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The Supreme Court and the President: Toward a Balancing Test with Bite

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The Supreme Court and the President: Toward a Balancing Test with Bite

*Pooya Safarzadeh**

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INTRODUCTION

With President Reagan’s formal apology and reparation payments in 1988 to Japanese-Americans who were interned during World War II,¹ many felt that a troublesome chapter in

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¹ Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4 (2000).

United States history had closed. After Pearl Harbor was attacked on December 7, 1941, approximately 120,000 American citizens and aliens of Japanese ancestry were evacuated from their homes on the West Coast.² They were gathered at assembly centers and relocated to internment camps throughout the country.³ The internment of Japanese-Americans was immediately condemned by legal scholars as “the worst blow our liberties have sustained in many years.”⁴ Although internment was a drastic measure, many believed that it was an anomalous response to a catastrophic attack that could not happen again.

The events of September 11, 2001 shattered the sense of security that Americans had enjoyed for several decades. For the first time since Pearl Harbor was invaded sixty years earlier, there was an attack on American soil that cost thousands of lives. President Bush and Congress reacted to the attacks with swift military action⁵ and new domestic security laws.⁶ In the ensuing years, several lawsuits challenged the constitutionality of those measures before the Supreme Court.⁷

Historically, the Supreme Court has responded to the President’s wartime actions in two ways. At times, the Court has used a deferential balancing model to weigh the President’s assertion of wartime necessity against the protection of civil liberties.⁸ Under this model, the Court interprets constitutional principles broadly to allow presidential actions during wartime that it would find unconstitutional in peacetime.⁹ The Court limits the role of judicial review by refusing to examine the reasonableness of the President’s actions.¹⁰ Advocates of the deferential balancing model argue that the Court should not interfere with the President’s protection of national security during temporary wartime periods.¹¹ However, critics of the model assert that the

² TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II, at 4 (2003).

³ *Id.*

⁴ Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 490 (1945).

⁵ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁶ See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁷ See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

⁸ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

⁹ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1059 (2003). Gross calls this model “interpretive accommodation.”

¹⁰ *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting) (“In adjudging the military action taken . . . it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage.”).

¹¹ Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV.

Court's failure to scrutinize presidential policies has allowed policies based on animosity toward unpopular groups to be justified as national security measures.¹²

At other times, the Court has responded to the President's wartime actions by invoking justiciability doctrines to avoid addressing the merits of a particular issue until the emergency has subsided.¹³ Under the justiciability doctrines model, the Court applies procedural grounds like the political question doctrine and standing to avoid establishing a precedent that would condone constitutional violations.¹⁴ Supporters of the justiciability doctrines model argue that the Court should not demand that military policies conform to constitutional principles when they are needed to protect the country.¹⁵ Some measures essential to winning a war may be unconstitutional.¹⁶ Those supporters be-

605, 627 (2003).

¹² Rostow, *supra* note 4, at 491. Rostow states that in *Korematsu*, the Court "upheld an act of military power without a factual record in which the justification for the act was analyzed." *Id.* See also *Korematsu*, 323 U.S. at 239–40 (Murphy, J., dissenting) ("A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations.").

¹³ See, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1943).

¹⁴ Posner & Vermeule, *supra* note 11, at 606 n.1.

¹⁵ *Korematsu*, 323 U.S. at 244–45 (Jackson, J., dissenting). Justice Jackson explains the justification for the justiciability doctrines model as follows:

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . . No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. . . .

. . . .

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. . . . Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Id.

¹⁶ *Id.* at 245–46. Jackson argues that the internment of Japanese-Americans is a violation of civil liberties. However, the Court's decision upholding the internment under the Constitution was much worse than the internment order itself:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting

lieve that the Court should not exercise judicial review to validate a policy that is necessary, but clearly unconstitutional.¹⁷ However, critics of the justiciability doctrines model argue that by failing to hear cases during wartime, the Court avoids its constitutionally-mandated duty to protect citizens' rights.¹⁸

The major problem with both models, however, is that they are inconsistent with the Founding Fathers' beliefs.¹⁹ The Framers passionately believed that the President and Congress could not ignore constitutional principles.²⁰ They established a Supreme Court with a constitutionally-mandated duty to prevent oppressive government actions passed in times of war and hysteria.²¹ The Founders believed that a plea of military necessity should not be used to violate fundamental constitutional rights.²²

Counterbalancing the Founders' strict adherence to protecting constitutional rights was their belief that national security was extremely important.²³ The Court has often failed to take this into account by inflexibly interpreting the Constitution.²⁴ The Founding Fathers believed that the President should have sufficient power to protect the nation against foreign attacks,²⁵ but the Court's unduly restrictive interpretation can prevent the President from defending against sudden attacks.²⁶ During im-

American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Id.

¹⁷ *Id.* at 244–46.

¹⁸ See, e.g., THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . .”).

¹⁹ *Id.* at 470 (“Until the people have, by some solemn and authoritative act, annulled or changed the established form, [the Constitution] is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.”).

²⁰ *Id.*

²¹ See *id.* (“[I]t is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.”).

²² See *id.*; THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 18, at 69–70.

²³ THE FEDERALIST NO. 41 (James Madison), *supra* note 18, at 256 (“Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union.”).

²⁴ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144, 148–50 (C.C.D. Md. 1861) (No. 9487) (holding that even in times of war, the President does not have the power to suspend the writ of habeas corpus).

²⁵ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 423 (“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.”).

²⁶ See, e.g., *Merryman*, 17 F. Cas. at 149. Justice Taney inflexibly interprets the Constitution during the Civil War. In response to imminent danger that Confederate forces would invade Washington, D.C., President Lincoln ordered General Cadwalader to suspend the writ of habeas corpus. He did not get permission from Congress before doing so. In *Merryman*, Justice Taney harshly criticized President Lincoln for unilaterally sus-

minent threats to national security, constitutional principles must be tempered by the President's need to protect the nation.

This comment advocates the balancing test with bite model, which the Court adopted in *Hamdi v. Rumsfeld*.²⁷ This model is most consistent with the Founding Fathers' views because it provides all three branches with important roles during wartime.²⁸ The Court in *Hamdi* exercised its constitutionally-mandated duty to judicially review the President's wartime actions.²⁹ It also demanded evidence to support a citizen's detention,³⁰ while accommodating the military's needs by lowering its evidentiary burden.³¹ At the same time, however, the Court balanced its protection of citizens' rights with the President's interest in conducting the war by reaffirming the holding in *Ex parte Quirin*, which allows the President to detain even American citizens designated as enemy combatants.³²

Part I of this comment explores how the Supreme Court historically has responded to the President's wartime actions. Part II explains the Founding Fathers' belief in constitutional absolutism and the Supreme Court's duty to protect citizens' rights. Part III argues that the Court has applied constitutional absolutism inconsistently with the Founders' wishes by unduly burdening the President's power to protect national security during wartime. Part IV advocates the balancing test with bite model and shows that it is most effective at simultaneously defending national security and protecting constitutional rights.

pending the writ of habeas corpus:

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.

Id.

²⁷ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647–48 (2004) (holding that an individual detainee's interest in due process must be balanced against the government's interest in protecting national security).

²⁸ *Id.* at 2650 (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

²⁹ *Id.* (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”).

³⁰ *Id.* at 2651 (“Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”).

³¹ *Id.* at 2649 (“[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

³² *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

I. THE SUPREME COURT'S WARTIME RESPONSES TO PRESIDENTIAL ACTIONS

Historically, the Supreme Court has responded to the President's wartime actions by following one of two models: the deferential balancing model³³ or the justiciability doctrines model.³⁴ Under the deferential balancing model, the Court examines the reasonableness of the President's actions in a highly deferential manner, allowing infringement of citizens' rights.³⁵ Likewise, under the justiciability doctrines model, the Court avoids reviewing presidential actions so that a harmful judicial precedent is not established.³⁶ Both models severely restrict the wartime role of judicial review in protecting citizens' constitutional rights.³⁷

A. The Deferential Balancing Model

Under the deferential balancing model, the Supreme Court defers to the President's determination that his policies strike the proper balance between defending national security and protecting civil liberties during wartime.³⁸ Constitutional rights normally provided during peacetime are outweighed by the President's need to conduct the war effort.³⁹ Scholars who defend the deferential balancing model argue that the Court's defense of constitutional rights during wartime will unduly burden the

³³ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218 (1944) ("[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943))).

³⁴ See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943) ("Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained.").

³⁵ *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting) ("[N]o reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation" (quoting *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1872))).

³⁶ *Hirabayashi*, 320 U.S. at 85.

³⁷ This is particularly problematic because an independent judiciary was specifically intended to protect the constitutional rights of individuals without being swayed by popular opinion. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469 ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

³⁸ See, e.g., *Korematsu*, 323 U.S. at 218.

³⁹ Gross, *supra* note 9, at 1034 ("Judges . . . are sensitive to the criticism that they impede the war effort. Thus, in states of emergency, national courts assume a highly deferential attitude when called upon to review governmental actions and decisions.").

President's protection of national security.⁴⁰ However, critics of the model argue that the Court should review the reasonableness of the President's actions without such deference to determine whether the cost of infringing citizens' rights outweighs national security objectives.⁴¹

The Court adopted the deferential balancing model in *Korematsu v. United States*⁴² in response to President Roosevelt's Executive Order 9066, which authorized General J.L. DeWitt to intern Japanese-Americans during World War II.⁴³ After President Roosevelt signed Executive Order 9066, General DeWitt issued Public Proclamation No. 1, which designated security areas from which Japanese residents should be removed.⁴⁴ In *Korematsu*, the Court upheld the internment order, reasoning that "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."⁴⁵ Although no Japanese resident was ever charged with espionage,⁴⁶ the Court refused to examine the reasons behind General DeWitt's internment order.⁴⁷ The Court determined that the President's national security measures outweighed citizens' due process rights.⁴⁸

Scholars who defend the deferential balancing model argue that vigorous judicial review during wartime unduly burdens the President's defense of national security.⁴⁹ They observe that "[t]he characteristics of judicial review—deliberation, openness, independence, distance, slowness—may be minor costs, and sometimes virtues, during normal times; but during emergencies

⁴⁰ Posner & Vermeule, *supra* note 11, at 627 ("The characteristics of judicial review—deliberation, openness, independence, distance, slowness—may be minor costs, and sometimes virtues, during normal times; but during emergencies they can be intolerable.").

⁴¹ See, e.g., *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting). Justice Murphy applies no such deference in his dissent, stating, "In adjudging the military action . . . it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion . . . of all persons with Japanese blood . . . has no such reasonable relation." *Id.*

⁴² *Id.* at 217–19.

⁴³ Exec. Order No. 9066, 3 C.F.R. 1092–93 (1942).

⁴⁴ *Hirabayashi v. United States*, 320 U.S. 81, 86 (1943).

⁴⁵ *Korematsu*, 323 U.S. at 218 (quoting *Hirabayashi v. United States*, 323 U.S. 81, 99 (1943)).

⁴⁶ Sharon Boswell & Lorraine McConaghy, *Abundant Dreams Diverted*, SEATTLE DAILY TIMES, June 23, 1996, at B2.

⁴⁷ See *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting) (arguing that no reasonable relation existed between the exclusion order and the removal of danger).

⁴⁸ *Id.* at 219–20 (majority opinion) ("Compulsory exclusion of large groups of citizens from their homes . . . is inconsistent with our basic governmental institutions. But when . . . our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

⁴⁹ See, e.g., Posner & Vermeule, *supra* note 11, at 627.

they can be intolerable.”⁵⁰ The Court’s examination of wartime actions can interfere with military operations in foreign countries by requiring soldiers to gather evidence about detainees.⁵¹ Furthermore, the openness of court proceedings may allow national security secrets that could harm the military to be released.⁵² Military officials should be given wide latitude to protect national security during wartime without judicial intervention.⁵³

Advocates of the deferential balancing model also argue that the temporary hardships of war justify policies that should not be permitted during peacetime.⁵⁴ As Justice Frankfurter observed in his concurring opinion in *Korematsu*, “action is not to be stigmatized as lawless because like action in times of peace would be lawless.”⁵⁵ Constitutional principles should be somewhat relaxed during a temporary wartime emergency.⁵⁶ Scholars have noted that “[a]lthough deference also permits the executive to violate rights, violations that are intolerable during normal times become tolerable when the stakes are higher.”⁵⁷ The President’s protection against imminent attacks may be unduly restricted by a court that rigidly interprets the Constitution without regard to legitimate national security concerns.⁵⁸

Critics of the deferential balancing model respond that by refusing to examine the President’s policies, the Court allows citizens’ constitutional rights to be violated for reasons unrelated to national security.⁵⁹ In *Korematsu*, for example, the Court ig-

⁵⁰ *Id.*

⁵¹ *Hamdi v. Rumsfeld*, 316 F.3d 450, 470 (2003) (“The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case.”), *vacated*, 542 U.S. 507.

⁵² John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 448 (2003) (“A habeas proceeding could become the forum for recalling commanders and intelligence operatives from the field into open court; disrupting overt and covert operations; revealing successful military tactics and methods; and forcing the military to shape its activities to the demands of the judicial process.”).

⁵³ *Hamdi*, 316 F.3d at 474 (“Article III courts are ill-positioned to police the military’s distinction between those in the arena of combat who should be detained and those who should not.”).

⁵⁴ *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring).

⁵⁵ *Id.*

⁵⁶ Gross, *supra* note 9, at 1059 (“[T]he need for additional powers to fend off a dangerous threat is accommodated by an expansive, emergency-minded interpretive spin on existing norms through which various components of the ordinary legal system are transformed into counter-emergency facilitating norms.”).

⁵⁷ Posner & Vermeule, *supra* note 11, at 609.

⁵⁸ Gross, *supra* note 9, at 1044 (“When faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis.”).

⁵⁹ See, e.g., *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting) (“[N]o reasonable relation to an ‘immediate, imminent, and impending’ public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation” (quoting *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1872))).

nored the fact that General DeWitt, the military commander who ordered the internment of Japanese residents from the West Coast, had animosity toward the Japanese.⁶⁰ As Justice Murphy observed in his dissenting opinion in *Korematsu*, General DeWitt testified before Congress that “I don’t want any of them [persons of Japanese ancestry] here. . . . It makes no difference whether he is an American citizen, he is still a Japanese. . . . [W]e must worry about the Japanese all the time until he is wiped off the map.”⁶¹

The Court’s failure to consider General DeWitt’s reasons for the internment order allowed a policy motivated by hostility toward a racial group to be disguised as a national security measure.⁶² As Justice Murphy observed, “A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations.”⁶³ During wartime, where a racial or politically unpopular group is often targeted, the Court should be especially vigilant in protecting civil liberties.⁶⁴

B. The Justiciability Doctrines Model

Under the justiciability doctrines model, the Court prevents the establishment of a judicial precedent sanctioning constitutional violations by failing to address the merits of a case or an issue.⁶⁵ The Court uses the doctrines of standing and political question to avoid reviewing the constitutionality of the President’s policies.⁶⁶ By refusing to hear a case, the Court does not interfere with the military’s prosecution of a war and does not constitutionally challenge the President’s policies.⁶⁷

⁶⁰ *Id.* at 236 n.2.

⁶¹ *Id.*

⁶² CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 50 (expanded ed. 1976) (Justice Murphy “had apparently bothered to read the military and congressional reports on the evacuation, and had been shocked by the evidences of naked prejudice that ran like angry veins of poison through its entire history.”).

⁶³ *Korematsu*, 323 U.S. at 239–40 (Murphy, J., dissenting).

⁶⁴ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 672 (2d ed. 2002) (“[T]he Constitution and the Court’s role are most important precisely in such times when pressure and even hysteria to violate rights and discriminate will be most likely to occur.”).

⁶⁵ *See, e.g., Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (“A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”).

⁶⁶ Posner & Vermeule, *supra* note 11, at 606 n.1 (“[T]he expansion of executive power is accepted but not explicitly acknowledged, and courts . . . do and should exercise deference surreptitiously, by ducking legal challenges with the help of the copious procedural mechanisms at their disposal—standing doctrine, denial of certiorari, delay, and so forth.”).

⁶⁷ *Id.*

The Court applied the justiciability doctrines model in *Hirabayashi v. United States*, a case challenging both the curfew and internment orders against Japanese-Americans during World War II.⁶⁸ Gordon Hirabayashi was charged with violating the internment order and failing to comply with the curfew order.⁶⁹ The district court ordered him to serve a concurrent sentence of three months for both counts.⁷⁰ The Court used the concurrent sentence doctrine to avoid deciding the constitutionality of the internment order.⁷¹ Under this doctrine, if an appellate court can affirm a conviction on one count, it does not need to hear a challenge to a second count if the second count's sentence is equal to or less than the first count.⁷² The Supreme Court upheld the curfew order and avoided addressing the internment order:

Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained.⁷³

The Court easily upheld the curfew order, as Hirabayashi himself admitted that it was a reasonable wartime measure.⁷⁴ The Court reasoned that "it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made."⁷⁵ As Chief Justice Rehnquist observed in his book on the subject:

In *Hirabayashi* . . . the Court could have decided the validity of both the relocation requirement and the curfew requirement. The "concurrent sentence" doctrine under which the Court declined to do so is not mandatory but discretionary. But counseling against any broader decision was the well-established rule that the Court should avoid deciding constitutional questions if it is possible to do so.⁷⁶

By using the concurrent sentence doctrine, the Court in *Hirabayashi* avoided review of the controversial internment order.⁷⁷

⁶⁸ *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943).

⁶⁹ *Id.* at 83.

⁷⁰ *Id.* at 85.

⁷¹ See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 205 (1998).

⁷² BLACK'S LAW DICTIONARY 310 (8th ed. 2004).

⁷³ *Hirabayashi*, 320 U.S. at 85.

⁷⁴ *Id.* at 99.

⁷⁵ *Id.* at 102.

⁷⁶ REHNQUIST, *supra* note 71, at 205.

⁷⁷ *Hirabayashi*, 320 U.S. at 85 ("Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained.").

The curfew order requiring citizens to remain in their homes after 8:00 p.m. was a much lighter restriction on civil rights than the internment order forcing citizens to be removed from their homes, sell their personal belongings, and relocate to internment camps.⁷⁸ The Court avoided establishing a legal precedent that validated the internment order until a year and a half later in *Korematsu*.⁷⁹

In *Korematsu*, Justice Jackson defended the justiciability doctrines model in his dissenting opinion.⁸⁰ Although Jackson observed that the internment order singling out Japanese residents was both over-inclusive and under-inclusive, he reluctantly noted that it is more important that military measures be successful than legal.⁸¹ He then presented the rationale for the justiciability doctrines model:

[C]ourts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.⁸²

Justice Jackson argued that military decisions should not be subject to judicial standards that might sacrifice the war effort.⁸³ The military emergency of the time may warrant drastic, legally questionable actions by the President.⁸⁴ A judicial precedent approving such policies, however, could be used in times that do not warrant such action.⁸⁵ Thus, the Court should refuse to hear challenges to the President's policies to prevent the establishment of a harmful judicial precedent.⁸⁶

Scholars have asserted two major critiques of the justiciabil-

⁷⁸ *Korematsu v. United States*, 323 U.S. 214, 225–26 (1944) (Roberts, J., dissenting) (“This is not a case of keeping people off the streets at night as was *Hirabayashi* . . . it is [a] case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp.”).

⁷⁹ *Id.* at 219.

⁸⁰ *Id.* at 242 (Jackson, J., dissenting).

⁸¹ *Id.* at 244.

⁸² *Id.* at 245–46.

⁸³ *Id.* at 244 (“No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting.”).

⁸⁴ *Id.* at 246 (“A military order, however unconstitutional, is not apt to last longer than the military emergency.”).

⁸⁵ *Id.* (“But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

⁸⁶ *Id.*

ity doctrines model. First, critics have challenged Justice Jackson's argument that wartime precedents will be used to sanction abuses during normal times.⁸⁷ They assert:

Why must the precedent both (1) spill over into ordinary law and (2) remain entrenched 'for all time,' as Jackson puts it? As for the first condition, the precedent will itself have a built-in limitation to emergency circumstances. . . .

. . . .

As for the second condition, . . . [s]tare decisis will be either strong or weak. If it is weak, then past precedents granting emergency powers can be overruled . . .⁸⁸

According to these critics, Justice Jackson incorrectly assumes that wartime measures validated by the Court will be used during normal times.⁸⁹ The Court can restrict the precedent's application to similar wartime emergencies.⁹⁰ The Court can also refuse to extend a precedent to a situation that does not warrant similar deference.⁹¹

A second criticism of the justiciability doctrines model is the normative argument that the Supreme Court has an affirmative duty to prevent constitutional violations.⁹² As Chief Justice Marshall observed in *Marbury v. Madison*, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."⁹³ With lifetime tenure and guaranteed salaries, federal judges are in a unique position to vindicate the constitutional rights of racially and politically unpopular groups during times of hysteria.⁹⁴ The Court's use of justiciability doctrines effectively ignores constitutional violations.

II. THE FOUNDING FATHERS' BELIEFS

The primary reason that the Court should avoid applying the deferential balancing model and the justiciability doctrines model is that both models are inconsistent with the Founding Fathers'

⁸⁷ See, e.g., Posner & Vermeule, *supra* note 11, at 615–16.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 615 ("[L]ater judges may either distend the precedent to accommodate government power or else contract the precedent to constrain it.").

⁹¹ *Id.*

⁹² THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469.

⁹³ 5 U.S. (1 Cranch) 137, 163 (1803).

⁹⁴ See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Id.

beliefs.⁹⁵ The Framers adopted a written Constitution to establish certain fundamental rights that are immune from actions by the President and Congress.⁹⁶ They believed that the role of the Supreme Court is to protect citizens' fundamental civil rights during both wartime and peacetime.⁹⁷ The President and military officials cannot use a plea of military necessity to violate fundamental constitutional rights.⁹⁸

A. The Constitution's Supremacy over Ordinary Acts

By creating the Constitution, the Founders intended to establish certain fundamental rights that a political majority could not easily change.⁹⁹ Unless it is amended, the Constitution's provisions are superior to all contrary presidential and congressional acts.¹⁰⁰ Alexander Hamilton declared in *The Federalist No. 78*, "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act."¹⁰¹ The Founding Fathers worried that a tyrannical majority would unite to deprive other citizens of their rights.¹⁰² Thus, they pro-

⁹⁵ *Id.* at 470 (The Constitution "is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it.").

⁹⁶ *Id.*

⁹⁷ See *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866). The Court in *Milligan* embraced constitutional absolutism:

Those great and good men [Founding Fathers] foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence

Id.

⁹⁸ *Id.* at 121, 123.

⁹⁹ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 467 ("No legislative act, therefore, contrary to the Constitution, can be valid.").

¹⁰⁰ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

¹⁰¹ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 470.

¹⁰² THE FEDERALIST NO. 10 (James Madison), *supra* note 18, at 80 ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

posed and ratified a written Constitution to grant all citizens basic protections that cannot be denied by the political branches of government.¹⁰³

Justice Marshall reaffirmed the Constitution's supremacy over acts of the President and Congress in *Marbury v. Madison*.¹⁰⁴ There, Justice Marshall argued that the theory behind written constitutions is to establish certain fundamental, unalterable principles:

The [C]onstitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. . . .

. . . .

[I]f the latter part be true, then *written constitutions are absurd attempts*, on the part of the people, to limit a power, in its own nature illimitable. . . .

. . . .

[I]t thus *reduces to nothing* what we have deemed the greatest improvement on political institutions—a written constitution.¹⁰⁵

Justice Marshall argued that measures passed by Congress and the President cannot be given the same weight as constitutional provisions.¹⁰⁶ The Constitution's fundamental principles must remain superior to the temporary decisions of political majorities.¹⁰⁷

The Founders feared that leaders could use the fear of foreign attacks to deprive citizens of their constitutional rights.¹⁰⁸ In *The Federalist No. 8*, Alexander Hamilton contrasts countries forced to maintain standing armies to defend against frequent invasions with those that have small militaries.¹⁰⁹ He warns of

¹⁰³ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469 (“[Y]et it is not to be inferred from this principle [that the Constitution can be amended] that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions.”).

¹⁰⁴ 5 U.S. (1 Cranch) 137, 180 (1803) (observing that the Constitution is the “supreme law of the land,” and that only the laws of the United States “made in pursuance of the [C]onstitution” are valid).

¹⁰⁵ *Id.* at 177–78 (emphasis added).

¹⁰⁶ *Id.* at 176–77 (“The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”).

¹⁰⁷ *Id.* at 177 (“[A]n act of the legislature, repugnant to the [C]onstitution, is void.”).

¹⁰⁸ See THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 18, at 68–69 (noting that “[i]t is of the nature of war to increase the executive at the expense of the legislative authority,” and that “in a country seldom exposed . . . to internal invasions, . . . the people are in no danger of being broken to military subordination. The laws are not accustomed to relaxation in favor of military exigencies . . .”).

¹⁰⁹ *Id.* at 69.

the consequences of a society where people constantly need military protection:

The continual necessity for [the military's] services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. . . . The inhabitants of territories, often the theater of war, are unavoidably subject to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors.¹¹⁰

Hamilton urged Americans to avoid the constant wars that plagued Europe and made the military state superior to the civil state.¹¹¹ The Founders realized that the government could use wartime hysteria as a pretext to violate citizens' rights.¹¹² By drafting a written Constitution, the Founding Fathers sought to prevent leaders from using wars to aggregate their own power at the expense of constitutional rights.¹¹³

B. The Duty of Judges to Protect Constitutional Rights

The Founding Fathers left the protection of the Constitution to federal judges, who have the duty to defend citizens' rights despite political pressure.¹¹⁴ The Founders understood that in times of hysteria, politically accountable legislators and executive officials cannot protect unpopular constitutional principles.¹¹⁵ Hamilton argued that "it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."¹¹⁶ Federal judges were given lifetime tenure so that they could protect citizens' rights against oppressive legislation without fearing political pressure.¹¹⁷

The Founders also envisioned that the Court would challenge policies that restricted citizens' rights during times of hys-

¹¹⁰ *Id.* at 70.

¹¹¹ THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 18, at 56.

¹¹² THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 18, at 67 ("The violent destruction of life and property incident to war . . . will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights.").

¹¹³ THE FEDERALIST NO. 8 (John Jay), *supra* note 18, at 69 ("[I]n a country seldom exposed . . . to internal invasions, . . . the people are in no danger of being broken to military subordination. The laws are not accustomed to relaxation in favor of military exigencies . . .").

¹¹⁴ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 470.

¹¹⁷ *Id.* at 469.

teria.¹¹⁸ They predicted situations where powerful interest groups would deceive legislators into passing oppressive measures:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹¹⁹

The scenario Hamilton describes is strikingly similar to Japanese-American internment during World War II, where farmers competing with the Japanese fiercely lobbied Congress to support the internment order.¹²⁰ As Justice Murphy observed in his *Korematsu* dissent, competing farmers had admitted that “[i]f all the Japs were removed tomorrow, we’d never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows.”¹²¹ The Founding Fathers realized that politically accountable legislators and the President could not defend unpopular groups’ constitutional rights against intense political pressure.¹²² They trusted independent, lifetime-tenured judges to protect all citizens’ constitutional rights.¹²³

III. THE IMPRACTICALITY OF RIGIDLY INTERPRETING THE CONSTITUTION

Although the Founding Fathers believed that constitutional rights should not be violated during wartime, they also wanted the President to have sufficient power to protect national security.¹²⁴ The Court can interpret the Constitution flexibly without violating it to give the President sufficient power to defend the country. By refusing to accommodate civil liberties to wartime necessities, the Court does not give the President sufficient power to defend the country. The Founding Fathers believed

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 469.

¹²⁰ *Korematsu v. United States*, 323 U.S. 214, 239 n.12 (1944) (Murphy, J., dissenting).

¹²¹ *Id.* at 239 n.12 (internal quotation marks omitted).

¹²² THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 469–70.

¹²³ *Id.* at 470–71 (“That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”).

¹²⁴ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 423 (“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . .”).

that an important government objective was defending the nation against military attacks.¹²⁵ While protecting constitutional rights, the Court can still allow the President enough power to defend national security.¹²⁶

The Founding Fathers believed that the President should have sufficient power to protect the country against foreign attacks.¹²⁷ The Founders worried that a weak President would be ineffective at quickly responding to national security dangers.¹²⁸ As Hamilton observed, “[e]nergy in the executive is a leading character in the definition of good government. . . . [and] is essential to the protection of the community against foreign attacks.”¹²⁹ During wars, the President should not be unduly restricted from acting decisively in conducting military operations.¹³⁰

Contrary to the Founders’ belief in presidential strength during wartime, the Court has sometimes rigidly interpreted the Constitution in a manner that frustrates important military measures. During the Civil War, for example, Justice Taney in *Ex parte Merryman* refused to accommodate the President’s war effort by compromising constitutional principles.¹³¹ John Merryman, a citizen residing in Baltimore, Maryland, was arrested for aiding the Confederacy during the Civil War.¹³² He petitioned for a writ of habeas corpus, but the military commander refused to honor it, arguing that he was authorized to suspend the writ by President Lincoln.¹³³ In *Merryman*, Justice Taney rejected President Lincoln’s authority to suspend the writ of habeas corpus without congressional approval:

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground what-

¹²⁵ THE FEDERALIST NO. 3 (John Jay), *supra* note 18, at 42.

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. . . .

At present I mean only to consider [safety] as it respects security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*.

Id. See also THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 423.

¹²⁶ See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649–50 (2004) (“[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”).

¹²⁷ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 423.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

¹³² ROSSITER, *supra* note 62, at 20–21.

¹³³ *Merryman*, 17 F. Cas. at 148.

ever for supposing that the [P]resident, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.¹³⁴

Justice Taney argued that only Congress can suspend the writ of habeas corpus because the power to suspend it is found in Article I of the Constitution, which lists Congress's powers.¹³⁵ He also cited Chief Justice Marshall's opinion in *Ex parte Bollman* that "[i]f at any time, the public safety should require the suspension of the . . . [writ of habeas corpus], it is for the legislature to say so."¹³⁶ Justice Taney believed that the President could not suspend the writ of habeas corpus under any circumstances.¹³⁷

Contrary to Justice Taney's uncompromising opinion in *Merryman*, some scholars argue that the President has the constitutional power to suspend the writ of habeas corpus to defend against a sudden attack.¹³⁸ If Congress is not in session, the President may need to act quickly to challenge an imminent national security danger. As Professor William F. Duker has observed, "Taney's analysis was faulty in failing to acknowledge a presidential power to suspend where essential to repel sudden invasion."¹³⁹ Other scholars argue that during the Civil War, it was debatable whether the President or Congress should suspend the writ of habeas corpus in emergencies.¹⁴⁰ They contend that President Lincoln should not be criticized for suspending the writ of habeas corpus and for failing to honor John Merryman's habeas petition because Lincoln's constitutional duty as Commander in Chief to protect the nation from an imminent invasion outweighed the debatable procedural rule that only Congress could suspend the writ of habeas corpus.¹⁴¹

¹³⁴ *Id.* at 149.

¹³⁵ *Id.* at 148 ("The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This comment is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.").

¹³⁶ *Id.* at 152 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807)).

¹³⁷ *Id.* at 149 ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus . . .").

¹³⁸ WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 147-48 (1980).

¹³⁹ *Id.*

¹⁴⁰ ROSSITER, *supra* note 62, at 25 ("It would seem equally futile to argue over the present location of this power, for it is a question on which fact and theory cannot be expected to concur.").

¹⁴¹ Eli Palomares, *Illegal Confinement: Presidential Authority to Suspend the Privilege of the Writ of Habeas Corpus During Times of Emergency*, 12 S. CAL. INTERDISC. L.J. 101, 119. The author writes: "An argument can be made that Lincoln's first suspension of the writ was legally justified under the President's implied power to repel sudden attacks." *Id.* at 118.

Justice Taney unrealistically believed that the Constitution's provisions should not be interpreted flexibly during hardships faced by the nation.¹⁴² As noted by Clinton Rossiter, Taney "considered himself the last barricade between the Constitution and despotism."¹⁴³ After stating that he was sending a sealed copy of his opinion to President Lincoln, Justice Taney then solemnly observed, "It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."¹⁴⁴

President Lincoln responded to Justice Taney by admitting that he had an oath to act constitutionally, but argued that the military danger justified his actions.¹⁴⁵ In a speech before Congress on July 4, 1861, President Lincoln agreed with Taney that "the attention of the country has been called to the proposition that one who is sworn to take care that the laws be faithfully executed should not himself violate them."¹⁴⁶ However, he defended his actions as essential to protecting the Union at a time of threatened invasion: "[A]re all the laws *but one* to go unexecuted, and the Government itself to go to pieces, lest that one be violated?"¹⁴⁷ President Lincoln felt that he was required to suspend the writ of habeas corpus without waiting for Congress because an imminent invasion by Confederate forces threatened the nation, and he had a constitutional duty to protect the country.¹⁴⁸

¹⁴² *Merryman*, 17 F. Cas. at 149.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted

Id.

¹⁴³ ROSSITER, *supra* note 62, at 22.

¹⁴⁴ *Merryman*, 17 F. Cas. at 153.

¹⁴⁵ ROSSITER, *supra* note 62, at 24.

¹⁴⁶ *Id.* (internal quotation marks omitted).

¹⁴⁷ Gross, *supra* note 9, at 1015 (alteration in original).

¹⁴⁸ ROSSITER, *supra* note 62, at 25 ("The law of the Constitution, as it actually exists, must be considered to read that in a condition of martial necessity the President has the power to suspend the privilege of the writ of habeas corpus."). See also *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). After President Lincoln refused to comply with Justice Taney's ruling in *Ex parte Merryman*, the Court was unsuccessful in protecting even basic civil liberties during the Civil War. In *Ex parte Vallandigham*, Clement L. Vallandigham was arrested for announcing to a crowd that he believed "that the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purposes of crushing out liberty and to erect a despotism . . ." *Id.* at 244. He was arrested, charged with sympathizing with the Confederacy, and sentenced to confinement for the duration of the war. The Supreme Court refused to hear the merits of

IV. THE BALANCING TEST WITH BITE MODEL

This comment advocates the balancing test with bite model, which the Court adopted in *Hamdi v. Rumsfeld*.¹⁴⁹ The balancing test with bite model is most consistent with the Founding Fathers' wishes because it secures essential roles for all three branches of government during wartime.¹⁵⁰ Unlike the deferential balancing model and the justiciability doctrines model, which deferred to the President's decisions with little scrutiny, the Court in *Hamdi* recognized its constitutionally-mandated duty to review presidential actions that threaten to deprive citizens of their rights.¹⁵¹ The Court rejected the argument that exercising judicial review will necessarily interfere with the military's war effort.¹⁵² Further, the Court demanded concrete evidence from the President to support his detention of United States citizens,¹⁵³ but accommodated the military's wartime needs by lowering its evidentiary burden.¹⁵⁴ However, in addition to protecting civil rights as mentioned above, the Court also validated the holding in *Ex parte Quirin*, which gave the President extensive power to conduct the war by detaining even American citizens designated as enemy combatants.¹⁵⁵ In doing so, it achieved a critical balance between civil rights and presidential war powers.

A. The Court's Recognition of Its Duty to Protect Rights

By recognizing its duty to protect constitutional rights, the Court in *Hamdi v. Rumsfeld* complied with the Founders' demand that all three branches of government have active roles at all times.¹⁵⁶ The Supreme Court refused to defer to the military commanders' designation of enemy combatant status without in-

Vallandigham's case, explaining that it lacked jurisdiction under the Judiciary Act of 1789 to originate a writ of certiorari to review the proceedings of a military commission. *Id.* at 251–52.

¹⁴⁹ 124 S. Ct. 2633, 2647 (2004).

¹⁵⁰ *Id.* at 2650 (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

¹⁵¹ *Id.* (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”).

¹⁵² *Id.* at 2649 (“[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”).

¹⁵³ *Id.* at 2651 (“Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”).

¹⁵⁴ *Id.* at 2649 (“[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

¹⁵⁵ *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

¹⁵⁶ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

specting its reasonableness.¹⁵⁷ The Court observed that a true balancing test must preserve a role for the Court's protection of civil liberties: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."¹⁵⁸

Like the Founding Fathers, who believed that judges should protect constitutional rights against government infringements in times of war and hysteria, the Court recognized its duty to review the constitutionality of wartime policies.¹⁵⁹

The Court rejected the reasoning in *Hirabayashi v. United States* that challenging military decisions would compromise the war effort.¹⁶⁰ In *Hirabayashi*, the Court observed:

Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.¹⁶¹

The Court in *Hirabayashi* assumed that providing hearings for 70,000 Japanese-American citizens to prove their loyalty would be unduly time-consuming and administratively burdensome.¹⁶² However, England showed that administering due process proceedings for residents was not too difficult.¹⁶³ As Clinton Rossiter observes, "the English in 1940 had examined 74,000 enemy aliens individually . . . [while] Americans in 1942 had declined to make any attempt to separate the loyal from the disloyal in the Japanese-American population."¹⁶⁴ Mere administrative inconvenience is not a valid reason for the government to violate citizens' fundamental constitutional rights.¹⁶⁵

The Fourth Circuit Court of Appeals' decision in *Hamdi v. Rumsfeld* shows that courts still fear that their exercise of judicial review will harm the military's efforts.¹⁶⁶ Arguing that

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

¹⁶¹ *Id.*

¹⁶² *Id.* at 99 ("[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.").

¹⁶³ ROSSITER, *supra* note 62, at 50–51.

¹⁶⁴ *Id.*

¹⁶⁵ *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) ("Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.").

¹⁶⁶ [*Hamdi I*], 316 F.3d 450, 471 (4th Cir. 2003).

Hamdi's detention should be upheld under a "some evidence" standard, the government presented an affidavit from Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy, as evidence of Hamdi's affiliation with the Taliban.¹⁶⁷ The district court "criticized the generic and hearsay nature of the affidavit, calling it 'little more than the government's "say-so."'"¹⁶⁸ However, the Fourth Circuit accepted the Mobbs declaration as sufficient evidence. The Fourth Circuit stated: "For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical."¹⁶⁹

The Fourth Circuit reasoned that reviewing the government's allegations would unduly burden the military.¹⁷⁰ The court argued that the military would compromise its wartime objectives by having to collect evidence to prove enemy combatant status.¹⁷¹ Furthermore, it argued that courts would have difficulty judging the accuracy of military procedures in distant battle zones.¹⁷²

B. The Court's Modification of Evidentiary Requirements

In addition to recognizing its duty to protect constitutional rights, the Court in *Hamdi* demanded concrete evidence to support the government's detention of American citizens, but lowered its evidentiary standards.¹⁷³ The Supreme Court required that a prisoner have an opportunity to rebut the government's allegations: "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."¹⁷⁴

The Court ruled that the Due Process Clause requires that detained citizens have an opportunity to present evidence chal-

¹⁶⁷ *Hamdi v. Rumsfeld* [*Hamdi II*], 124 S. Ct. 2633, 2636–37 (2004).

¹⁶⁸ *Id.* at 2637.

¹⁶⁹ *Hamdi I*, 316 F.3d at 463.

¹⁷⁰ *Id.* at 473–74.

¹⁷¹ *Id.* at 470 ("[L]itigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged . . . with winning a war, not prevailing in a possible court case.").

¹⁷² *Id.* at 474 ("Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not.").

¹⁷³ *Hamdi II*, 124 S. Ct. at 2648, 2649 ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

¹⁷⁴ *Id.* at 2651.

lenging the government's accusation of disloyalty.¹⁷⁵ It refused to defer to the government's evidence without reviewing its reasonableness.¹⁷⁶

Although the Court required the government to provide evidence to support citizen detentions, it also gave the government significant power to prosecute the war by lowering evidentiary standards.¹⁷⁷ The Court observed that a citizen's due process rights must be weighed against the government's interests in protecting national security secrets and preventing prisoners from returning to the battlefield.¹⁷⁸ The Court ruled that lowered evidentiary requirements in court proceedings are constitutional:

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.¹⁷⁹

Furthermore, a prisoner can be tried by a military tribunal, as long as proper due process protections are implemented.¹⁸⁰ The Court also trusted lower federal courts to balance citizens' constitutional rights with the military's need to protect national security secrets.¹⁸¹ Despite its presumption in favor of the government's evidence, the Court protected the foundation of due process: a person's right to be heard by a neutral decision-maker and to rebut allegations made against him.¹⁸²

As the Court explained in *Hamdi*, a federal district court can implement procedures that protect both constitutional rights and

¹⁷⁵ *Id.* at 2649. "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded." *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

¹⁷⁶ *Hamdi II*, 124 S. Ct. at 2650 ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.").

¹⁷⁷ *Id.* at 2649.

¹⁷⁸ *Id.* at 2647 ("We reaffirm today . . . a citizen's right to be free from involuntary confinement . . . and we weigh the opposing governmental interests . . . in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.").

¹⁷⁹ *Id.* at 2649.

¹⁸⁰ *Id.* at 2651.

¹⁸¹ *Id.* at 2652 ("We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.").

¹⁸² *Id.* at 2648. See also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").

national security secrets.¹⁸³ The Court reasoned that “arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant’s acts.”¹⁸⁴

As Professor John Yoo has observed, like surveillance courts, federal courts can modify judicial procedures to accommodate national security concerns.¹⁸⁵ In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA), which established Foreign Intelligence Surveillance Courts (FISC) composed of federal district court judges who can issue search warrants upon probable cause that the government is targeting a foreign power.¹⁸⁶ Yoo explains that “FISA proceedings are held *ex parte*, with only the government represented, in a closed hearing so that classified information can be discussed with the judges while protecting intelligence sources and methods.”¹⁸⁷ Like FISA proceedings, federal habeas courts can ensure that citizens’ due process rights are protected by a neutral decision-maker while also protecting national security secrets during wartime.¹⁸⁸

C. The Court’s Respect for the President’s Power

Although the Supreme Court protected constitutional rights in *Hamdi v. Rumsfeld*, it also recognized the President’s power to defend national security.¹⁸⁹ The Court reaffirmed the holding in *Ex parte Quirin*, which allows the President to detain enemy combatants during a war, even if the enemy combatant is an American citizen.¹⁹⁰ In *Ex parte Quirin*, decided by the Court in 1942 during World War II, eight Germans used submarines to reach the United States.¹⁹¹ They carried explosives and planned to destroy war facilities in the U.S. for the German government.¹⁹² After they were captured, President Roosevelt signed a

¹⁸³ *Hamdi II*, 124 S. Ct. at 2652 (“We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”).

¹⁸⁴ *Id.* at 2649.

¹⁸⁵ Yoo, *supra* note 52, at 442.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Hamdi II*, 124 S. Ct. at 2652.

¹⁸⁹ *Id.* at 2647 (“[O]ur Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”).

¹⁹⁰ 317 U.S. 1, 37 (1942) (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”).

¹⁹¹ *Id.* at 21.

¹⁹² *Id.*

proclamation declaring that anybody attempting to enter the United States to commit war acts would be “subject to the law of war and to the jurisdiction of military tribunals.”¹⁹³ The captured individuals, one of whom claimed to be an American citizen, challenged the President’s authority to establish military tribunals and argued that they had to be tried in civil courts by juries.¹⁹⁴

The Court in *Quirin* distinguished between lawful combatants and unlawful combatants under the law of war.¹⁹⁵ The main distinction between a lawful combatant and an unlawful combatant is that the latter does not wear a uniform.¹⁹⁶ Spies and terrorists are commonly classified as unlawful combatants, i.e., “those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property.”¹⁹⁷

The Court ruled that captured individuals who do not wear a uniform while aiding enemy forces are subject to military tribunals, not civil courts.¹⁹⁸ Furthermore, the Court declared that the citizenship of one of the prisoners did not entitle him to a civil trial by jury.¹⁹⁹ It observed, “Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”²⁰⁰ The Court ruled that the President’s power to detain enemy combatants so that they do not return to the battlefield is an essential war power.²⁰¹

The Court’s opinion in *Quirin* modified but did not overturn the ruling in *Ex parte Milligan* that “[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”²⁰² In *Hamdi*, the Court distinguished *Quirin* from *Milligan* by observing that in the latter case, the Court reasoned that Milligan was arrested at home as a resident of Indiana, not as a prisoner of war:

¹⁹³ *Id.* at 22–23 (quoting Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942)).

¹⁹⁴ *Id.* at 24.

¹⁹⁵ *Id.* at 30–31.

¹⁹⁶ *Id.* at 31.

¹⁹⁷ *Id.* at 35.

¹⁹⁸ *Id.* at 31.

¹⁹⁹ *Id.* at 31, 37.

²⁰⁰ *Id.* at 37.

²⁰¹ *Id.* at 28–29 (“An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”).

²⁰² See *Ex parte Milligan*, 71 U.S. 2, 127 (1866).

Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.²⁰³

The Court in *Hamdi* showed that judicial review and military operations can function together.²⁰⁴ Once a captured prisoner is found to be an American citizen, he must be provided with the due process rights detailed in *Hamdi* before a neutral decision-maker.²⁰⁵ However, if the tribunal confirms that the citizen is indeed an enemy combatant, he may be detained for the duration of the war.²⁰⁶ The Court in *Hamdi* provided strong protection both for constitutional rights and for national security, proving that they are not mutually exclusive objectives.²⁰⁷

CONCLUSION

As evidenced by the World War II cases of *Korematsu v. United States*²⁰⁸ and *Hirabayashi v. United States*,²⁰⁹ the Supreme Court has historically refrained from challenging the President's wartime actions.²¹⁰ Using the deferential balancing model, the Court in *Korematsu* deferred to the President's constitutional interpretation to allow presidential actions that it would normally find unconstitutional.²¹¹ Similarly, in *Hirabayashi*, the

²⁰³ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2642 (2004).

²⁰⁴ *Id.* at 2649–50.

²⁰⁵ *Id.* at 2648.

²⁰⁶ *Id.* at 2641, 2642.

²⁰⁷ *Id.* at 2647 (“We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”).

²⁰⁸ 323 U.S. 214 (1944).

²⁰⁹ 320 U.S. 81 (1943).

²¹⁰ *Korematsu*, 323 U.S. at 218 (“[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”).

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

Hirabayashi, 320 U.S. at 93.

²¹¹ *Korematsu*, 323 U.S. at 219–20.

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our

Court did not challenge the internment order against Japanese-Americans.²¹² Instead, the Court used the justiciability doctrines model to avoid hearing the merits of the internment order entirely.²¹³

The Supreme Court should reject both the deferential balancing model and the justiciability doctrines model because they are inconsistent with the Founding Fathers' belief in constitutional absolutism.²¹⁴ The Founders felt that the President and Congress could not alter the Constitution's provisions even during wartime.²¹⁵ They expected the Supreme Court to recognize its constitutionally-mandated duty to protect citizens' constitutional rights from oppressive governmental actions.²¹⁶ Although the constitutional absolutism model is most consistent with the Founders' wishes, the Court has applied the model in ways contrary to their beliefs by overly restricting presidential power during wartime,²¹⁷ instead of ensuring that the President had sufficient power to defend the country against foreign attacks.²¹⁸

The balancing test with bite model advocated in this comment is most consistent with the Founding Fathers' views because it provides all three branches with important wartime roles.²¹⁹ In applying the balancing test with bite model, the

shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id.

²¹² *Hirabayashi*, 320 U.S. at 85.

Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count [for violating the internment order] if we find that the conviction on the second count, for violation of the curfew order, must be sustained.

Id.

²¹³ *Id.*

²¹⁴ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 470 ("Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.").

²¹⁵ *Id.* at 469.

[Y]et it is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions . . .

Id.

²¹⁶ *Id.* at 469 ("[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . .").

²¹⁷ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144, 151 (1861).

²¹⁸ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 423 ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . .").

²¹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with en-

Court in *Hamdi v. Rumsfeld* recognized its duty to determine whether the President's actions are constitutional.²²⁰ The Court also required the President to provide concrete evidence to support a citizen's detention,²²¹ but lowered the military's evidentiary standard during wartime.²²² Finally, the Court granted the President extensive wartime power by reaffirming the holding in *Ex parte Quirin*, which allows the President to detain even American citizens designated as enemy combatants.²²³

The Court in *Hamdi* showed that courts can have vigorous roles in protecting citizens' rights during wartime.²²⁴ It seems that the Court learned from the World War II cases that failing to review presidential wartime actions can lead to tragic abuses of citizens' constitutional rights.²²⁵ During wars, the Court must delicately balance the competing interests of protecting constitutional rights and allowing the President sufficient power to protect national security.²²⁶ However, it is essential to the system of

emy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

²²⁰ *Id.* (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

²²¹ *See id.* at 537 (“Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”).

²²² *Id.* at 533 (“[E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

²²³ *Ex parte Quirin*, 317 U.S. 1, 37 (1942) (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”).

²²⁴ *Hamdi*, 542 U.S. at 535 (“[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”).

²²⁵ The Court cites Justice Murphy’s dissenting opinion in *Korematsu v. United States*, where he argued that the Court should examine the reasonableness of military policies that impact citizens’ constitutional rights. *Id.* *See also* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003). Tushnet argues that courts, along with the rest of society, undergo a process of social learning. Tushnet explains the process as follows:

The government takes some action that its officials—and, frequently, the courts—justify by invoking national security. In retrospect, once the wartime emergency has passed, the actions, and their endorsement by the courts, come to be seen as unjustified in fact (that is, by the facts as they actually existed when the actions were taken). . . . The social learning is this: Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.

Id. at 283–84.

²²⁶ *See, e.g., Hamdi*, 542 U.S. at 533.

[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. . . . At the same time, the exigencies of the circumstances may

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checks and balances underlying the American government that the Court take a significant role in protecting citizens' rights.

demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.

Id.