padilla* noted that the President's war authority gives him the power to treat any individual, including an American citizen, as an enemy combatant and deprive that individual of due process rights if he deems him to be belligerent.<sup>36</sup> As such, because the government alleged that the petitioner actively associated with the enemy, he became an enemy combatant.<sup>37</sup> Inevitably, the court's decision makes the notion of "wartime" a mere formality — one that the President himself proclaims to gain access to his wide-ranging war powers. Moreover, the case opens itself to an interpretation that would allow the President to declare any potentially "dangerous" individual a threat to national security and deprive him of his constitutional liberties.<sup>38</sup>

Though one could counter that this slippery slope perspective speaks only to potentialities, the fact that they have already manifested themselves in the past suggests that they could reoccur in similar circumstances. These past events represent legal precedents as well as social realities, and their potential effect on the present administration's authority goes beyond the realm of mere academic inquiry. In the next section, I will examine the Internment Cases and illustrate how, when combined with *Padilla* and *Hamdi*, mere speculations of mass-individual liberty violations become dangerous realities.

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<sup>34</sup> *Padilla*, 233 F. Supp. 2d at 589.

<sup>35</sup> *See id.* ("A formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict — particularly when, as on September 11, the United States is attacked.").

<sup>36</sup> *Id.* at 594.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 591 (citing *United States v. Salerno*, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.")).

### III. THE INTERNMENT CASES

#### A. A FACTUALLY ANALOGOUS SITUATION

The bombing of Pearl Harbor and the subsequent internment of Japanese Americans closely mirrors the current situation involving the September 11th terrorist attacks, revealing a strong initial argument for the Internment Cases' legal applicability. Both the Internment and the Patriot Act represent a government response to a "surprise attack" on American soil by a foreign adversary. Like the sudden devastation resulting from the terrorists careening their planes into the World Trade Center and the Pentagon, Japanese forces launched a surprise raid on Pearl Harbor on December 7, 1941, crippling the United States' naval fleet in the Pacific and killing thousands of people. Both President Franklin Roosevelt and President George W. Bush viewed the nature of the events as an affront to humanity with President Roosevelt characterizing Pearl Harbor as a "day which will live in infamy,"<sup>39</sup> and President Bush denoting the terrorist attacks as "the very worst of human nature."<sup>40</sup> Such use of moral injectives to characterize the attacks indicates that there existed a deep-rooted emotional need for an immediate and decisive response in both scenarios. Furthermore, the mass media broadcasted these statements (the radio for Roosevelt's,<sup>41</sup> and both the radio and television for Bush's), allowing the country itself to take them in, and creating an atmosphere receptive to broad presidential authority. On the other hand, one could argue that despite sharing many factual and emotional similarities, the terrorist attacks differ significantly from that of Pearl Harbor because they were not official military acts and were not officially sponsored by a foreign government. Nonetheless, this argument represents a moot point, for as shown by the subsequent war in Afghanistan following September 11, the United States has indicated that it will still hold a foreign government responsible for an attack even if that foreign government does not admit to sponsoring it.

It was the inherent surreptitiousness of these attacks that made both the Pearl Harbor bombings and the terrorist attacks domestic, as well as international issues. The government inferred that the terrorists and the Japanese could not have planned such elaborate and destructive attacks without some help from the ground. Consequently, government suspicions veered inwards towards ferreting out the "saboteurs among us." Paralleling the joint resolution authorizing President Bush to take "necessary and appropriate" force against those harboring terrorists, President Roosevelt

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<sup>39</sup> *Joint Address to Congress Leading to a Declaration of War Against Japan*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY AND MUSEUM (Dec. 8, 1941), available at <http://www.fdrlibrary.marist.edu/dec71941.html> (last visited Oct. 1, 2003).

<sup>40</sup> Press Release, The White House, *Statement by the President in His Address to the Nation*, (Sept. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

<sup>41</sup> *Radio Newslines Text: KU Professor Recalls Pearl Harbor and 60-year-old Diary*, UNIVERSITY OF KANSAS, OFFICE OF UNIVERSITY RELATIONS (December 6, 2001), available at <http://www.ur.ku.edu/News/01N/DecNews/Dec6/sponholtzrnl.html>.

signed proclamations authorizing the FBI to arrest any aliens in the continental United States suspected of being “dangerous to public peace or safety.”<sup>42</sup> Simultaneously, the navy ordered all fishing boats owned by Japanese nationals beached in order to prevent them from aiding Japanese ships.<sup>43</sup> Analogous to President Bush’s executive order seizing the assets of organizations suspected of aiding terrorists, the 1941 Treasury Department froze the assets of Japanese nationals as “enemy aliens.” Inevitably, though, it was this “veering inward” that resulted in the 1942 government’s use of race as a proxy for national allegiance, a factor which I later cite as reason to avoid the Internment Cases as precedent. For the time being, drawing purely from these factual similarities, the Internment Cases may be characterized as analogous solutions for addressing potential sabotage and espionage by members of the general populace during times of war.

## B. THE INTERNMENT CASES

The greatest move towards containing the threat of sabotage occurred on February 19, 1942, when President Roosevelt signed Executive Order 9066, which authorized the Secretary of War, or the military commander whom he might designate, “to prescribe military areas in such places and of such extent as he . . . may determine, from which any or all persons may be excluded.”<sup>44</sup> Congress gave force to the Order by passing Public Law 503, which made it a misdemeanor to violate the orders of a military commander in a designated military area.<sup>45</sup> Immediately, General DeWitt issued a number of proclamations setting up military zones, curfews, and travel regulations.<sup>46</sup> These proclamations were followed up with civilian exclusion orders, which removed persons of Japanese ancestry from various areas along the West Coast, gathered them in assembly areas and transported to relocation camps.<sup>47</sup> In all, the government removed 112,000 persons of Japanese ancestry from their homes.<sup>48</sup>

The Internment Cases both occurred under violations of the military proclamations. Gordon Hirabayashi, in an act of civil defiance, turned himself into the FBI with the specific purpose of challenging the constitutionality of the civilian exclusion and curfew orders.<sup>49</sup> Conversely, Fred Korematsu violated the exclusion order in trying to pose as a non-Japanese.<sup>50</sup> In both cases, the petitioners challenged the military orders (*Hirabayashi* addressed the curfew order, *Korematsu* addressed the exclusion order) for violating their rights to equal protection under the law.

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<sup>42</sup> GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 102-08 (Harvard University Press 2001).

<sup>43</sup> *Id.* at 75.

<sup>44</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

<sup>45</sup> HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS 1790-1990* 133 (1994); *Hirabayashi*, 320 U.S. at 87 (citing to “Act of March 21, 1942, 18 U.S.C.A. s 97a”).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 134.

<sup>48</sup> *Id.*

<sup>49</sup> Yamamoto, *supra* note 12, at 104.

<sup>50</sup> *Id.* at 137.

Condemning any legal classifications based on race, it appeared that the Supreme Court would lean in the petitioners' favor.<sup>51</sup> Despite its rigid scrutiny of the racial classifications involving the curfew and exclusion orders, however, the Court upheld both orders to prevent acts of espionage and sabotage by the potentially disloyal members of the Japanese American population.<sup>52</sup> The Supreme Court's ruling that such blatant racial classifications were constitutional in light of the government's national security interests indicates that the Internment Cases provide the current government with broad authority to curb the terrorist threat.

### C. ARE THE INTERNMENT CASES GOOD LAW TODAY?

Before determining Internment Cases' present legal effect, one must realize that the Court used a more amorphous form of equal protection analysis to uphold the exclusion orders. Although both cases were decided before the Court "reverse incorporated" the 14th Amendment's Equal Protection Clause into the 5th Amendment (thus making it applicable to federal government actions), it conducted the analysis anyway.<sup>53</sup>

The fact that the Internment Cases relied on an embryonic form of scrutiny affects the way in which courts today can interpret their precedential scope. For example, a modern court may have trouble narrowly interpreting the two cases as precedents permitting the government to intern American citizens on the basis of race. Although matter-of-factly that was what occurred, as a legal matter, it is questionable whether the Internment would survive the modern form of strict scrutiny, which requires the government to achieve its ends with the least restrictive means, no matter how compelling those ends might be.<sup>54</sup> As such, a court may have a better chance at analogizing to more general themes within the Internment Cases, or to particular statements of law, which remain unchanged to this day.

In 1938, the Supreme Court had established the notion of differing levels of judicial scrutiny to be utilized when examining government actions that violated the Bill of Rights in the now-famous footnote in *United States v. Carolene Products Co.* ("*Carolene Products*").<sup>55</sup> The

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<sup>51</sup> *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."); *Korematsu*, 323 U.S. at 216 ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.")

<sup>52</sup> *Hirabayashi*, 300 U.S. at 99; *Korematsu*, 323 U.S. at 218.

<sup>53</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (both *Korematsu* and *Hirabayashi* were decided over 10 years before) (equal protection applies to the federal government through the due process clause of the Fifth Amendment); *Hirabayashi*, 320 U.S. at 100 ("The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.")

<sup>54</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 532 (1997).

<sup>55</sup> 304 U.S. 144, 152 n.4 (1938); CHERMERINSKY, *supra* note 54, at 414-15.

Court held that any government action facially classifying individuals on the basis of race, under this equal protection analysis, would require a “more searching inquiry,” since “prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>56</sup> Justice Harlan Stone, who authored the footnote, did not offer it as a settled theorem of judicial review, but as a starting point for debate among attorneys, academics, and judges that would eventually yield a well thought-out comprehensive doctrine.<sup>57</sup> Equal protection and free speech challenges arose, however, before his proposal had time to percolate within the legal community.<sup>58</sup> As a result, the Internment Cases’ Court had little precedent or scholarly analysis with which to guide their understanding of “a more searching inquiry.”

Although the Internment Cases do not cite to the footnote in their analysis, they both recognized that classifications based on ancestry are “by their nature odious to a free people,”<sup>59</sup> and therefore “immediately suspect”<sup>60</sup> and subject to “the most rigid scrutiny.”<sup>61</sup> Though *Hirabayashi* did not specifically use the terms “most rigid scrutiny,” it implied such heightened inquiry, noting that because of the “odious[ness]” of “legislative classification or discrimination based on race alone,” “for that reason” such legislation has often constituted a denial of equal protection.<sup>62</sup> Furthermore, Chief Justice Stone authored the *Hirabayashi* opinion, which would lead to the assumption that he would abide by the reasoning he set forth in the *Carolene Products* footnote.<sup>63</sup> Both decisions, however, added one caveat to the *Carolene Products* footnote, stating that the Bill of Rights does not represent an impenetrable guarantee of individual liberty and may be supplanted when the government proffers a legally sufficient justification.<sup>64</sup>

The greatest distinction between the Internment Cases’ scrutiny and the modern notion of heightened scrutiny is the former’s underdeveloped sense of what burden the government must meet in order to offer a sufficiently legal justification. Modern equal protection analysis states that the government can classify on the basis of race only if it is necessary to achieve a compelling interest.<sup>65</sup>

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<sup>56</sup> *Carolene Products*, 304 U.S. at 152 n.4.

<sup>57</sup> Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1098-99 (1982).

<sup>58</sup> *Id.* (not one legal scholar took Justice Stone’s invitation to extend the analysis of differing standards of judicial review).

<sup>59</sup> *Hirabayashi*, 320 U.S. at 100.

<sup>60</sup> *Korematsu*, 323 U.S. at 216.

<sup>61</sup> *Id.*

<sup>62</sup> *Hirabayashi*, 320 U.S. at 100.

<sup>63</sup> *Id.* at 83.

<sup>64</sup> *See id.* *See also Korematsu*, 323 U.S. at 216.

<sup>65</sup> CHEMERINSKY, *supra* note 54, at 550 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

The Internment Cases' Court failed to address the "necessity" aspect of heightened scrutiny. The Courts' analyses granted the government with far more "wiggle room" than any modern court would dare provide. The term "necessary" entails a close-fit between the government's means to achieving its compelling end; it cannot be substantially over or under-inclusive.<sup>66</sup> For example, even if preventing terrorism represents a worthwhile pursuit, the government cannot exclude Arabs from large buildings as such a policy would be both substantially over-inclusive (because all Arabs are not terrorists) and under-inclusive (because all terrorists are not Arabs). *Hirabayashi* literally did not address the potential burdens and overbreadth of the military imposed curfew for Japanese Americans.<sup>67</sup> On the other hand, *Korematsu* did briefly ponder the higher burden of being excluded from one's home versus being subject to a curfew.<sup>68</sup> Despite mentioning these hardships, the Court seems to have merged the "means-ends fit" analysis with the "compelling interest" portion of heightened scrutiny as it completely dismisses the burdens as a necessary wartime hardship and part of maintaining national security.<sup>69</sup> It did not independently address whether the hardships incurred by the Japanese Americans were so "overreaching" or "burdensome" that there had to exist a less restrictive alternative to bolster national security. If anything, the *Korematsu* majority's terse mention of the hardships appears almost perfunctory as shown in Justice Owen Robert's dissent.<sup>70</sup>

The Court's language in the Internment Cases also indicates a somewhat ambiguous definition of what exactly constitutes a "compelling government interest." Admittedly, judicial scrutiny represents a value judgment based on the totality of the circumstances, such that determining the level of deference owed to the government in scrutinizing its actions becomes a daunting task for the Court. Justice Stone, however, deployed his "newly forged" invention of heightened scrutiny before the legal community could explore its intricacies. As such, heightened scrutiny

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<sup>66</sup> *Id.* at 532.

<sup>67</sup> See generally *Hirabayashi*, 320 U.S. 81.

<sup>68</sup> *Korematsu*, 323 U.S. at 219 ("[W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships.").

<sup>69</sup> *Id.* ("[B]ut when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

<sup>70</sup> See *id.* at 225-26 (Robert, J., dissenting) ("This is not a case of keeping people off the streets at night . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.").

appeared before scholars characterized it as “strict in theory and fatal in fact.”<sup>71</sup>

*Korematsu* states that while “a pressing public necessity” may sometimes justify classification, “racial antagonism never can.”<sup>72</sup> Taken as they are, the words “pressing public necessity” imply absolutely anything the government finds to be gnawing at its heel. The only limitation the Court places on a “pressing public necessity” is the absence of any openly racist justifications. Within the context of the Court’s analysis, one can find some rigidity to the “pressing public necessity” requirement as it explained the special circumstances of war and the dangers of an unascertainable number of enemy saboteurs among the Japanese American population.<sup>73</sup> Then again, any justification can appear “necessary” with competent lawyering. The Court offered little on the basis of comparison to give teeth to the standard of review, basing most of its analysis on the equally ambiguous *Hirabayashi* case.<sup>74</sup>

Justice Stone’s language in *Hirabayashi* seems to imply that the court’s conception of “rigid scrutiny” is not necessarily rigid when compared to modern formulations of judicial scrutiny for facially racial classifications. The Court stated that it was “enough” that circumstances within the knowledge of the military afforded a “rational basis for the decision which they made.”<sup>75</sup> Modern “rational basis review” is extremely deferential to the government interest — so much so that any conceivable constitutional purpose, even if it is not the government’s actual purpose, will justify upholding the law.<sup>76</sup>

Contextually, however, Justice Stone probably meant for this rational basis formulation to possess less government deference than the rubberstamp interpretation it holds today. Within the decision, he prefaced his application of the standard by generally condemning government racial classifications.<sup>77</sup> It would not make sense logically to condemn a practice and then excuse it without any compelling justification. Furthermore, it is clear that the standard by which Justice Stone conducted his equal protection analysis followed his *Carolene Products* footnote, as it fell in stride with a series of post-*Carolene* dissents in which he appealed for greater minority protection.<sup>78</sup>

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<sup>71</sup> Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>72</sup> *Korematsu*, 323 U.S. at 216.

<sup>73</sup> *Id.* at 217-19.

<sup>74</sup> *Id.* at 218.

<sup>75</sup> *Hirabayashi*, 320 U.S. at 102.

<sup>76</sup> CHEMERINSKY, *supra* note 54, at 534-35.

<sup>77</sup> *See Hirabayashi*, 320 U.S. at 100.

<sup>78</sup> *See Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601-602 (1940) (Stone, J., dissenting) (citing the need to protect interests of those who don’t agree with the message contained in the flag salute). *See also Jones v. City of Opelika*, 316 U.S. 584, 608 (1942) (Stone, J., dissenting) (arguing that the Constitution gives the First and Fourteenth Amendments preferred protection).

Although Stone offered precedents to further explicate the components of heightened scrutiny for racial classifications in *Hirabayashi*, the cases do little to elaborate on his original query posed in *Carolene Products*. Setting up the standard for heightened scrutiny, he listed *Yick Wo v. Hopkins* (“*Yick Wo*”),<sup>79</sup> *Yu Cong Eng v. Trinidad* (“*Yu Cong Eng*”),<sup>80</sup> and *Hill v. Texas* (“*Hill*”)<sup>81</sup> as examples of racial classifications failing to meet the standard.<sup>82</sup> However, he conceded that these precedents would be controlling, “were it not for the fact that the danger of espionage and sabotage, in time of war . . . calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”<sup>83</sup> Stone’s language, “were it not for,” seems to distinguish the use of heightened scrutiny altogether in the face of military necessity, and the decision itself fails to debate the validity of the government’s justification or the means with which to achieve it.

Even the cases themselves shed little light on the intricacies of heightened scrutiny. *Yick Wo*, *Yu Cong Eng*, and *Hill*, which dealt with facially race-neutral laws that had discriminatory results, barely analogized to *Hirabayashi*, which dealt with the exclusion order specifically targeting Japanese Americans.<sup>84</sup> Although the Court generally deplored the discriminatory results and application of the laws considered in those cases, its lengthy discussions on the merits of the government’s purposes were unnecessary since, in all three cases, they were clearly discriminatory.<sup>85</sup> Therefore, in *Hirabayashi*, Stone did not compare the government purpose of military necessity to any cases involving government purposes that were outright irrational. Consequently, the majority simply “shot from the hip” in making its value judgment.

Despite the circumstances under which they were decided, the Internment Cases have not been overruled and represent good law today. Some may argue that even without the formality of a Supreme Court ruling, lower courts have overturned the convictions of Gordon Hirabayashi and

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<sup>79</sup> 118 U.S. 356 (1886).

<sup>80</sup> 221 U.S. 500 (1926).

<sup>81</sup> 316 U.S. 400 (1942).

<sup>82</sup> *Hirabayashi*, 320 U.S. at 100.

<sup>83</sup> *Id.*

<sup>84</sup> See generally *Yick Wo*, 118 U.S. 356 (San Francisco ordinance that gave the board of supervisors authority, at their discretion, to refuse permission to carry on laundries); *Yu Cong Eng*, 271 U.S. 500 (Chinese Bookkeeping Act in Philippines which made it illegal to conduct one’s books in any language other than English, Spanish, or local dialect); *Hill*, 316 U.S. 400 (grand jury selection statute required jurors to be citizens of the state and country, qualified to vote there, a freeholder within the state or a householder with the county, of sound mind and good moral character, able to read and write, and has not been convicted of a felony).

<sup>85</sup> See *Yick Wo*, 118 U.S. at 374 (“no reason for [the law] exists except hostility to the race and nationality to which the petitioners belong . . . .”); *Yu Cong Eng*, 271 U.S. at 528. (“we think the present law which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws . . . .”); *Hill*, 316 U.S. at 405 (“chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more . . .”).

Fred Korematsu, placing the original decisions in jeopardy.<sup>86</sup> In fact, a recent article in the *Georgetown Immigration Law Journal* commented that *Korematsu* is dead law in light of the 2001 Supreme Court decision, *Zadvydas v. Davis*.<sup>87</sup> These criticisms, however, fail to actually phase out the Internment Cases' core legal analysis.

Lower courts overturned Hirabayashi and Korematsu's convictions on the basis of a factual error, but they did not overrule the legal analysis relied upon in the original Internment Cases. Hirabayashi and Korematsu challenged their convictions in the mid-1980s after the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") unearthed a drove of information suggesting that the government knowingly suppressed and altered evidence during the original trial.<sup>88</sup> Their cause of action, however, limited them to only challenging the factual errors leading to their convictions and not the law itself. Hirabayashi and Korematsu each petitioned the court under a writ of *coram nobis*, which allows petitioners to challenge a federal criminal conviction obtained by constitutional or fundamental error that renders a proceeding irregular and invalid.<sup>89</sup> Although Korematsu argued that under current constitutional standards his conviction would not survive strict scrutiny, the Court dismissed his argument, noting that "the writ of *coram nobis* [is] used to correct errors of fact," and "[is] not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors."<sup>90</sup> The court hearing Hirabayashi's *coram nobis* petition simply ignored the issue entirely.<sup>91</sup>

Although the Georgetown article interprets *Zadvydas*' reasoning to overrule the Internment Cases, the actual holding of the case is limited to modifying a post-removal-period detention statute, and, even if applied broadly, does not rule out the possibility of infinitely detaining "specially dangerous individuals."<sup>92</sup> *Zadvydas* concerned a statute which allows the government to detain a deportable alien if it has not been able to secure the alien's removal during a 90-day statutory "removal period."<sup>93</sup> The Court held that the statute implies a limit on the post-removal detention period, which the article interprets as an all-out ban on indefinite detentions of immigrants or citizens without due process.<sup>94</sup> Factually, the *Zadvydas* statute applies to a procedurally narrower class of people than the Internment Orders (aliens *adjudged* to be deported versus aliens *suspected* of espionage) and appears to serve a less "urgent" purpose in "ensuring the

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<sup>86</sup> *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) [hereinafter *Hirabayashi II*]; *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) [hereinafter *Korematsu II*].

<sup>87</sup> 533 U.S. 678 (2001). Micah Herzig, Note, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 687 (2002) (citing *Zadvydas*, 533 U.S. at 682).

<sup>88</sup> Yamamoto, *supra* note 12, at 279-80.

<sup>89</sup> 28 U.S.C. § 1651 (a) (2003).

<sup>90</sup> *Korematsu II*, 584 F. Supp. at 1420.

<sup>91</sup> See generally *Hirabayashi II*, 828 F.2d at 591.

<sup>92</sup> *Zadvydas*, 533 U.S. at 690-91.

<sup>93</sup> *Id.* at 682 (citing 8 U.S.C. § 1231(a)(6) (1994)).

<sup>94</sup> *Id.* at 679; Herzig, *supra* note 87, at 687.

appearance of aliens at future immigration proceedings” and “[p]reventing danger to the community.”<sup>95</sup> Therefore, it may be argued that the two cases are not factually analogous. Even if they are, *Zadvydas*’ holding itself does not preclude the possibility of indefinitely detaining particularly dangerous individuals without due process.<sup>96</sup> The Court set aside this particular exception to the general rule, stating that such detention is constitutionally suspect.<sup>97</sup> The *Zadvydas* statute did not target dangerous individuals, such as terrorists; therefore, it did not fit within the exception because it broadly applied to even the most innocuous tourist visa violators.<sup>98</sup> In *Hirabayashi* and *Korematsu*, the Court upheld the orders because the government, despite falsifying the evidence, convinced the Court that Japanese Americans and immigrants presented an acute danger to national security. Lastly, *Zadvydas* did not contain any references to either Internment Case, so it is probably safe to assume that the Court did not intend to overrule them in the process.

The greatest evidence, however, that the Internment Cases are still live precedents is that current cases still cite to them. Ninth Circuit decision *Johnson v. State of California*<sup>99</sup> cited to *Hirabayashi* on February 25, 2003, and *American Federation of Government Employees (AFL-CIO) v. United States* referred to *Korematsu* on March 29, 2002.<sup>100</sup> Both cases used *Hirabayashi* and *Korematsu* as authority for strictly scrutinizing government racial classifications. Additionally, the United States Supreme Court cited the Internment Cases as authority on the relationship between strict scrutiny and race.<sup>101</sup> In fact, many cases have referred to the Internment Cases for this purpose, as they represent the Supreme Court’s first formulation of heightened scrutiny. The scope of the Internment Cases’ precedent, however, extends beyond simply establishing strict scrutiny for racial classifications, and includes the Supreme Court’s commentary on the circumstances in which such “odious”<sup>102</sup> measures are justifiable. The recalcitrant position that this justification occupies in Supreme Court case history poses the greatest threat to present-day civil liberties.

With respect to the current cases challenging the executive orders invoked in the wake of the September 11th attacks, *Korematsu* and *Hirabayashi* may offer virtually unlimited deference to the government in its efforts to maintain national security in times of war. *Hirabayashi* (upon which *Korematsu* based its analysis) characterized the war power of the

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<sup>95</sup> See *Zadvydas*, 533 U.S. at 690.

<sup>96</sup> *Id.* at 691.

<sup>97</sup> *Id.* at 690.

<sup>98</sup> *Id.*

<sup>99</sup> 321 F.3d 791, 796 (9th Cir. 2003).

<sup>100</sup> 195 F. Supp. 2d 4, 11 (D.D.C. 2002).

<sup>101</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995) (citing to the Internment Cases as the basis for using strict scrutiny to evaluate racial classifications). This usage was particularly significant considering that *Adarand* represents the modern case requiring heightened scrutiny for both benevolent and invidious racial classifications.

<sup>102</sup> *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

federal government as the “power to wage war successfully” that “extends to every matter so related to war as substantially to affect its conduct, and embraces every phase of the national defense[.]”<sup>103</sup> By approving the wholesale detainment of an entire ethnic group in order to prevent potential sabotage, the Court provided the government a very wide berth in determining the necessary actions in waging a successful war. Such a precedent ostensibly allows the government to use a “declaration of war” as a proxy for any action it sees fit. “War” then releases the government from any obligations to equal protection and other Constitutional rights. Thus, *Padilla*’s characterization of the current terrorist scenario as one in which the President’s war powers are invoked<sup>104</sup> renders *Hirabayashi* and *Korematsu* applicable.

The government has already crept toward the direction predicted by the Internment Cases. Prior to *Hamdi* and *Padilla*, Congress passed a joint resolution empowering the President to take all “necessary and appropriate” measures to prevent any future acts of terrorism against the United States.<sup>105</sup> *Hamdi* itself implicitly acknowledged the Internment Cases’ precedent in its explanation of the President’s war power, by referencing the Supreme Court’s tendency to defer to the political branches when “called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.”<sup>106</sup> Coincidentally, both *Hamdi* and *Hirabayashi* cite to *Ex parte Quirin* (“*Quirin*”), a case involving the due process rights of German saboteurs caught on American soil, to derive the broad authority given to the President during times of war.<sup>107</sup> Although *Hamdi* paid lip service to the idea that executive wartime authority is not unlimited,<sup>108</sup> it also stated, “the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.”<sup>109</sup>

Even if the President’s war power is invoked, one might argue that in 1971 the legislature statutorily curtailed the President’s discretionary power to detain citizens by first requiring an “Act of Congress.”<sup>110</sup> Although argued in the government’s brief in the *Korematsu coram nobis* case as a pre-existing legislative barrier to future mass-internments, the statute does little to limit the Internment Cases’ authority.<sup>111</sup> The legislature did, in fact,

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<sup>103</sup> *Id.* at 93.

<sup>104</sup> *See Padilla*, 233 F. Supp. 2d at 589 (“a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict — particularly when, as on September 11, the United States is attacked.”).

<sup>105</sup> Authorization for Use of Military Force § 2 (a).

<sup>106</sup> 316 F.3d at 463.

<sup>107</sup> *Hirabayashi*, 320 U.S. at 92 (citing *Ex parte Quirin*, 317 U.S. 1, 25 (1942)); *Hamdi*, 316 F.3d at 472 (citing *Ex parte Quirin*, 317 U.S. 1, 25 (1942)).

<sup>108</sup> *See Hamdi*, 316 F.3d at 464.

<sup>109</sup> *Id.* at 474.

<sup>110</sup> 18 U.S.C. § 4001 (a) (1971).

<sup>111</sup> PETER IRONS, JUSTICE DELAYED, THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 211 (1989).

approve the executive order under which *Korematsu* was convicted.<sup>112</sup> The government may have characterized this approval as an isolated incident that was repealed in 1976,<sup>113</sup> but *Hamdi* and *Padilla* subsequently refuted any notion that occurrences of congressional approval are few and far between. Both cases exempted President Bush's detainment executive order stating that the prior joint resolution granting the President "necessary and appropriate" authority constituted an "Act of Congress."<sup>114</sup> Although in theory the 1971 statute makes it more difficult for the President to detain citizens by requiring congressional approval, the joint resolution that quickly followed the terrorist attacks demonstrates that Congress is not reluctant to give its authorization.

The broad presidential war authority precedent established in the Internment Cases appears to act as an all-purpose compelling government interest, which may allow the government to openly target ethnic and religious groups associated with terrorism. The current executive orders tiptoe around equal protection issues given that they do not specifically call for the detention of Arabs or Muslims. Even if the government detains a disproportionate number of people who are members of these groups, the government's actions are unchallengeable on these grounds without proof of a discriminatory purpose. Now, with *Hirabayashi* and *Korematsu* as accessible precedents, the government may openly profile suspect groups by entirely quashing the equal protection issue. Even if the government bases its correlations off of unreliable research tainted with racial prejudice, as long as the Court is unaware of these transgressions, the government can argue in the vein of *Hirabayashi* that such classifications are logically related to preserving national security. Though neither *Hamdi* nor *Padilla* involved an equal protection issue, their deference to government war authority foreshadows a *Hirabayashi* extension of that authority to facially racial classifications.

One factor hindering the use of the Internment Cases is that they were decided in a very different time and under a dated legal standard. The fact that the Internment Cases emerged under a less-developed form of strict scrutiny makes it less tenable that something as extreme as a full-scale exclusion and internment of an ethnic group will occur again. Moreover, it is always possible that the *Hirabayashi* and *Korematsu* Courts' ambiguity in defining a compelling interest may even limit the clout "national security" carries as an end-all government purpose.

Even with these historical and contextual roadblocks, cases decided after the Internment Cases effectively touched up their anachronistic blemishes. *Adarand Constructors, Inc. v. Peña* referred to *Korematsu* and *Hirabayashi* in delineating its standard of heightened scrutiny, confirming that the two previous cases did, in fact, employ some version of strict

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<sup>112</sup> 18 U.S.C. § 1383 (1942).

<sup>113</sup> See Irons, *supra* note 111, at 211.

<sup>114</sup> *Padilla*, 233 F. Supp. 2d at 598; *Hamdi*, 316 F.3d at 467.

scrutiny at the time.<sup>115</sup> Furthermore, *Adarand* explicitly rejected the long-held notion that “strict scrutiny is strict in theory, and fatal in fact,”<sup>116</sup> which although more of an academic characterization, highlights the surmountability of heightened scrutiny. Still, it is almost impossible for the government to intern an entire ethnic group because it is not narrowly tailored to, nor the least restrictive alternative for, the government’s interest in protecting national security. This construction of strict scrutiny, however, does not rule out inconveniences slightly less than Internment and leaves open the possibility of, for example, mandatory baggage searches for all Arab-American airplane passengers. Furthermore, there is always the possibility of a Court resorting to *Korematsu*’s “balancing out” of the narrow tailoring requirement for “hardships are part of war, and war is an aggregation of hardships.”<sup>117</sup> Moreover, even if the Internment Cases’ outdated methodology of judicial review precludes them from being applied in a modern equal protection analysis, it still does not affect the broad authority given the President to “wage war successfully.” Indeed, no precedent explicitly bars uses of the Internment Cases, and in the crises-minded state of our present times, these relics of the past are factually analogous and legally applicable.

#### D. SHOULD THE INTERNMENT CASES BE USED AS PRECEDENTS TO EXPAND THE GOVERNMENT’S AUTHORITY IN COMBATting TERRORISM?

Although the Internment Cases represent good law today, judicial and scholarly criticisms as well as historical arguments present strong warnings against their application.

Since the Internment, the Supreme Court has vehemently criticized the cases’ outcomes and in some instances the analysis itself, despite citing to *Hirabayashi* and *Korematsu* on numerous occasions. In light of the *coram nobis* cases, the majority opinion in *Adarand* skeptically examined the government’s use of illegitimate racial classifications to intern citizens. It described *Korematsu* as the product of a time in which “even the most rigid scrutiny [could] sometimes fail to detect an illegitimate racial classification” and stated that any retreat from the most searching inquiry would lead to a reoccurrence of that error in the future.<sup>118</sup> The Court clearly viewed the result of *Korematsu* as a mistake in history and a warning for future vigilance. The majority, however, focused only on the mistaken result of the *Korematsu* decision — one that was revealed only by future factual inquiry — and refrained from attacking the *Korematsu* court’s heightened scrutiny analysis.

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<sup>115</sup> 515 U.S. at 236 [hereinafter *Adarand*].

<sup>116</sup> *Id.* at 237.

<sup>117</sup> *Korematsu*, 323 U.S. at 219.

<sup>118</sup> See *Adarand*, 515 U.S. at 236 (although not specifically mentioning the *coram nobis* cases, the majority’s use of the words “failing to detect” and “most searching inquiry” implies that later hearings uncovered factual errors in the original Internment Trials).

Conversely, the *Adarand* dissent, led by Justices Ruth Bader Ginsburg and Stephen G. Breyer, abolished *Korematsu* as judicial precedent altogether. The dissent began by criticizing the *Korematsu* majority's conception of heightened scrutiny, noting that although they described the level of scrutiny as "most rigid," it "yielded a pass for an odious, gravely injurious racial classification."<sup>119</sup> For that reason, the *Adarand* dissent argued that the strict scrutiny standard was "indeed fatal for classifications burdening groups that have suffered discrimination in our society."<sup>120</sup> The dissent then concluded that such a *Korematsu* classification would never survive the current strict scrutiny standard and that as "history and precedent instruct . . . properly ranks as prohibited."<sup>121</sup> Although the more negative view of *Korematsu* appears in the *Adarand* dissent, it is clear that, as a whole, *Adarand* does not view *Korematsu's* racial classification favorably. Its criticisms serve as a judicial warning and maybe even as a precedential limit to the government's war authority.

The Supreme Court has in no uncertain terms placed *Korematsu* along side with some of the worst decisions in its jurisprudential history. Justice Antonin Scalia's impassioned dissent in *Stenberg v. Carhart* commenced with the hope that the majority's decision would one day be "assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."<sup>122</sup> Although *Stenberg* dealt with abortion and had little substantive relation to racial classifications, Justice Scalia's dissent epitomizes his, and potentially those of many of the other Justices, rebuke of the Internment decision. Overall, it appears that the Supreme Court has been reluctant to cite to the broad war authority provided by the Internment Cases, as *Kennedy v. Mendoza-Martinez*, a Vietnam War draft-dodging case decided in 1963 represents the last instance of its use.<sup>123</sup> Then again, it is arguable that prior to the present terrorist crisis, the United States had not fallen (or headed) into any international conflicts involving such pressing domestic concerns.

Several lower court decisions also offer persuasive authority attacking the validity of the Internment precedents. Although it is somewhat of an obvious point, these cases are especially relevant because potential challenges to government authority start at the district level, where circuit law governs. In a Second Circuit case contesting the transfer of black officers to different precincts to avoid racial strife, the court explicitly criticized *Korematsu's* treatment of a "national emergency" as the end-all justification for breaching individual rights.<sup>124</sup> Moreover, the court implicitly sided with the *Adarand* dissent's legal disapproval of *Korematsu*

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<sup>119</sup> *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting).

<sup>120</sup> *See id.*

<sup>121</sup> *Id.*

<sup>122</sup> 530 U.S. 914, 953 (2000) (*Dred Scott*, which upheld slavery, is unanimously regarded as one of the worst decisions in Supreme Court history).

<sup>123</sup> 372 U.S. 144, 160 (1963) [hereinafter *Martinez*] (citing to *Hirabayashi*, 320 U.S. at 93).

<sup>124</sup> *See* *Patrolmen's Benevolent Ass'n. of City of New York v. City of New York*, 310 F.3d 43, 53-54 (2d Cir. 2002) ("such unconditional deference to a government agent's invocation of 'emergency' to justify a racial classification has a lamentable place in our history.").

by highlighting the *Korematsu* analysis (rather than just the result) as the mistake *Adarand* advises courts to avoid.<sup>125</sup>

Vigorously dissenting against the majority's upholding of a warrantless search, Fifth Circuit Justice Jacques L. Wiener elaborated on Scalia's *Stenberg* characterization of *Korematsu* as one of the historical low points of Supreme Court jurisprudence.<sup>126</sup> While Scalia mentioned *Korematsu* as a constitutional mistake only to highlight the majority holding's general inadequacy, Judge Wiener used *Korematsu* to specifically attack the majority's lack of concern for constitutional liberties.<sup>127</sup> Relating *Korematsu* back to the majority's failure to recognize the Fourth Amendment violation, he held the decision up as a warning, calling it a "shameful failure" of the Court to defend "constitutional liberties" against the "popular hue and cry that would have us abridge them."<sup>128</sup> As a result, his analysis breathes new life into Scalia's criticism by pointing out the exact reason why *Korematsu* should be relegated to the constitutional basement.

The nation's foremost constitutional scholars have also had little esteem for the Internment Cases' analysis. In particular, scholars have criticized the way the majority balanced out constitutional liberties in the face of crisis. Just a few years after their decisions, Professor Eugene Rostow, in a critical essay entitled *The Japanese American Cases — A Disaster*, warned that the precedent set by the Internment Cases may be used to "encourage attacks on the civil rights of citizens and aliens."<sup>129</sup> He railed against excessive deferment to military necessity, stressing that action taken in the name of war should be held to "standards of responsibility under such circumstances."<sup>130</sup> About thirty years later, Professor Laurence Tribe wrote that "the [*Korematsu*] decision represents the nefarious impact that war and racism can have on institutional integrity and cultural health."<sup>131</sup> Likewise, Professor Erwin Chemerinsky, in his treatise *Constitutional Law: Principles and Policies*, posed that, during times of war, the Constitution and the Court's roles are arguably most important when "pressure and even hysteria to violate rights and [to] discriminate will be most likely to occur."<sup>132</sup> But to what degree can scholars' opinions sway the opinions of the Court? Though the legal analysis in *Korematsu* was not addressed, the companion *coram nobis* case

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<sup>125</sup> See *id.* (citing to *Adarand*, 515 U.S. at 236, 244, 275) (referring first to the legal mistake in *Korematsu* and then stating that the mistake should be avoided, citing to *Adarand* as criticizing *Korematsu*).

<sup>126</sup> *United States v. Zapata-Ibarra*, 223 F.3d 281, 282 (5th Cir. 2000) (Weiner, J., dissenting) ("to borrow from Justice Scalia, I sense that history is likely to judge the judiciary's evisceration of the Fourth Amendment . . . as yet another jurisprudential nadir, joining *Korematsu*, *Dred Scott*, and even *Plessy* . . .").

<sup>127</sup> See *id.*

<sup>128</sup> *Id.*

<sup>129</sup> Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489, 491 (1945).

<sup>130</sup> *Id.* at 515.

<sup>131</sup> LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978).

<sup>132</sup> CHEMERINSKY, *supra* note 54, at 554.

cited to Professor Tribe's aforementioned critique in regarding *Korematsu's* holding as limited.<sup>133</sup>

Apart from legal critiques, it has often been said that "those who ignore the mistakes of the past are doomed to repeat them." The similarly panicked, emotionally charged atmospheres surrounding the internment and the Patriot Act's inceptions reveal that our current legislative direction is following a previously beaten path: rushing to resolve a crisis while forsaking civil liberty concerns along the way. It is this grim comparison that warns against resorting to legal precedents established during the Internment.

Although the Bush administration and the legislature never explicitly deemphasized individual rights in pursuing the Patriot Act, the push for national security inevitably drove the passage of the Act. The Act's author, Senator Patrick Leahy, who is usually an active proponent of civil liberties, vowed to give law enforcement as much power as possible to fight future attacks.<sup>134</sup> The Bush Administration and Attorney General John Ashcroft, in particular, wanted to fortify Leahy's Patriot Act not only with extensions of the Justice Department's surveillance power, but also with provisions providing for the indefinite detention and seizure of assets from potential terrorists and terrorist groups.<sup>135</sup> Moreover, touting the mantra "talk[ing] won't prevent terrorism," Ashcroft wanted this security-laden bill immediately punched through Congress.<sup>136</sup> Predictably, many in the Senate shared Ashcroft's concerns as well, and the Act passed 96-1. Two weeks later, on October 26, 2001, President Bush signed the bill.<sup>137</sup>

One can accredit much of the Act's hasty passage to the anti-terrorism drive that had infused the United States in the waking moments of September 11, 2001. Even members of Congress, such as Senators Dianne Feinstein and Charles Schumer, who generally were active supporters of personal liberty rights, had no intention of impeding the Patriot Act's passage.<sup>138</sup> Inevitably, the senators were merely following the demands of their constituents, as polls "showed that most people were more than willing to trade off civil liberties and privacy protections for more security."<sup>139</sup> Consequently, the voices of civil rights activists went largely unnoticed. As the news of the terrorist attacks reverberated through Washington, civil liberties groups such as the American Civil Liberties Union ("ACLU") met together to draft a manifesto urging the government to remember individual liberties in the process of fortifying terrorist countermeasures.<sup>140</sup> Though they publicized the manifesto via press conference and established personal contact with Members of Congress,

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<sup>133</sup> See *Korematsu II*, 584 F. Supp. at 1420 (citing Tribe at §§ 16-6, 16-14).

<sup>134</sup> O'Harrow, *supra* note 20, at W06.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (Ashcroft statement made at a press conference following a meeting with Senator Leahy).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

many key figures involved in the enactment of the Patriot Act admitted that they had never even heard about the manifesto.<sup>141</sup>

The rapid passage of the Patriot Act and the virtual disappearance of concerns about civil liberty eerily mirror the 1942 government's immediate reactions to the Pearl Harbor bombings. The seriousness of the two threats united both governments, as consolidated legislatures willingly handed President Bush and President Roosevelt the reigns to countering the security threat. Like the Patriot Act, which was congressionally approved by a landslide, President Roosevelt's declaration of war met virtually no legislative resistance.<sup>142</sup> Furthermore, the treacherous and clandestine nature of the two attacks evoked feelings of animosity and rage from the general populace and the government. In the days following the bombing of Pearl Harbor, Americans expressed their hatred for the "treacherous Japs"<sup>143</sup> in government halls, in newspapers, and on the streets. Likewise, Senator Leahy, who is generally considered to be very liberal, could only feel anger upon hearing about the September 11 terrorist attacks and vowed to give law enforcement all the power it needed to counter the threat.<sup>144</sup> Against the backdrop of increasing retributive antagonism towards the Japanese after the Pearl Harbor bombing, individual liberty pleas were largely ignored, as Fair Play committees and religious groups' anti-Internment petitions met the same indifferent reception as the post-terrorist attack ACLU memoranda on civil liberties.<sup>145</sup>

Racial paranoia engulfed both the 1942 and twenty-first century public because of the foreign source of the attacks, driving the public to associate resident aliens and citizens with the enemy. After the Pearl Harbor bombing, radio broadcaster John B. Hughes gave a series of radio talks accusing Japanese Americans of subversive activities and hinting that Japanese American control of agricultural production in California was all part of some plan of the Japanese empire.<sup>146</sup> On February 2, 1942, *Los Angeles Times* columnist W.H. Anderson wrote that Japanese Americans are "vipers," loyal to Japan, who pose a "potential and menacing" danger to the country.<sup>147</sup> These scathing remarks in the popular media, combined with a general mistrust of Japanese Americans, led to a racially charged climate in which skin color was synonymous with national affiliation. Although not blatantly broadcasted by the popular media, mistaken animosity towards Arab Americans as a result of the September 11th terrorist attacks seamlessly parallels the plight of the Japanese Americans. Less than two weeks after the attacks, authorities reported more than forty

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<sup>141</sup> *Id.*

<sup>142</sup> Robinson, *supra* note 42, at 74.

<sup>143</sup> *Id.*

<sup>144</sup> See O'Harrow, *supra* note 20, at W06.

<sup>145</sup> Robinson, *supra* note 42, at 102.

<sup>146</sup> *Id.* at 89.

<sup>147</sup> *Id.* at 96.

hate-related incidents targeting Arab Americans in Los Angeles County alone, including assaults, bomb threats and anti-Arab graffiti.<sup>148</sup>

Indeed, panic and racial animosity surrounded the 1942 government's decision to intern the Japanese American population. From the outskirts, it seems as if the current administration's rush to address the national security crisis is following suit. On an optimistic note, though, history has stopped short of repeating the racism which pervaded the 1942 government's decision-making, as it appears as though current courts and the Bush administration will refrain from citing the Internment Cases — cases that are this low point in history.

In 1942, racism extended beyond popular attitudes and actually drove the government's decision to intern Japanese Americans. In his February 14, 1942, "Final Recommendation," commanding general of the Western Defense Command John DeWitt, requested the relocation of Japanese Americans, characterizing them as members of an "enemy race," regardless of their citizenship. He further stated their "undiluted racial strains" made them innately Japanese and a risk to national security.<sup>149</sup> In addition, even prior to the Pearl Harbor incident itself, "President [Roosevelt] consistently regarded Japanese Americans as adjuncts of Japan and therefore as potential enemies."<sup>150</sup> If Roosevelt's opinion towards Japanese Americans had not already been cemented, he had ample help in forming it, as the administration received at least 200 letters per week urging relocation.<sup>151</sup>

Conversely, the Bush administration has done a careful job of assuring the American people that it will not associate Arab Americans or Muslims with the terrorist threat on the basis of their race or religion. In a televised telephone call to the New York Governor George Pataki and the New York City Mayor Rudy Giuliani, President Bush emphasized that "there are thousands of Arab Americans who live in New York City who love their flag just as much as the three of us do" and that in fighting the war on terrorism, "we [should] treat Arab Americans and Muslims with the respect they deserve."<sup>152</sup> Attorney General Ashcroft offered similar statements in reference to sporadic outbreaks of anti-Arab violence:

We must not descend to the level of those who perpetrated Tuesday's violence by targeting individuals based on race, religion, or national origin. Such reports of violence and threats are in direct opposition to the very principles and laws for which the United State of America stands,

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<sup>148</sup> *Terrorism Strikes America: ADL Responds to Violence and Harassment against Arab Americans and Muslim Americans*, ANTI-DEFAMATION LEAGUE, available at [http://www.adl.org/terrorism\\_america/adl\\_responds.asp](http://www.adl.org/terrorism_america/adl_responds.asp) (last visited Oct. 1, 2003).

<sup>149</sup> Robinson, *supra* note 42, at 85.

<sup>150</sup> *Id.* at 71.

<sup>151</sup> *See id.* at 102.

<sup>152</sup> Press Release, The White House, *President Pledges Assistance for New York in Phone Call with Pataki, Giuliani*, (Sept. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010913-4.html>.

and such reports of violence and threats of violence will not be tolerated.<sup>153</sup>

Public racial paranoia has little effect on influencing policy if the government itself possesses levelheaded views on the issue. Assuming that the current government truly has learned from the mistakes of the past and consciously separates race and culpability, there is a good chance it will not walk (at least not purposely) over the internment trapdoor.

#### IV. HOW DO WE BALANCE THE NEED TO PROTECT OUR NATION FROM TERRORISTS WHILE PRESERVING INDIVIDUAL LIBERTIES?

Notwithstanding the unlikelihood of a government mass-internment of Arab Americans or Muslims, the issue of whether more subtle rights deprivations are justifiable when demands for bolstering national security require their sacrifice must be addressed. It goes without saying that national security crises such as the bombing of Pearl Harbor and the September 11th terrorist attacks are emergency situations, requiring rapid decision-making to address the threat. Yet, in the rush to counter the terrorist threats, lawmakers seemed to perpetuate a cycle of unintentionally sacrificing foresight for expediency. Congress previously enacted strict surveillance/privacy laws in immediate response to scandalous revelations of government privacy invasions.<sup>154</sup> The current administration criticized these laws for creating terrorist security holes and, without a second thought, reevaluated the balance via the Patriot Act.<sup>155</sup> Jim Dempsey, Executive Director of the Center for Democracy and Technology characterized the Patriot Act's formation as a familiar "dynamic" in which "something terrible happens. Legislators rush to respond. They don't have time to investigate the policy implications thoroughly, so they reach for what's available and push it through."<sup>156</sup>

Certainly, because of the speed with which the legislature changed the law, they did not have time to consider the ramifications of the security holes created or the individual rights sacrificed as a result. They simply dismissed either national security or individual liberties, depending on what was important at the moment. When making such decisions, the political and judicial branches of our government must maintain a background mindset of consistency in order to give both liberty and national security interests their full due. To maintain this consistency they must give extra attention to the interest most likely to be forgotten as a result of the current pressing necessity.

Considering that our country is currently in a crisis that demands a fortification of national security, the judiciary and political branches have a

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<sup>153</sup> *American Leaders Speak Out Against Backlash in Wake of September 11 Tragedy*, ARAB AMERICAN INSTITUTE FOUNDATION, available at <http://www.aaiusa.org/PDF/Quotes.pdf>.

<sup>154</sup> See O'Harrow, *supra* note 20, at W06.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

responsibility to carefully scrutinize how such fortifications affect individual liberties. Indeed, during the present post-terrorist scenario, this type of approach requires a degree of counter-majoritarian activism, for polls seem to show that most people are willing to trade their liberties for more security.<sup>157</sup> Although politicians serve as representatives of the majority and may beg to differ with this suggestion, at least on the part of the judiciary, this form of constitutional thought is not inappropriate. Constitutional theorist Ronald Dworkin asserted that the Court has an obligation to the Constitution, not the majority, and that the Constitution is a protector of individual rights.<sup>158</sup> Also along these lines, Justice William Brennan, Jr., urged the Court to look to the long-term purposes of the Constitution, rather than settling for “temporary political majorities.”<sup>159</sup>

One can observe such keen judicial balancing of civil liberties in the sixteen-year tenure of Chief Justice Earl Warren, who decided such life-changing cases as *Brown v. Board of Education* (ending desegregation in education) and *New York Times v. Sullivan* (extending constitutional protection to those who defame public officials).<sup>160</sup> The Warren Court was also responsible for mollifying the effectiveness of the Smith Act, the anti-communist statute that made it a crime to advocate or organize for the purpose of overthrowing the government.<sup>161</sup> The 1950s also represented a time of crisis comparable to the Internment period and the current terrorist situation. Cold War tensions between the United States and the Soviet Union were steadily rising, and many in the United States feared the threat of a communist takeover, both from abroad and from within.<sup>162</sup> As the United States military joined the arms race to counter Soviet nuclear developments, domestic policy focused on eliminating communist activity on the home front. Congress created the House Committee on Un-American Activities to ferret out “un-American” propaganda activities and developed the Smith Act to punish the perpetrators of such ideas.<sup>163</sup>

Despite the popular fears of communist subversion, Warren did not forget the constitutional protection of free speech and other individual liberties.<sup>164</sup> He gave several lectures in the spring of 1955 advocating the need to tolerate dissent.<sup>165</sup> And, in a *Fortune* magazine article, he urged the public to resist sacrificing individual liberty when the temptation was greatest, writing: “The Constitution exists for the individual as well as for the nation . . . In the present struggle between our world and communism,

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<sup>157</sup> *Id.*

<sup>158</sup> Lori Sachs, Note, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 *FORDHAM URB. L. J.* 1715, 1718-19 (2002) (citing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 133, 137-38 (1977)).

<sup>159</sup> *See id.* at 1719 (citing William J. Brennan, Jr., *The Constitution of The United States: Contemporary Ratification*, 27 *S. TEX. L.J.* 433, 437 (1986)).

<sup>160</sup> ARTHUR J. SABIN, IN *CALMER TIMES: THE SUPREME COURT AND RED MONDAY* 106-07 (1999).

<sup>161</sup> *Id.* at 108; 18 U.S.C.A. § 2385 (2003).

<sup>162</sup> *See Sabin, supra* note 160, at 25.

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* at 123.

<sup>165</sup> *Id.*

the temptation to imitate totalitarian security methods is a subtle temptation that must be resisted.”<sup>166</sup> The constituents of the Warren Court followed his lead, as Justice John Marshall Harlan in *Yates v. United States* reversed the Smith Act convictions of the second-string leaders in the Communist Party.<sup>167</sup> What is significant about Harlan’s analysis is that in the midst of the anti-communist furor surrounding the trial, he considered the defendants’ free speech interests while deciding the best means to prevent a communist revolt. While he acknowledged the need to protect the government from communist subversion by not striking down the Smith Act, he simultaneously struck a blow for free speech rights by narrowing its application to that speech most directly connected with subversion: “advocacy directed at promoting unlawful action.”<sup>168</sup> As a result, he firmly prohibited the Justice Department from prosecuting someone simply for advocating abstract communist doctrine.<sup>169</sup> By keeping its eye on constitutional liberties, the Warren Court protected national security during a time of crisis while refusing to let freedom of speech fall by the wayside. This strategy, as employed by the Warren Court, can help avoid the mistakes of history in which individuals’ rights were needlessly sacrificed for some greater end.

## V. CONCLUSION

The Internment Cases, *Hirabayashi* and *Korematsu*, albeit low points of an already ignominious era, still represent good law today and may have a profound effect on the authority government officials have in tackling the current terrorist crises. With *Padilla* and *Hamdi* opening the doors to the President’s use of his war powers, the Internment Cases now become available as dangerous precedents, permitting the racial targeting of suspect groups in the name of military necessity. Even with their availability, judicial and scholarly criticisms have denounced the results as well as the legal analysis in the Internment Cases — some to the point of ranking the two cases at the bottom of Supreme Court jurisprudence. Moreover, contextual comparisons between the respective inceptions of the Patriot Act and the internment reveal a running trend of hasty, emotional judgments which may lead our current counter-terrorist effort in the direction of its infamous historical counterpart. Despite the temptation for our courts and our legislatures to hastily address the terrorist threat, mistakes, like the internment, may be avoided by the careful protection of civil liberties in times when they are most likely to be forsaken.

Traditions and current views in this country seem to sway both ways in the balancing of civil liberties and national security. Just recently, Congressman Howard Coble commented that the internment of Japanese

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<sup>166</sup> *Id.* (citing Warren, *Law and the Future*, 107 (1955)).

<sup>167</sup> See generally *Yates v. United States*, 354 U.S. 298 (1957).

<sup>168</sup> *Id.* at 318.

<sup>169</sup> *Id.*

Americans was appropriate, for “we were at war . . . [and] some [Japanese Americans] probably were intent on doing harm to us.”<sup>170</sup> And as noted above, Chief Justice Rehnquist has had a dim view of civil rights in times of war.<sup>171</sup> At the same time, despite their shortcomings, *Hamdi* and *Padilla* do exhibit some of the balancing typified by the Warren Court. The *Hamdi* court limited its holding to its own specific factual context, citing the tensions underlying presidential war authority and civil liberties as reasons not to construe its holding broadly.<sup>172</sup> In a subsequent hearing, a district court granted Padilla the right to consult with an attorney in order to respond to the declaration containing the basis for his detention.<sup>173</sup> Will this balancing continue in the future? Only time will tell, but at least history may guide our actions along the way.

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<sup>170</sup> *Coble and Myrick are Criticized by Advocacy Groups for Remarks*, WINSTON-SALEM J. (N.C.), Feb. 6, 2003, at 1.

<sup>171</sup> Rehnquist, *supra* note 9, at 224.

<sup>172</sup> *Hamdi*, 316 F.3d at 464-65.

<sup>173</sup> *Padilla*, 243 F. Supp. 2d at 57.