ARTICLES

KOREMATSU REVISITED—CORRECTING THE INJUSTICE OF EXTRAORDINARY GOVERNMENT EXCESS AND LAX JUDICIAL REVIEW: TIME FOR A BETTER ACCOMMODATION OF NATIONAL SECURITY CONCERNS AND CIVIL LIBERTIES

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I. INTRODUCTION

In 1942, the federal government convicted Fred Korematsu for refusing to abide by the military's wartime exclusion orders. Those orders precipitated the mass internment without indictment or hearing of over 110,000 persons of Japanese ancestry, including 70,000 American citizens.

The Supreme Court affirmed Korematsu's conviction in 1944.[1] The Court rejected Korematsu's constitutional challenge to the orders, declaring that the Court "could not reject as unfounded" the government's assertion that "military necessity" justified such unprecedented action against a racial group.[2]

In its deliberations, the Court failed to scrutinize carefully the factual basis of the military's claim of necessity. The official record was bereft of evidence supporting this claim. Looking beyond the record, the Court in effect took judicial notice of the government's

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1. Korematsu v. United States, 323 U.S. 214 (1944). Korematsu was convicted under 18 U.S.C. § 979 (1942) (originally enacted as PUB. L. NO. 503, 56 Stat. 173. Congress enacted the law on March 21, 1942, and thereby made the knowing violation of a military order a misdemeanor punishable by prison and a fine.

2. 323 U.S. at 214, 218-19.

proferred general conclusions concerning both racial stereotypes and the danger of espionage and sabotage which was allegedly posed by West Coast Japanese Americans.[3] Indeed, a multitude of official documents which contained conclusions directly contrary to those advanced by the government were shielded from judicial review.

According to recent judicial decisions, those now declassified government documents, many of which were discovered through Freedom of Information Act requests, revealed two extraordinary facts: first, government intelligence services unequivocally informed the highest officials of the military and of the War and Justice Departments that the West Coast Japanese as a group posed *no* serious danger to the war effort and that *no need* for mass evacuation existed;[4] and second, that the Supreme Court was deliberately misled about the "military necessity" which formed the basis of the *Korematsu* decision.[5]

Based upon these recently discovered documents, Fred Korematsu filed a Petition for Writ of Error Coram Nobis on January 19, 1983 seeking to vacate his forty year-old conviction.[6] On November 10, 1983, United States District Judge Marilyn Hall Patel, finding "manifest injustice," granted the Petition on the merits.[7]

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3. *See infra* section IIB.

4. *See infra* section IIA, Horhi v. United States, No. 84-5460, slip op. (D.C. Cir. 1986) "It is now apparent that there were no countervailing professional intelligence analyses justifying the need for mass evacuation based on the rule." *Id.*

5. *See infra* note 7.

6. A writ of coram nobis is an extraordinary writ which operates to correct fundamental errors or to prevent manifest injustice in criminal proceedings. *See* 28 U.S.C. § 1651 (1970); United States v. Morgan, 346 U.S. 502 (1954). It is the substantive equivalent of a writ of habeas corpus. The primary difference between the two is that the writ of coram nobis is operative even after the petitioner's sentence is served and the petitioner is no longer in government custody. *Morgan*, 346 U.S. at 510-11; Taylor v. United States, 648 F.2d 565, 573 (9th Cir.), *cert. denied*, 454 U.S. 866 (1981). Prosecutorial misconduct in "knowingly us[ing] perjured testimony or with[holding] materially favorable evidence" is grounds for issuance of the writ. *Taylor*, 648 F.2d at 571.

7. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). The conclusion to Judge Patel's opinion aptly summarizes the basis of the district court's decision to vacate Korematsu's conviction.

> [T]here is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the [Supreme] Court. The information was critical to the Court's determination [of military necessity] . . . . Because the information was of the kind peculiarly within the government's knowledge, the Court was dependent upon the government to provide a full and accurate account. Failure to do so presents the "compelling circumstance" contemplated by *Morgan*. The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.

Id. at 1420.

The government's misrepresentations to the Court in *Korematsu* and the following cover-up preceded Watergate by thirty years, with far more tragic consequences.[8] In accepting without close scrutiny the government's claim of necessity, the Court not only legitimized the dislocation and imprisonment of loyal citizens without trial solely on account of race, but it also weakened a fundamental tenet of American democracy—government accountability for military control over civilians. Justice Jackson, in his scathing dissent, pinpointed the dangerous latent principle of *Korematsu*. "What the Court appears to be doing, whether consciously or not . . . [is] to distort the Constitution to approve all the military may deem expedient."[9] *Korematsu* has never been explicitly overruled by the Court,

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See also Hohri v. United States, No. 84-5460, slip op. "And taken together, the suppression of the Ringle Report and the absence of countervailing data suggest the Justice Department misled the Supreme Court when it argued that military necessity justified the mass evacuation of Japanese Americans." *Id.*

The government did not file a substantive opposition to the Korematsu petition although the Court had set a specific deadline for such a response and had granted two extensions. The Court deemed the government's failure to respond on the merits "tantamount to a confession of error." 584 F. Supp. at 1413. The government appealed Judge Patel's decision and later withdrew its appeal.

8. The effect of the concealment of documents on the running of the statute of limitations for the internees' property loss claims against the government was addressed in Hohri v. United States, No. 84-5460, slip op. (D.C. Cir. 1986). In *Hohri*, the district court dismissed the internees' fifth amendment taking claims, among others, as time-barred because certain of the documents relied upon by the internees were available to the public shortly after the war. The court of appeals reversed. The court noted that the 1944 *Korematsu* decision which upheld the constitutionality of the evacuation on military necessity grounds foreclosed any taking claims. The finding of military necessity in *Korematsu* which also appeared to justify the deprivation of liberty also justified the deprivation of property. Congress' creation of the Commission on Wartime Relocation and Internment of Civilians in 1980 was the first indication by a "political branch" of government that there may have been no military basis for the evacuation. The court held that this event triggered the running of the limitations period on the internees' claims.

The court of appeals remanded to the district court to scrutinize independently the government's documents in evaluating the internees' taking claim. The Court deemed that Congress' 1980 decision to investigate the military reasons for evacuation and internment removed the *Korematsu* Majority's "presumption of deference to military judgment." An alternative principle justifying heightened judicial scrutiny on remand is suggested in section IV of this article. That principle focuses on the consitutional rights involved and attempts to accommodate both the government's need to defend the nation and society's need to protect its most precious liberties.

9. 323 U.S. at 244-45. For an excellent discussion, see Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 491 (1945) ("What the Supreme Court has done in these cases, and especially in Korematsu v. United States, is to increase the strength of the military in relation to civil government. It has upheld an act of military power without a factual record in which the justification for the act was analyzed. Thus it has created doubts as to the standards of responsibility to which military power will held."); Dembitz, *Racial Discrimination and Military Judgment: the Supreme Court's Korematsu and Endo Decisions*, 45

and, although its factual underpinnings have been undercut by Judge Patel's ruling, its legal legacy of diminished government accountability lingers.

This article will not attempt to fix historical responsibility.[10] Nor will it directly examine the roles of the two overtly political branches of government in crisis decisionmaking. It seeks instead to draw upon the lessons learned from *Korematsu*. It examines important judicial policy considerations and constitutional values and synthesizes *Korematsu* and its contemporary progeny in order to advocate the adoption of a clear and simple principle of judicial review for government restrictions of civil liberties for reasons of military necessity or national security.

Specifically, Section II of this article examines the government's apparent misconduct in prosecuting *Korematsu* and the Supreme Court's deferential posture in contributing to the breakdown of constitutional safeguards to personal liberty.

Section III illustrates that the deferential standard of review actually applied in *Korematsu* has not been discarded. The Supreme Court has yet to unambiguously determine whether heightened standards of review which are normally applied to evaluate government restrictions of our most cherished liberties,[11] become attenuated when

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COLUM. L. REV. 175 (1945).

10. Others have undertaken that task. *See, e.g.*, M. GRODZINS, AMERICANS BETRAYED (1949); J. TENBROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION (1954); A. BOSWORTH, AMERICA'S CONCENTRATION CAMPS (1967); B. HOSOKAWA, NISEI: THE QUIET AMERICANS (1969); A GIRDNER & A. LOFTIS, THE GREAT BETRAYAL: THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II (1969); R. DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II (1971); R. DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975); M. WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976); F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS (1976); REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982) [hereinafter cited as CWRIC]; P. IRONS, JUSTICE AT WAR (1983). (Professor Iron's book, in particular, discusses the meaning and origin of the documents supporting the *Korematsu* Petition).

11. Civil liberties accorded special constitutional protection are those specifically enumerated in the amendments to the Constitution, such as the freedom of speech, and those denoted "fundamental rights." The last three or so decades have witnessed the development of heightened standards of review concerning government restrictions of those liberties. *See infra* notes 163-64 and accompanying text. These liberties are accorded heightened judicial solicitude because by definition they are the liberties deemed most precious and integral to a functioning democracy and to a decent society. Indeed, they are the very liberties national defense and security measures are designed to protect. Concerning the continuing debate about the propriety of judicial identification of fundamental liberties not specifically enumerated in the Constitution, see COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); J. ELY, DEMOCRACY AND DISTRUST (1981).

"military necessity" or "national security" ostensibly justify the restrictions. The judiciary's record of "watchful care" over civil liberties during times of national stress has been punctuated with poignant exceptions such as *Korematsu*.[12] Certain of the Court's recent decisions even suggest a disturbing value judgment reminiscent of *Korematsu*: national security concerns, overt or latent, specifically defined or broadly general, justify essentially unreviewable government restrictions of American civil liberties.[13]

This apparent judicial value judgment, although not formally cast as constitutional doctrine, has contributed to the prospect of considerable government excess under the mantle of national security.[14] "National security" is an ill-defined concept with elastic limits.[15] Government definitions tend to be self-justifying.[16] Crisis government is no longer unusual as United States involvement in international hostilities increases and as developing despotic governments

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12. *See infra* note 116.

13. *See infra* notes 125-61 and accompanying text. This apparent movement towards governmental immunity in national defense and national security matters is consistent with the Court's general approach to civil liberties. Professor Lawrence Tribe recently observed, "Until this term, I thought the court was teetering in the middle of the road and could go either way . . . now it has made a definite turn to the right. I am reminded of George Orwell's 1984 in the way that the court has granted limitless government authority in some areas." San Jose Mercury News, July 8, 1984, at 8A, col. 1.

14. The court of appeals' decision in Hohri v. United States, No. 84-5460, slip op. (D.C. Cir. 1986), underscores the tremendous danger in according the government essentially unreviewable power under the mantle of military necessity. The court of appeals suggested that because the *Korematsu* Majority applied an extremely deferential standard of review, the Court might not have altered its decision even if the then concealed intelligence reports had been disclosed. *Hohri* thus implies that unless heightened judicial scrutiny is required to protect precious civil liberties, the terrible "mistake" and social tragedy sanctioned by the Court in *Korematsu* may again be sanctioned under our laws.

15. *See infra* note 132 concerning definitions of "national security." One commentator has noted, "Presidents Truman through Reagan have adopted a foreign policy of global containment" which results in an almost boundless definition of national security interests. Friedman, *Waging War Against Checks and Balances—The Claim of An Unlimited Presidential War Power*, 57 ST. JOHNS L. REV. 213, 215 (1983). Recently, "national security" has been the stated justification for: a news blackout on the space shuttle launch carrying military equipment, Honolulu Star Bulletin, Dec. 17, 1984, at A-17, cols. 1-4; and, the exclusion of media coverage of the initial stages of the United States' 1983 invasion of Grenada (the Defense Department subsequently discussed a plan for limited future coverage of such events by a government approved pool of reporters) San Francisco Chronicle, Dec. 3, 1984, at 39, cols. 5-6.

16. *See* Note, *Development in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1134 (1972) ("[P]articularly the political branches, characteristically have overestimated threats to national security to the detriment of civil liberties."). Commentators have also noted the "increasingly restrictive policy of the Reagan administration on the flow of military information to the public" for reasons of national security. Honolulu Star Bulletin, Dec. 17, 1984, A17, cols. 1-4.

cast threats at American security at home and abroad.[17] These crises and the apparent revival of Cold War tensions have generated, quite appropriately, governmental concern about and reaction to threats to national security. They have also, however, laid fertile ground for government overreaction to unsubstantiated threats in the form of far-reaching restrictions on the liberties of American civilians.[18] This potential for overreaction arises at a time when the political branches' system of checks and balances in the area of national se-

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17. *See* Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 737 (1978): Forkosch, *Speech and Press in National Emergencies*, 18 GONZ. L. REV. 1 (1982/83).

18. *See* Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HAST. CONST. L.Q. 719 (1982). Professor Paust notes an apparent revival of the Nixonian contention that "so-called 'governmental [security] interests' can outweigh public interests and obviate democratic freedoms." *Id.* at 720-21. *See also* Forkosch, *supra* note 17; Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 IND. L.J. 621 (1978); F. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM (1980). *See also* Haig v. Agee, 453 U.S. 280 (1981) and Regan v. Wald, 104 S. Ct. 3026 (1984) (the government's contention of almost limitless presidential authority to restrict civil liberties in order to further national security interests pursuant to the executive power over foreign relations); Dronenburg v. Zeck, 746 F.2d 1579 (9th Cir. 1984) (navy regulations mandating discharge of homosexuals, with limited exceptions). *See generally supra* notes 11 and 12.

Such overreaction is not limited to the government. Immediately following the Iranian hostage crisis, for example, there was a resounding backlash against not only Iranian aliens in the United States but also against Iranian Americans. Reports of xenophobic outbursts were numerous. Violence and threats of violence abounded. Iranian residents were fired from their jobs or placed on leave. A community college in South Carolina decided (and later changed its mind) to expel all Iranian students. Congressmen reportedly called for the deportation of Iranian students participating in demonstrations against the former Shah of Iran. *See* NEWSWEEK, Nov. 19, 1979, at 73, col. 2; TIME, Nov. 26, 1979, at 20, col. 1; NEWSWEEK, Dec. 3, 1979, at 65, col. 2; U.S. NEWS & WORLD REPORT, Dec. 10, 1979, col. 1. While implementing a dragnet of all Iranian students in the United States to weed out illegal immigrants, government officials cautioned against such overreaction: "We all must restrain our actions and behave with a considered regard for our rule of law." U.S. NEWS & WORLD REPORT, Dec. 10, 1979, at 35, col. 2 (quoting Attorney General Benjamin Civiletti).

Judges are also susceptible. In Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 446 U.S. 957 (1980) (upholding the attorney general's hostage crisis regulation requiring that non-immigrant alien Iranian students report and prove their immigration status), Justice McKinnon's concurring opinion tended to equate alienage and ethnicity with disloyalty and implied that the restrictive treatment of uninvolved Iranian aliens in America was justified as a retaliatory measure — by "the fact that the Government of their home country has committed, and is committing, a number of violent and lawless acts against the United States." 617 F.2d at 749. Such views were perhaps more reflective of public sentiment than judicial temperament.

As noted aptly in Note, *Narenji v. Civiletti: Equal Protection and the Iranian Crisis*, 31 CATH. U.L. REV. 101 (1981), "[p]erhaps the most disturbing implication of the *Narenji* decision is the court's failure to remember the lesson of the *Japanese Restriction Cases* . . . . [N]ational origin is a characteristic readily seized upon in the heat of national crises for the creation of political scapegoats." *Id.* at 120.

curity and military affairs is showing definite signs of strain.[19]

Section IV proposes a principle of judicial review which responds to the problem of ambiguous, if not unduly lax, standards of government accountability which exist at a time when clarity and balance are critical. If a constitutional democracy is to function, its constitution must be construed both to afford the government ample latitude in dealing with a wide range of threats to the nation and to still protect the most precious liberties of its citizens from government excesses during times of crisis. Encompassing both concerns is the following organizing principle: except when martial law is legitimately in force, the standard of judicial review of government restrictions of civil liberties is not altered or attenuated by government claims of "military necessity" or "national security" as justification for the restrictions. Standards of constitutional review[20] are important because they identify and order societal values. They reflect the relative importance society attaches to the various liberties of its people. The more valued the liberty, the less acceptable the government infringement, and the more exacting the standard of judicial review. As discussed later, the proposed principle applies with special force in the context of government control over civilians for reasons of military necessity or national security.

What are the standards of government accountability for military or national security actions inimical to the civil liberties of Americans? What is the role of the judiciary when the executive and legislative branches are inundated by the ephemeral emotions of their political constituencies? What value choices are made to accom-

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19. In 1973, as a result of a perceived shift in war powers away from Congress and towards the President, Congress adopted the War Powers Resolution, PUB. L. NO. 93-148, 87 Stat. 555, (codified at 50 U.S.C. §§ 1541-48 (1973)). The primary purpose of the Resolution was to check Presidential commitments of armed forces to international hostilities without congressional consultation or approval.

In deciding to invade Grenada in October of 1983 and to deploy marines in Lebanon in March of 1984, President Reagan adopted a position that neither prior congressional consultation nor approval were required. For a discussion of the conflicting positions of the President and members of Congress about the effect of the Resolution on those decisions, see Comment, *The Case of Korematsu v. United States*, 6 U. HAWAII L. REV 109, 132 (1984). *See also* Regan v. Wald, 104 S. Ct. 3026 (1984) (executive branch's position that it did not need to receive congressional approval or declare a state of emergency to prohibit American economic transactions in Cuba, as expressly required by Congress' 1976 amendments to the Trading with the Enemy Act, because a 1962 declaration of emergency during the Cuban missile crisis was sufficient to validate the executive's action in 1982).

20. "Standards of review" is a phrase with two generally accepted meanings. It refers to the level of deference accorded by an appellate court to a lower court's determinations. It also refers to the standards by which a court evaluates the consitutionality of executive and legislative branch actions. The latter meaning is used here.

modate national security concerns and civil liberties when a court, faced with a "suspect" government classification, adopts a deferential as opposed to a heightened standard of review in evaluating the government's contention of military necessity? These vital issues faced the *Korematsu* Court in 1944. They are alive today.

II. THE KOREMATSU AND HIRABAYASHI CASES: EXTRAORDINARY GOVERNMENT EXCESS AND LAX JUDICIAL REVIEW

The Supreme Court decided three cases which challenged the constitutionality of the World War II military orders. In *Hirabayashi v. United States*[21] and *Yasui v. United States*[22] the Court upheld military orders which imposed a curfew upon German and Italian aliens and upon all persons of Japanese ancestry, including American citizens, on the West Coast. In *Korematsu v. United States*,[23] the Court upheld the military's Japanese evacuation orders.[24] The government asserted in these cases that the danger of

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21. 320 U.S. 81 (1943). In 1983, Gordon Hirabayashi, like Fred Korematsu, filed a Coram Nobis Petition to vacate his conviction. The federal district court for the Western District of Washington recently granted the Petition on the merits, finding that War Department deliberately misled the Supreme Court about the basis and rationale for military orders. *Hirabayashi v. United States*, memorandum decision (Feb. 10, 1986). Trial on the Petition followed in June of 1985. A decision is expected around the time of publication of this article.

22. 320 U.S. 115 (1943). Minoru Yasui also a filed Coram Nobis Petition to vacate his conviction. The Federal District Court in Portland, unlike the courts in San Francisco and Seattle, granted the government's nolle prosequi Rule 48(a) motion to vacate Yasui's conviction and therefore dismissed Yasui's petition as unnecessary. The *Yasui* case was appealed and in October of 1985 the Ninth Circuit remanded to the District Court for a determination of whether the appeal was timely filed. No. 84-3730, slip op. (9th Cir. 1985).

23. 323 U.S. 214 (1944).

24. The following is a brief history of pertinent government actions. On February 14, 1942, General John DeWitt, military commander of the Western Defense Command, submitted his Final Recommendation to the Secretary of War. He recommended the mass evacuation of all persons of Japanese ancestry from designated areas on the West Coast because such persons were "potential enemies" organized for concerted activity.

On February 19, 1944, President Roosevelt issued Executive Order No. 9066 which authorized the Secretary of War and designated military commanders to prescribe military areas and to exclude or restrict the activities of persons in these areas to prevent espionage and sabotage. *Hirabayashi*, 320 U.S. 81, 84-86.

On March 2, 1942, DeWitt issued Public Proclamation No. 1 which established military areas on the West Coast and which warned that exclusion orders might follow. *Id.* at 86. On March 21, 1942, Congress enacted PUB. L. NO. 503 which made it a misdemeanor for anyone to "enter, remain in, leave, or commit any act" in a military area in violation of the orders of the military commanders of the area. *Id.* at 87-88. Neither the Executive Order nor the Congressional enactment referred to internment or provided definite standards for actions by the military.

On March 24, 1942, DeWitt promulgated Public Proclamation No. 3, which imposed a curfew on "all alien Germans, all alien Italians *and all persons of Japanese ancestry*" (emphasis added). DeWitt asserted military necessity as the basis for the curfew. *Id.* at 88.

espionage and sabotage by persons of Japanese ancestry on the West Coast justified these extraordinary actions. Specifically, the government claimed that all Japanese, including American citizens, were, by culture and race, predisposed to loyalty to Japan and to disloyalty to the United States; that Japanese on the West Coast had committed and were likely to commit acts of espionage and sabotage against the United States; and that mass action was needed because there was insufficient time to determine disloyalty individually. No evidence of record supported these conclusions.[25]

The *Korematsu* Court implied that it was impelled to accept these government conclusions in the absence of contradicting evidence—"[H]ere, as in *Hirabayashi* . . . 'we cannot reject as unfounded the judgment'. . . ."[26] The information critical to supporting or discrediting the military's claim of necessity, however, lay exclusively in the hands of the government.

By applying a deferential standard of review to the information proffered by the government, the *Hirabayashi* and *Korematsu* Court in essence validated the curfew and evacuation on faith. As found by Judge Patel in her recent decision, that faith was badly misplaced.

A. *Governmental Misrepresentation and Concealment of Evidence*

The following is a brief summary of the most significant government documents from the Supreme Court in 1943-44. The documents on their face appear to contradict directly the government's legal position concerning military necessity. Judge Patel referred to these documents as a basis for her recent decision.[27] They are also cited and discussed in the opinions of the appellate and district courts

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Commencing on March 23, 1942, DeWitt issued a series of 108 Civilian Exclusion Orders pursuant to which over 110,000 Japanese were uprooted from their homes, sent to assembly centers and ultimately to internment camps — all without charges made against them or individual review as to their loyalty. Neither Japanese Americans in Hawaii nor citizens of German or Italian descent in any part of the country were subject to mass evacuation or detention. For a detailed discussion of the influence of West Coast politicians, agricultural organizations, anti-Asian groups and the press on these government actions, *See* CWRIC, *supra* note 10, and J. TENBROEK, *supra* note 10.

25. *See infra* section A.

26. *Korematsu*, 323 U.S. at 218.

27. 584 F. Supp. at 1407. For a thorough discussion see Korematsu Petition for Writ of Error Coram Nobis, including Exhibits A through FF attached thereto, filed with the U.S. District Court for the Northern District of California, January 19, 1983 (No. CR-2763W) [hereinafter cited as Petition] (on file at the Santa Clara Law Review office). The discussion of documents here is in principal part based upon sections of the Petition. *See also* P. IRONS, *supra* note 10; CWRIC, *supra* note 10.

in *Hohri v. United States*.[28] The government did not contest the authenticity of these documents in either case.[29] Their existence and contents, and the knowledge of them by the highest officials in the War and Justice Departments speak eloquently about the inherent dangers in weakening the principle of government accountability when fundamental liberties are restricted.

1. *DeWitt's Final Report*

The only information presented to the *Korematsu* Court concerning military necessity was information not included in the official record on appeal. The information was presented in Commander DeWitt's unverified Final Report was dated June 5, 1943 but it was not officially submitted to the Justice Department until January of 1944. The Final Report was transmitted to the Court along with the government's *Korematsu* brief;[30] it was not a part of the evidentiary record considered by the lower courts.

DeWitt had prepared the report to explain the military's justification for the curfew and evacuation. Ten copies of the report in final form were printed, bound and transmitted to the War Department on April 15, 1943 for use in the preparation of the government's *Hirabayashi* brief.[31] The report contained an astonishing statement about the military's rationale for the evacuation: due to racial characteristics it was impossible to distinguish loyal Japanese Americans from disloyal Japanese Americans and therefore it did not matter whether there was adequate time to determine disloyalty individually.

> It was impossible to establish the identity of the loyal and the disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.[32]

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28. No. 84-5460, slip op. (D.C. Cir. 1986); 586 F. Supp. 769 (D.C. 1984). *See supra* notes 8 and 14.

29. The danger of unfairness exists whenever past events and actions are recreated and reassessed. However, that danger is mitigated here because the past government action is being assessed based upon the government's official working documents that describe contemporaneous events.

30. Final Report, Japanese Evacuation From the West Coast, 1942, *reprinted in* Petition, *supra* note 27, at Exhibit D.

31. Letter from DeWitt to Assistant Secretary of War John McCloy, April 15, 1943, *reprinted in* Petition, *supra* note 27, at Exhibit C.

32. Petition, *supra* note 27, Final Report at 9. Although it is possible to construe this

DeWitt's statement revealed the racial stigmatization underlying the evacuation and also contradicted the position the War Department planned to present to the Court—that a primary military consideration was the insufficiency of time to deal with the disloyal individually.

After a heated and lengthy debate between DeWitt and Assistant Secretary of War John McCloy, the statement in the report was changed to read: "To complicate the situation, no ready means existed for determining the loyal and disloyal with any degree of safety."[33] This alteration concealed DeWitt's belief that racial characteristics predisposed all Japanese to disloyalty. It also concealed DeWitt's statement that time was not a factor in the evacuation decision. Most important, it shifted the justification for the evacuation from unsupportable racial myths to logistical practicalities. Following the alteration, the War Department and the military attempted to destroy all evidence of the original report.[34]

The alteration of DeWitt's report may have significantly affected the Court's decisions. The government's brief in *Hirabayashi* cited insufficient time for individual loyalty investigations and hearings.[35] Accepting this argument, the *Hirabayashi* Court upheld the curfew orders because DeWitt had determined that the Japanese American population included "disloyal members [who] . . . could not readily be isolated and separately dealt with" by other means.[36]

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statement as an admission that there was sufficient time to determine disloyalty on an individual basis, the context of the statement and its use of a double negative indicate that DeWitt meant to say that time to determine disloyalty was not a major factor in his decision. *See* P. IRONS, *supra* note 10, at 208.

33. Petition, *supra* note 27, Final Report at 9; see P. IRONS, *supra* note 10, at 206-11, for an excellent discussion of the circumstances surrounding the alteration of the Final Report.

34. DeWitt ordered destruction of all copies of the report. "Take action to call in all copies previously sent to WD less enclosures and to have WD destroy all records of receipt of report as when final revision is forwarded letter of transmittal will be redated." Telegram, Colonel Bendetsen to General Barnet, May 9, 1943, *reprinted in* Petition, *supra* note 27, at Exhibit H. On June 7, 1943, the War Department responded, "War Department records have been adjusted accordingly." Letter, Captain Hall to Colonel Bendetsen, June 7, 1943, *reprinted in* Petition, *supra* note 27, at Exhibit J. The destruction of records was completed on June 29, 1944. "I certify that this date I witnessed the destruction by burning of the galley proofs, galley pages, drafts and memorandums of the original report of the Japanese Evacuation." Memorandum, Warrant Officer Junior Grade Theodore E. Smith, June 29, 1943, *reprinted in* Petition, *supra* note 27, at Exhibit K.

It is noteworthy that the Justice Department, in opposing Gordon Hirabayashi's Coram Nobis Petition, characterized the original DeWitt Report as a "draft." Government's Proposed Prehearing Order, at 15 and 21 (hearing on March 22, 1985), Hirabayashi v. United States, No. C83-122V, United States District Court for the Western District of Washington.

35. Brief for United States, at 62-65, Hirabayashi v. United States, 320 U.S. 81.

36. 320 U.S. at 99.

The *Korematsu* opinion quoted this passage from *Hirabayashi* in justifying the evacuation as well.[37] However, the government did not proffer any evidence of "insufficiency of time," and the military's actual rationale for the evacuation lay hidden behind the government's untested contention.[38]

2. *The ONI, FBI, and FCC Intelligence Reports*

The government also failed to disclose to the Court reports by the American intelligence services which investigated the potential disloyalty of West Coast Japanese. These reports directly contradicted key statements in General DeWitt's Final Report concerning espionage and sabotage and also contradicted the contention that Japanese Americans as a group posed a danger to military security. None of the intelligence services recommended mass evacuation.

The DeWitt Final Report which was presented to the Court contained examples of two specific incidents of espionage and sabotage on the West Coast. First, the report stated that the military intercepted unauthorized radio signals and implied that these illicit signals were connected with Japanese submarine attacks on American ships. "This seemed conclusively to point to the existence of hostile shore-to-ship (submarine) communication."[39] Second, the report stated that "there were hundreds of reports nightly of signal lights visible from the coast . . . signalling was often observed at premises which could not be entered without a warrant because of mixed [i.e., alien and citizen] occupancy."[40]

These two statements comprised the entire case presented by DeWitt concerning "actual" acts of espionage and sabotage by Japanese Americans.[41] Neither the Final Report itself, nor the govern-

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37. 323 U.S. at 218.

38. That time was not a major factor is supported by the relatively slow pace at which the evacuation proceeded. The evacuation did not commence until four months after Pearl Harbor, and it took almost five months to complete. Justice Murphy, in his dissent in *Korematsu*, noted "[I]t seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women," and cited the experience of the British government in providing loyalty hearings to 74,000 German and Austrian aliens in the six months following the commencement of the war. 323 U.S. at 241-42; *see* Dembitz, *supra* note 9, at 190.

39. Petition, *supra* note 27, Final Report at 4.

40. *Id.* at 8; Hohri v. United States, 586 F. Supp. at 777.

41. In the *Korematsu* prosecution and appeal in 1944 and in the coram nobis proceeding in 1983, the government did not refer to the "Magic" cables as evidence of military necessity. The "Magic" cables are an eight volume publication. DEP'T OF DEFENSE THE "MAGIC" BACKGROUND OF PEARL HARBOR (1977). Those volumes contain Japanese diplomatic (as

ment in presenting it to the Court, however, acknowledged the contradictory findings of other civil and military intelligence services.[42]

The Office of Naval Intelligence ("ONI")[43] had commenced an extensive investigation of potential danger posed by Japanese Americans well before Pearl Harbor. In its January 26, 1942 Report, the ONI concluded that Japanese Americans posed little danger to military security—that potentially disloyal Japanese aliens and American citizens were "estimated to be less than 3,500 . . . in the entire United States," and that most of those persons "are either already in custodial detention or are members of . . . groups already fairly well known" to the ONI or FBI.[44]

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distinguished from military) cables sent in 1941 and then deciphered by American intelligence. "A small number of the cables concern Japanese intelligence efforts in the United States" to recruit Japanese Americans. CWRIC, *supra* note 10, at Addendum to Report at 1. The CWRIC Report analyzed those cables and concluded that the recruitment effort failed. "[T]here is no indication in the Magic cables of a sabotage or fifth column organization. The likelihood of sabotage and fifth column aid in case of attack were, of course, major arguments advanced in support of the exclusion." *Id.* at 1-2, 4 (footnotes omitted).

For an excellent analysis of the "Magic" cables which is supportive of the CWRIC's findings, see Herzig, *Japanese Americans and Magic*, 11 AMERASIA J. 47 (1984). The CWRIC addendum reflected the view of eight of the nine commissioners. Commissioner Lungren filed a supplemental addendum in which he stated that the commission may have too easily dismissed the possibility that the "Magic" cables effected the decision to undertake mass evacuation. CWRIC, *supra* note 10, at Addendum.

In the *Hirabayashi* Coram Nobis proceeding, the court implicitly rejected the Justice Department's contention that the "Magic" cables showed the Japanese government's belief that "it had succeeded in establishing an espionage network which included Japanese Americans and aliens." *See supra* note 34.

42. In granting Korematsu's Petition, Judge Patel found: "Omitted from the report presented to the courts was information possessed by the Federal Communications Commission, the Department of Navy, and the Justice Department which directly contradicted General DeWitt's statements." 584 F. Supp. at 1419. In ruling from the bench on November 10, 1983, Judge Patel stated:

> These records show the facts upon which the military necessity justification for the executive order . . . the legislative act . . . and the exclusion orders . . . were based upon and relied upon by the government in its arguments to the Court and to the Supreme Court, on unsubstantiated facts, distortions and representations of at least one military commander whose views were seriously infected by racism."

Transcript of Hearing at 37, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

43. The Office of Naval Intelligence ("ONI") was assigned primary responsibility for gathering and disseminating intelligence about West Coast Japanese Americans. The FBI was assigned control over "actual or strongly presumptive cases of espionage or sabotage." The Military Intelligence Division ("MID") of the Army coordinated intelligence efforts with the ONI and FBI. *See* Petition *supra* note 27, at Exhibit M 66-69.

44. Petition, *supra* note 27, at Exhibit N, Lieutenant Commander K.D. Ringle, "Report on Japanese Question," January 26, 1942. Ringle had spent much time doing intelligence work in both Japan and southern California where he had assisted in breaking a major Japanese spy ring through a surreptitious entry. He had also developed an effective system of Nisei

The report concluded:

> [I]n short, the entire "Japanese Problem" has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious than the problems of the German, Italian and communistic portions of the United States population, and, finally that it should be handled on the basis of the individual regardless of citizenship, and not on a racial basis.[45]

The report prepared by the intelligence service responsible for investigating West Coast Japanese thus directly contradicted the government's legal position in *Korematsu* in three critical respects. It found that the potentially disloyal were small in number and were generally identifiable and that the situation for Japanese was no different than the Germans and Italians. The report recommended handling potential disloyalty on an individual, nonracial basis.[46]

The FBI also concluded that "the necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data."[47] These findings were echoed by Attorney General

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informants which he shared with the FBI. CWRIC, *supra* note 10, at 53. At the request of the War Relocation Authority, Ringle prepared and expanded a 57-page report entitled "The Japanese Question in the United States" dated June 15, 1942.

The Justice Department in opposing Hirabayashi's Coram Nobis Petition, took the position that Ringle's report was an "expression of his individual opinion" rather than an "authoritative factual report which conclusively refuted every rational basis for an 8:00 p.m. to 6:00 a.m. curfew." *See supra* note 29, at 14. But in Hohri v. United States No. 84-5460, slip op. (D.C. Cir. 1986), the court of appeals reviewed historical documents and noted:

> Ennis [director of the Justice Department's Alien Enemy Control Unit] knew that Ringle's views would not be dismissed as those of a solitary dissident, for Ennis had been informed that Ringle's views were shared by his superiors at Naval Intelligence . . . . Ennis also knew that the Army and Navy had agreed that Naval Intelligence would assume responsibility for the Japanese issue.

Id. (citations omitted).

45. Report on Japanese Question, *supra* note 44, at 3; *see* Hohri v. United States, 586 F. Supp. at 778.

46. The report, which was available to DeWitt pursuant to the Delimitation Agreement, was brought to the attention of both Attorney General Francis Biddle and Assistant Secretary of War John McCloy before the curfew and evacuation orders. Letter from Biddle to McCloy, March 9, 1942, *reprinted in* Petition, *supra* note 27, at Exhibit O. Letter from McCloy to Biddle, March 21, 1942 ("I was greatly impressed with Commander Ringle's knowledge of the Japanese problem along the coast."), *reprinted in* Petition, *supra* note 27, at Exhibit P.

47. Memorandum from J. Edgar Hoover to Biddle, February 2, 1942, *reprinted in* CWRIC, *supra* note 10, at 73. In March of 1941, the FBI, working with the ONI, surreptitiously entered the Japanese consulate in Los Angeles and seized a list of Japanese sympathizers and espionage agents. The arrests that followed "effectively dismantled a Japanese espionage network" nine months before Pearl Harbor. IRONS, *supra* note 10, at 22; Memorandum from Special Agent in Charge N.J.L. Pieper to Hoover, November 8, 1941, *reprinted in*

Biddle in his dissent against the proposed evacuation in a memorandum to President Roosevelt two days before the issuance of the executive order.[48] Furthermore, in February, 1944, while the Justice Department was preparing its *Korematsu* brief, FBI director Hoover directly refuted the general statements in DeWitt's Final Report concerning espionage allegedly connected with Japanese submarine attacks and shore-to-ship signalling.[49] Hoover repeated the FBI's findings to Biddle:

> Every complaint in this regard [shore to ship signalling] has been investigated, but in no case has any information been obtained which would substantiate the allegations that there has been illicit signalling from shore-to-ship since the beginning of the war.[50]

Federal Communications Commission Commissioner James Fly confirmed Hoover's conclusions to Biddle.[51]

Petition, *supra* note 27, at Appendix.

In addition, immediately following the bombing of Pearl Harbor, the United States Attorney General's office, authorized by the President, detained over 2,300 aliens (including 1,291 Japanese) who were deemed a potential threat to national security. Petition, *supra* note 27, Final Report at 3. The detention was undertaken pursuant to the Alien Enemy Act, 50 U.S.C. § 21 (1976), which authorized the President during war or threatened hostilities to apprehend, restrain, secure and remove aliens of hostile countries.

48. "For several weeks there have been increasing demands for evacuation of all Japanese, aliens and citizens alike, from the West Coast states . . . . [V]arious special interests would welcome their removal from good farm land and the elimination of their competition . . . . Walter Lippman [sic] and Westbrook Pegler recently have taken up the evacuation cry on the ground that attack on the West Coast and widespread sabotage is imminent. My last advice from the War Department is that there is no evidence of imminent attack and from the FBI that there is no evidence of planned sabotage." Memorandum from Biddle to President Roosevelt, February 17, 1942, *reprinted in* CWRIC, *supra* note 10, at 83.

49. Even the intelligence reports of the Army MID submitted to DeWitt prior to the evacuation indicated that enemy intelligence about the West Coast had not been gleaned through West Coast "fifth column" activity. The MID's five weekly reports, dated January 3 through January 31, 1942, stated that enemy intelligence about West Coast operations had been obtained through "information learned during peace and by the activities of fifth columnists." G-2 Periodic Report No. 3, January 31, 1942, *reprinted in* Petition, *supra* note 27, at Exhibit R. Commencing on February 7, 1942, and continuing through the onset of the evacuation, the MID's revised weekly reports completely eliminated citation of fifth column activity as a source of enemy intelligence. G-2 Periodic Report No. 20, May 16, 1942, *reprinted in* Petition, *supra* note 27, at Exhibit R.

50. Memorandum from Hoover to Biddle, February 7, 1944, *reprinted in* Petition, *supra* note 27, at Exhibit W. *See* Hohri v. United States, 586 F. Supp. at 779.

51. Fly reported to Attorney General Biddle that "the Commission knows of no evidence of any illicit signalling in this area during the period in question." Memorandum from Fly to Biddle, April 4, 1944 (*see* Petition *supra* note 27, at Exhibit V). *See also Hohri*, 586 F. Supp. at 778.

The FCC's radio intelligence division was responsible for monitoring all radio communications. It maintained constant surveillance with sophisticated equipment. In specifically refut-

3. *The Suppression of Evidence*

The government in its presentation to the Court in 1944 failed to acknowledge or even to mention the findings and conclusions of the ONI, FBI, FCC, and MID concerning the identifiability of the small number of potentially disloyal, the recommendation to handle disloyalty on an individual basis, the absence of a single verified act of espionage or sabotage, or the absence of significant "fifth column" intelligence gathering. The government, over vehement objections by the Justice Department personnel responsible for drafting the government's brief, maintained just the opposite. Attempts by Justice Department attorneys to alert the Court to the falsity of the DeWitt report were thwarted.

On April 30, 1943, Edward Ennis, the Director of the Alien Enemy Control Unit of the Justice Department and the official responsible for preparation of the *Hirabayashi* brief, informed Solicitor General Fahy of his knowledge of the ONI report and its impact on the government's legal position. Ennis stated, among other things: "[T]he Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary."[52] Concerning disclosure of the ONI report to the Court, Ennis advised, "Any other course might approximate the suppression of evidence."[53]

Despite awareness of the ONI report by the Attorney General, the Assistant Secretary of War, and the Solicitor General, and despite Ennis' warning concerning non-disclosure, neither DeWitt's Final Report nor the government briefs in *Hirabayashi*, *Yasui*, or *Korematsu* referred to the ONI report or its contents. The briefs presented to the Court also failed to refer to the FCC or FBI reports, both of which specifically refuted the DeWitt report and noted the complete absence of actual or anticipated acts of espionage or sabotage by West Coast Japanese.

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ing the Final Report concerning illicit shore-to-ship signalling by radio, Fly wrote to Biddle: "There were no radio signals reported to the Commission which could not be identified, or which were unlawful." Memorandum from Fly to Biddle, April 4, 1944, *reprinted in* Petition, *supra* note 27, at Exhibit V. Even the intelligence reports of the Army MID submitted to DeWitt prior to the evacuation indicated that enemy intelligence about the West Coast had not been gleaned through West Coast "fifth column activity." *Id.* at Exhibits R and S.

52. Memorandum from Ennis to Solicitor General Fahy, April 30, 1943, *reprinted in* Petition, *supra* note 27, at Exhibit Q.

53. *Id. See* Hohri v. United States, 586 F. Supp. at 779.

In preparing the government's *Korematsu* brief, Ennis and his assistant, John Burling, attempted to alert the Court to the existence of the FBI and FCC reports. Burling inserted a footnote into the brief to advise the Court that the Justice Department possessed information refuting the government's claims of alleged espionage. The footnote read:

> The [Final Report's] recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial notice of the recitals of those facts contained in the Report.[54]

Burling urged the Justice Department to resist War Department efforts to change the footnote, and he explained the footnote's rationale to Assistant Attorney General Wechsler.

> You will recall that General DeWitt's report makes flat statements concerning radio transmitters and ship-to-shore signalling which are categorically denied by the FBI and the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods . . . [I]t seems to me that the present bowdlerization of the footnote is unfortunate. There is in fact a contrariety of information and we ought to say so.[55]

In his unsuccessful defense of the Burling footnote, Ennis wrote to the Assistant Attorney General "strongly recommending that the footnote be kept in its existing form," citing and attaching the FBI and FCC reports "illustrating the falsity of the DeWitt report."[56] He also cited the Justice Department's ethical duty not to misuse the

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54. Memorandum from Burling to Wechsler, Sept. 11, 1944, *reprinted in* Petition, *supra* note 27, at Exhibit AA. *See* Korematsu v. United States, 584 F. Supp. at 1417; Hohri v. United States, 586 F. Supp. at 780.

55. Memorandum from Burling to Wechsler, Sept. 11, 1944, *reprinted in* Petition, *supra* note 27, at Exhibit AA. Burling also defended the footnote to Solicitor General Fahy:

> We are now therefore in possession of substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention were incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report to General Marshall.

Memorandum from Burling to Fahy, April 13, 1944, *reprinted in* P. IRONS, *supra* note 10, at 285.

56. Memorandum from Ennis to Wechsler, September 30, 1944, *reprinted in* Petition, *supra* note 27, at Exhibit B and Addendum A to Judge Patel's opinion.

doctrine of judicial notice and noted the unfairness of the government's position toward Japanese Americans.[57]

The War Department intervened, however, and ultimately convinced the Justice Department to alter substantially the Burling footnote to eliminate reference to the government's knowledge of any contradictory information.[58] The revised footnote asked the Court to take judicial notice of the facts recited in the government's brief and of the Final Report as it related to those facts.[59]

The government's statements on oral argument seemed to reflect both a serious attempt to stay within the bounds of the revised footnote and a conflicting recognition that "facts" in the Final Report not subject to judicial notice might be essential to proving military necessity.[60] The government's formal position was that the Court could only take judicial notice of "facts" in the Final Report which were of "public general knowledge"[61] and that the facts subject to judicial notice were sufficient to sustain the validity of the military orders.[62] The government also stated, however:

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57. This Department has an ethical obligation to the Court to refrain from citing it [the Final Report] as a source of which the court may properly take judicial notice if the Department knows that important statements in the source are untrue and if it knows as to other statements that there is such contrariety of information that judicial notice is improper . . . . The general tenor of the report is not only that there is a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them.

Id.

58. The revised footnote included in the government's *Korematsu* brief read: "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the Final Report only to the extent that it relates to such facts." Brief for the United States at 21-22, Korematsu v. United States, 323 U.S. 214 (1944). *See* P. IRONS, *supra* note 10, at 288-92 (regarding the War Department's campaign to alter the Burling footnote).

59. *See supra* note 58.

60. Transcript of Hearing before Supreme Court, October 12, 1944, at 8 and 10, Korematsu v. United States, 323 U.S. 214.

61. *Id.* For example, Justice Jackson asked about the Court's obligations concerning judicial notice because "in certain instances in which the report is silent as to dates, it is pointed out that the occurrences stated in the report were after the Japanese had all been evacuated." The government responded generally that the Court could not

> rely upon the facts other than those which are matters of common knowledge or which come from sources which the Court can take judicial notice, and from which such facts can be made available to the Court. If it should become important, we would make every effort to do that.

Id. at 9.

62. *Id.* at 10.

> Beyond that [facts of "public general knowledge"], as to the *details in the report*, certainly *the Court is entitled*, it seems to me, *to consider them in proving what the general was thinking, his motive and what he had before him* when he made the judgment which he made. *Otherwise, I see nothing to be done . . . except that the case go back to be heard*, and that all this be gone into at trial, which the Government does not suggest.[63]

This statement, which was made during oral argument, reflected the government's apparent position that the Court could and indeed should take notice of "facts" in the Final Report as proof of "what the general . . . had before him," even if those facts were not of "public general knowledge," to preclude the need for a remand for fact-finding.[64]

Judge Patel's decision granting Korematsu's Petition was based upon the manifest injustice to Korematsu resulting from the government's presentation of false and misleading information to the Court and in "knowingly with[holding] information from the courts when they were considering the critical question of military necessity."[65] The district court deemed the "record . . . [so] replete with protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions."[66] Similarly, the court of appeals in *Hohri* noted that the government's documents "suggest the Justice Department [in *Hirabayashi*] misled the Supreme Court when it argued that military necessity justified the mass evacuation."[67]

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63. *Id.* at 8-9 (emphasis added).

64. *Id.*

65. 584 F. Supp. at 1417. The Ennis and Burling memoranda, pertaining to the deliberate suppression of significant information and the intentional concealment of such information from the Court, were first disclosed publicly pursuant to Professor Irons' Freedom of Information Act request in 1982. These documents provided the specific intent element to Korematsu's claim of prosecutorial misconduct and formed a critical part of the Petition to vacate his conviction. *See* Petition, *supra* note 27, at 62-70. Judge Patel, in granting the Petition, explained the significance of the documents in relation to the Coram Nobis petition. "It appears from the record that much of the evidence upon which petitioner bases his motion was not discovered until recently. In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available." 584 F. Supp. at 1419. *But see* Hohri v. United States, 586 F. Supp. at 790 ("But there has long been sufficient circumstantial evidence of the concealment . . . .").

66. 584 F. Supp. at 1418. Judge Patel's decision did not encompass the government's arguments and representations in oral argument before the Supreme Court. The hearing transcript apparently was only recently located and no court has interpreted it or specifically ruled upon the effect of the government's statements to the Court.

67. Hohri v. United States, No. 84-5460, slip op. (D.C. Cir. 1986).

B. *Standard of Review*

Considering the amount of information concealed by the government and the paucity of information actually provided, the standard of review adopted by the Supreme Court to evaluate the government's claims of military necessity was probably the most critical aspect of the Court's decisions.

When the cases reached the Court—*Hirabayashi* and *Yasui* in April, 1943 and *Korematsu* in May, 1944—the threat of invasion of the West Coast had passed. The Court had to decide in this setting, with over 100,000 Japanese still interned, whether to accept without close factual scrutiny the military's assertion of "necessity" as the justification for the curfew and mass evacuation, or whether to require that the government establish a credible factual basis for its extraordinary actions.[68]

In various parts of its opinions in *Hirabayashi* and *Korematsu* the Court used language alluding to a demanding standard of review. The *Hirabayashi* opinion noted that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[69] The *Korematsu* opinion stated at its outset that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject [such restrictions] to the most rigid scrutiny."[70] The opinion also declared that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety" can justify such restrictions.[71] Several courts and commentators have seized upon this language and cited *Hirabayashi* and *Korematsu* as cases which have applied the strict scrutiny standard of review in upholding invidious racial classifications on the grounds of "pressing public necessity."[72]

Whether or not the Court intended to articulate for the first time a heightened standard of review of invidious racial classifica-

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68. Rostow, *supra* note 9, at 502-03, *See* CWRIC, *supra* note 10, at 12-16, 220-21.

69. Hirabayashi v. United States, 320 U.S. at 100.

70. *Id.* at 216.

71. *Id.* at 218.

72. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Graham v. Richardson, 403 U.S. 365, 372 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Graney, *Rostker v. Goldberg, Equal Protection and War Powers*, 15 J. MAR. J. PRAC. & PROC. 725, 731 (1982) (strict scrutiny applied to statute relocating Japanese during World War II); Note, *supra* note 16, at 1296 (After subjecting the measure to "rigid scrutiny," the court upheld the exclusion as necessary for the protection of the country in time of war). *See generally* Kent v. Dulles, 357 U.S. 116, 128 (1958) (citing *Korematsu* as a case involving the exercise of war power upon a showing of the "gravest imminent danger to the public safety.").

tions, it did not actually subject the government's racial classification to "strict scrutiny."[73] In both the *Hirabayashi* and *Korematsu* decisions, the Court adopted without factual scrutiny the military's unsubstantiated assertion of necessity.[74] Political expediency during war is one explanation advanced for the Court's approach to these momentous government actions.[75] Another and somewhat complementary explanation, with doctrinal underpinnings, may be found in a close reading of the Court's language and case citations. The Court may in part have labeled racial classifications "suspect" to reaffirm the general principle that such classifications are prohibited if they are based directly upon racial animus.[76] The Court then declined to apply the principle by distinguishing *Korematsu* and *Hirabayashi* from situations of racial antagonism.[77]

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73. The strict scrutiny standard of review had not been clearly articulated or accorded a place in American jurisprudence when these cases were decided. The Court had not adopted Chief Justice Stone's formulation in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1937), concerning strict scrutiny of "suspect" classifications. *See* McLaughlin v. Florida, 379 U.S. 184 (1964) (first articulating the compelling state interest and least restrictive means formulation of the strict scrutiny standard). Professor Irons suggests that the "immediately suspect" and "rigid scrutiny" language of the *Korematsu* opinion may have been added by Justice Black in the final draft of the opinion to placate the dissenters. P. IRONS, *supra* note 10, at 339.

74. *See infra* text accompanying notes 79-100. In view of the deference accorded the government's claim of military necessity, it is clear that the Court did not mean that all restrictive racial classifications, as a matter of constitutional principle, were to be subjected to "the most rigid scrutiny." The *Korematsu* Majority opinion's focus on the "apprehension [of the danger] by the proper military authorities" suggests a subjective approach which turns not on the existence of objective information available to the government, but on the military commander's actual state of mind. *See infra* text accompanying notes 84-86.

75. *See infra* text accompanying note 110.

76. "Pressing public necessity may sometimes justify the existence of such [racial] restrictions; racial antagonism never can." 323 U.S. at 216. This language appeared to be generally consistent with an earlier line of cases which invalidated government racial classifications motivated by racial prejudice. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Yu Cong - Eng v. Trinidad, 271 U.S. 500 (1926): Hill v. Texas, 316 U.S. 400 (1942), *cited* in *Hirabayashi*, 320 U.S. at 83. *See also infra* note 83. *Compare* Dred Scott v. Sanford, 19 How. 393 (U.S. 1857) (black slaves have no right to citizenship, and temporary residence in a free state does not remove the bonds of slavery), decided prior to the passage of the fourteenth amendment.

77. The Majority failed to scrutinize the factual basis of its conclusion that racial animus was not a significant factor in the government's decisions. Overlooked by the Court were military commander DeWitt's public statements which provided strong evidence that racial antagonism was a primary factor in the government's actions. In his Final Recommendation to the Secretary of War, on February 14, 1942, DeWitt wrote:

> In the war in which we are now engaged racial affinities are not severed by migration. *The Japanese race is an enemy race* and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," *the racial strains are undiluted* . . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today.

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers . . . merely confuses the issue.[78]

Hirabayashi articulated a standard of review which was then generally applicable to the evaluation of administrative and economic regulations. Chief Justice Stone's opinion focused on the collective war power of Congress and the Executive. Its opinion avoided the prickly question of whether Congress delineated adequate standards in its delegation of authority to the executive and military by finding that Congress, in enacting Pub. L. No. 503 on March 21, 1942, and in passing appropriations measures, knew of and therefore ratified DeWitt's proclamations of March 2 and 16 and his intention to issue curfew and exclusion orders.[79] This finding ignored the fact that neither the executive order nor the congressional act embodied standards for guiding the military's actions.[80] No limits were set. Within the vague confines of the executive order's declaration of a danger of

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Petition, *supra* note 27, at Final Report (emphasis added).

On April 13, 1943, testifying before Congress, DeWitt stated "[i]t makes no difference whether he is an American citizen, he is still Japanese. American citizenship does not necessarily determine loyalty . . . . We must worry about the Japanese all the time until he is wiped off the map." *Hearings Before House Naval Affairs Subcommittee to Investigate Congested Areas*, 78th Cong., 1st Sess., Part 3, 740 (1943).

On April 14, 1943, DeWitt informed news media of his doubt about the loyalty of American nisei soldiers who, while on leave, wanted to enter excluded areas: "A Jap is a Jap," *reprinted in* CWRIC, *supra* note 10, at 222.

Assuming the existence of racial animus as a basis of the military's actions, *Korematsu* stands as an anachronism in post-fourteenth amendment legal history.

78. 323 U.S. at 223.

79. Hirabayashi v. United States, 320 U.S. 81, 91, 102-04. *See generally Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (congressional approval of prior presidential actions "as if they had been . . . done under previous express authority and direction of Congress.").

80. *Compare* Panama Refining Co. v. Ryan, 293 U.S. 388, 416-18 (1935) (rejecting the National Industrial Recovery Act's declaration of emergency provision as providing the requisite standards for executive action and concluding that "Congress [improperly] left the matter to the president without standard or rule, to be dealt with as he pleased"); Kent v. Dulles, 307 U.S. 116, 129 (1958) ("[W]e will construe narrowly all delegated powers that curtail or dilute [constitutional liberties]"); *see also* Dembitz, *supra* note 9, at 184 n.31.

The *Hirabayshi* Court in effect held that when Congress takes some supportive action with knowledge of a broadly worded executive order and the military's contemplated restrictive measures, Congress and the Executive will be deemed to have acted in concert and the government's powers will be at their zenith, even though Congress neither pre-authorized the military's actions nor set specific standards by which those actions could be judged. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 83 n.81 (1977) ("the Japanese-American war relocation cases demonstrate most pointedly and painfully the expansive limits of the joint cooperative use of the war powers by the political branches.").

"espionage and sabotage" the military was given free rein.

The opinion also did not explicitly build into its calculus the counterveiling fifth amendment due process/liberty interests of those restricted. It declared that the curfew was within the government's war power if "in the light of all the facts and circumstances there was *any substantial basis for the conclusion* . . . that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage" and if there was *"reasonable ground for believing* that the threat . . . [was] real."[81] Adopting a deferential approach characteristic of the rational basis standard,[82] the Court stated that the government was entitled to a broad discretion in its determination of the "nature and extent of the threatened injury or danger" and in its "selection of the means for resisting it."[83] Accordingly, the Court conferred great deference to the military's "appraisal of facts."

> The military commander's appraisal of facts . . . involved the exercise of his informed judgment . . . [T]hose facts . . . support

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81. 320 U.S. at 95 (emphasis added).

82. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Brennan, joined by Justices Marshall, Blackmun and White, noted that the Court in fact applied the rational basis standard in both *Hirabayashi* and *Korematsu*. In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that the facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U.S. at 101. A similar mode of analysis was followed in *Korematsu*, 323 U.S. at 224, even though the Court stated there that racial classifications were "immediately suspect" and should be subjected to "the most rigid scrutiny." *Id.* at 216.

83. 320 U.S. at 93. The Court also noted that "it is not for any court to sit in review of the wisdom of their [Executive and Congress] actions or substitute its judgment for theirs." In certain respects, the Court's approach was more or less historically consistent with the Court's review of restrictive racial legislation which was not on its face motivated by racial animus. In Plessey v. Ferguson, 163 U.S. 537 (1896), later overruled by Brown v. Board of Education, 347 U.S. 483 (1954), "reasonableness" and good faith were the only limitations placed upon legislative racial classifications. "[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for promotion of the public good, and not for the annoyance or oppression of a particular class." 163 U.S. at 550.

Prior to *Korematsu*, the Court had also upheld state statutes mandating segregation in schools, Berea College v. Kentucky, 211 U.S. 45 (1908), public transportation, McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151 (1914), beaches and bathhouses, Dawson v. Mayor and City Council of Baltimore City, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955), and parks, Tate v. Department of Conservation and Development, 133 F. Supp. 53 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956).

It should be noted that none of these cases involved liberty interests as significant as freedom from imprisonment without charges for an indefinite period, and none of these cases were based upon military representations of necessity. Indeed, the *Hirabayashi* and *Korematsu* opinions essentially ignored war powers cases calling for demanding judicial scrutiny of the "necessity." *See infra* note 103.

> the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent . . . .[84]

Military commander DeWitt "appraised" two critical facts which were deemed to "afford a rational basis for the decision." The government asserted in its brief, and the *Hirabayashi* Court accepted that, Japanese American "residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of different ancestry,"[85] and that there was insufficient time to identify and deal with dangerous or disloyal Japanese individually. As to the first "fact"—that ethnicity determines disloyalty—the Court deferred to the military's judgment on a matter well beyond the realm of special military expertise. This "fact" was unsupported by any evidence of record. The Court took judicial notice of what might have been "some of the many considerations" of the military in ascertaining this ostensible fact, and cited newspaper reports, congressional hearings, and various books and articles.[86] Ignoring the indisputability requirement of the judicial notice doctrine, the Court noted that Japanese Americans on the West Coast had not assimilated into the American mainstream and had retained strong attachments to Japan, which, by implication, predisposed them to loyalty to Japan during war.[87] In drawing this conclusion, the Court fully adopted a government argument based on racial myths and stereotypes[88] and the Court ignored a plethora of contrary information cited in the amicus briefs of the Japanese American Citizens League and American

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84. 320 U.S. at 103-04.

85. *Id.* at 101.

86. *Id.* at 99.

87. The Court noted that these attachments were fostered by Japanese language schools, adherence to the Shinto religion, dual citizenship held by some, Kibei education for some, and other Japanese community organizations. The Court further noted that these attachments to Japan were enhanced by past anti-Asian discrimination on the West Coast. *Id.* at 98.

88. General DeWitt had determined that Japanese Americans were a "large, unassimilated, tightly-knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." Final Report, *supra* note 27, at vii. *See also* Brief of the United States at 11, *Hirabayashi*, 320 U.S. 81.

The CWRIC noted that this

> evaluation is not a military one but one for sociologists or historians. It runs counter to a basic premise on which the American nation of immigrants is built — that loyalty to the United States is a matter of individual choice and not determined by ties to an ancestral country. In the case of German Americans, the First World War demonstrated that race did not determine loyalty, and no negative assumptions were made with regard to citizens of German or Italian descent during the Second World War.

CWRIC Report, *supra* note 10, at 7.

Civil Liberties Union.[89]

As to the second "fact," the government produced no evidence which showed an insufficiency of time to handle disloyalty on an individual basis, and also produced no evidence or record of espionage, sabotage, or other acts of disloyalty by Japanese Americans.[90] Based on its deferential standard of review, however, and using a double negative, the Court was able to affirm Hirabayashi's conviction by concluding:

> [W]e *cannot reject as unfounded the judgment of the military authorities* and of Congress that there were disloyal members of [the Japanese American] population, whose number and strength could not be precisely and quickly ascertained . . . . Here the *findings* [of Commander DeWitt] of danger of espionage and sabotage, and of the necessity of the curfew order to protect against them, *have been duly made.*[91]

The "findings" the Court was referring to as "having been duly made" were nothing more than conclusory statements by DeWitt in Public Proclamations Nos. 1 and 2 that the West Coast was subject to a danger of "espionage and sabotage."[92]

Korematsu applied a similarly deferential if not even less demanding standard of review. Justice Black's Majority opinion[93] disposed of Korematsu's challenge to the evacuation by finding that the exclusion issue was identical to the curfew issue and by citing the Court's curfew decision in *Hirabayashi.*[94] In doing so, the Court failed to acknowledge the major difference in the severity of the restrictions. It also failed to address an important issue distinct to evacuation:[95] whether, assuming the existence of a danger of espionage

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89. Brief of Japanese American Citizens League and American Civil Liberties Union, Hirabayashi v. United States, 320 U.S. 81. For a thorough discussion of the contrary information cited in the briefs see P. IRONS, *supra* note 10, at 305-06. After reviewing literature cited in the brief of the American Civil Liberties Union, Justice Murphy found that each of the government's allegations "has been substantially discredited by independent studies made by experts in these matters." Korematsu v. United States, 323 U.S. at 240 (Murphy, J., dissenting).

90. *See supra* section IIA.

91. 320 U.S. at 99, 103 (emphasis added). *See generally* Tussman & tenBroek, *Equal Protection of the Laws*, 37 CAL. L. REV. 342, 372-74 (1949).

92. 320 U.S. at 86-87. The opinion also deemed the statement in the preamble to Executive Order No. 9066 of a danger of espionage and sabotage to be a "fact" indicating military necessity. *Id.* at 102-03.

93. Chief Justice Stone and Justices Reed, Douglas and Rutledge joined in Justice Black's opinion. Justice Frankfurter concurred in a separate opinion. Justices Roberts, Murphy and Jackson each authored dissenting opinions.

94. 323 U.S. 214, 218-19.

95. The Majority opinion even side-stepped consideration of the validity of the mass

and sabotage, the mass evacuation "remedy" was appropriately and narrowly tailored to meet the circumstances of the danger.[96]

The *Korematsu* Majority did not subject the issues it addressed to the "most rigid scrutiny." The Court focused singularly on the sweeping conclusions of the DeWitt Report and, without inquiry into their factual basis, adopted them as the justification for the evacuation. Concerning the need for mass evacuation due to the inadequacy of the curfew, the Court recited the general conclusion of the military: "The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion . . . . [E]xclusion of those of Japanese origin was deemed necessary. . . ."[97] The military's unsubstantiated contention of "insufficiency of time," which formed the foundation of the *Hirabayashi* decision and which was discredited by the undisclosed original DeWitt Final Report, was also accepted in *Korematsu*: "[T]emporary exclusion of the entire group was rested by the military on the same ground [that it was impossible to bring about an immediate segregation of the disloyal]."[98] Finally, in discussing the "real military danger," the Court cited military conclusions rather than facts: "[Korematsu] was excluded because . . . the proper military authorities feared an invasion . . . and because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . . ."[99]

In his prophetic dissent, Justice Jackson questioned the Court's deferential approach:

> How does the Court know that these orders have a reasonable

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internment, holding somewhat incredibly that the detention issue was not before the Court because Korematsu had not been interned. 323 U.S. 214, 221-22. Korematsu had been convicted of refusing to be moved from his San Leandro residence to an assembly center and ultimately to an internment camp. *Id.* at 229-30 (Roberts, J., dissenting). The logical extension of the Court's reasoning was that only persons who submitted to internment and filed habeas corpus petitions had standing to challenge the internment. *Id.* at 232 (Roberts, J., dissenting). The Majority thereby redefined and minimized the liberty interest at stake from imprisonment without trial on account of race to geographical displacement.

96. The *Korematsu* Majority deferred to military judgment about the means selected for preventing espionage and sabotage at defense installations, citing that congressional delegation of authority to the military. *Korematsu*, 323 U.S. at 223. PUB. L. No. 503, however, embodied no standards to guide the military in determining the breadth, duration or severity of its measures. It made no reference to temporary detention at assembly centers or indefinite incarceration in camps.

97. 323 U.S. at 218.

98. *Id.* at 219.

99. 323 U.S. at 223.

> basis in necessity? No evidence whatever on that subject has been taken by this or any other court . . . . So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.[100]

The Court's extreme degree of deference to military judgment in *Korematsu*, with all its attendant dangers, was also without precedent. The Court did not cite any authority to support its unquestioning reliance on the military's conclusions.[101] The war powers cases cited in the *Hirabayashi* opinion referred generally to the expansive scope of the war power.[102] However, the cases cited in *Hirabayashi* as conferring wide discretion to the military under the government's war power's differed markedly from *Hirabayashi* and *Korematsu*.[103] None of the cases cited counseled deference to military judgment or involved due process claims of citizens who were deprived of their freedom without specific charges or trial. In declining independent scrutiny of the factual foundation of the military's conclusions, the Court either ignored or summarily distinguished its own precedents which had established the judiciary as guardian of constitutional liberties during times of war or emergency.[104]

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100. 323 U.S. at 245. *See also* Dembitz, *supra* note 9, at 193 ("The *Korematsu* opinion indicates that there is no basis for invalidating war-time action by military authorities, save perhaps by a showing of malice and a lack of good faith on the part of the military.").

101. The opinion did not specify why the military, whether acting on its own or pursuant to a congressional delegation of authority in the form of a criminal statute which provided no standard for military action, should have its judgments about American civilians accepted without question.

102. "The war power of the national government is the 'power to wage war successfully'." 320 U.S. at 93. (Although not quoted directly in *Hirabayashi* this tautological statement appears to be the driving force behind the Court's reasoning.)

103. The controversy in two of those cases, appropriately cited with the "cf." signal, involved the interpretation and effect of war measures and not their underlying validity. *See* Martin v. Mott, 12 Wheat. 19, 29 (U.S. 1827); *Prize Cases*, 2 Black 635, 671 (U.S. 1862). The other case, *Ex Parte* Quirin, 317 U.S. 28 (1942), construed the Articles of War to determine whether the President was empowered to require accused "enemy belligerents" to stand trial before a military rather than civil tribunal for specific hostile acts against the United States.

104. *See, e.g.*, Mitchell v. Harmony, 13 How. 115 (U.S. 1851). [T]he emergency must be shown to exist before taking can be justified. But it is not sufficient to show that [the military officer] exercised an honest judgment, and took property to promote public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be . . . .

Id.

Sterling v. Constantin, 287 U.S. 378 (1932); *Ex Parte* Milligan, 71 U.S. (4 Wall.)(1866); United States v. Russell, 73 U.S. (4 Wall.) (1871); *see also* Keynes, *Democracy, Judicial Review and the War Powers*, 8 OHIO N.L. REV. 69, 75 (1981) ("During periods of war and hostilities the courts provide a forum in which individuals and minorities can vindicate their

In particular, the *Korematsu* opinion ignored the judicial landmark of *Ex Parte Milligan*.[105] *Milligan* held that the military lacked jurisdiction to try and punish civilians, even during times of national rebellion, when civil courts are open and functioning. In issuing a writ of habeas corpus, the Court held that the conviction of a civilian by a military tribunal violated his constitutional rights under the fourth, fifth and sixth amendments. Noting that a civilian's constitutional rights to a civil court trial by jury "cannot be frittered away on any plea of state or political necessity," the Court acknowledged that the judiciary during war must exercise great diligence to protect constitutional liberties against the aroused "passions of men" and the weakened "restraints of law."[106]

The Court summarily distinguished *Milligan* from the Japanese American cases in *Hirabayashi* and *Ex Parte Endo*,[107] noting "the exercise of that [war emergency] power here involves no question of martial law or trial by military tribunals."[108] The distinction misses the point. According to *Milligan*, the military cannot try and imprison civilians during war when the civil courts are open and accessible. Yet Japanese American civilians were interned initially by the military when the courts were open and accessible without any trial at all.[109]

Why did the Court adopt an extremely deferential posture and also fail to address squarely its earlier cases? The Commission on

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rights when Congress and the President exceed their constitutional war and defense powers.") The Court also ignored or dismissed, Freeman, *Genisis, Exodus and Leviticus—Geneology, Evacuation and Law*, 28 CORN. L.Q. 414 (1943) which canvassed war power cases and discussed *Mitchell, Sterling* and *Milligan* as requiring government proof of "necessity" and which ascertained an inadequate factual basis for the evacuation.

105. 71 U.S. (4 Wall) (1866).

106. The Court stated:

> [I]f society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards [of liberty] need, and should receive, the *watchful care* of those intrusted [sic] with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessing of liberty, consecrated by the sacrifices of the Revolution.

Id. at 8. *Ex Parte* Quirin, 317 U.S. at 123-24.

107. 323 U.S. 283, 297-98 (1944). *Ex Parte* Endo and *Korematsu* were announced at the same time. Justice Douglas, writing for a unanimous Court in *Endo*, followed an arduous statutory route in granting Endo's petition for writ of habeas corpus. Douglas declared that the War Relocation Authority, in charge of internment and release, lacked statutory authority to continue to confine concededly loyal citizens pending the WRA's determination of a "safe" locale for their release. The Court implied that mass internment was constitutionally permissible at least until individual loyalty was assessed.

108. 320 U.S. at 92; *see also* 323 U.S. at 297-98.

109. *See* Rostow, *supra* note 9, at 527.

Wartime Relocation and Internment of Civilians ("CWRIC") has suggested that the Court refrained from "any careful review of the facts" and chose to "give great deference to the military judgment . . . rather than looking closely at the record" because this "was the only plausible course for the court to follow if it were to conclude that exclusion was constitutionally permissible."[110] Indeed, the Court's contradictory language of heightened scrutiny and judicial deference might be best explained not by analysis of legal doctrine but by the *quid pro quo* involved in building a majority vote to uphold the government's actions.[111]

It is difficult now to predict with precision how the Supreme Court would have ruled had the government presented all material information in its possession. What is certain is that the Court's extremely deferential standard of review facilitated the government's presentation of unsupported statements concerning military necessity. Even though the ONI, FBI, FCC, and MID reports and the original Final Report undercut the factual basis of the government's legal position, the government was able to conceal these reports because it was not called upon to present any substantive factual justification for its extraordinary actions.

In a larger view, the Court's deferential approach accorded almost complete autonomy to the military in its dislocation and detention of civilians residing outside the theater of actual hostilities. Just as important, it signalled a hands-off role in reviewing alleged government war power excesses, including those detrimental to the most fundamental of democratic liberties. The Court, without saying so explicitly, made a profound value judgment affecting American democracy. Justice Jackson warned of the ominous implications.

> [T]he Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting

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110. CWRIC, *supra* note 10, at 236-37. The CWRIC was established in 1980 by an act of Congress. Its mission was to thoroughly investigate the treatment of Japanese Americans during World War II and to recommend remedies. After taking testimony of 750 witnesses and reviewing numerous documents and publications, the Commission concluded that there was in fact no military necessity for the curfew or mass evacuation and that the "broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership." *Id.* at 18. Note, however, the comment of the Chief Historian of the United States Army Center of Military History: "I cannot accept the historical information and conclusions offered in [the CWRIC] report as authoritative from the viewpoint of a professional historian." *Hearings on Japanese-American and Aleutian Wartime Relocation and H.R. 3387, H.R. 4110 and H.R. 4322*, 98th Cong., 2nd Sess., Serial No. 90, 79-81 (1984) (statement of David F. Trask, Chief Historian, United States Army Center of Military History).

111. *See supra* note 73.

> American citizens. The principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[112]

The human tragedy was the unjustified uprooting and internment of over 100,000 loyal Americans. The legal tragedy was both that the Court accepted without question the government's statements of military justification and that the government distorted the judicial process (at least by today's standards) to obtain approval of a then on-going program. The result was an apparent lessening of government accountability for military control over civilians—a result which, in view of recent Supreme Court rulings discussed below, raises serious questions about the structure of American democracy.

III. Seeing Through Murky Waters: The Need for Clarity in Standards of Government Accountability

Former Chief Justice Oliver Wendell Holmes declared that the essence of law is "prophesies of what the courts will do in fact."[113] By that he meant legal principles reflect societal values which enable us to predict what behavior will be deemed acceptable in the future. The law is thus valuable to society not only because of the justice it achieves in deciding a particular dispute, but also because it informs citizens and government of guidelines for forming present and future behavior.

If we look into the well of wisdom and ask, "What legal standards of accountability now guide the federal government in restricting the civil liberties of Americans for reasons of military necessity or national security?," no clear answer emerges. The waters of this constitutional principle are murky. Prophesies are blurred, and underlying values difficult to discern. This section discusses the need for clarity and balance, especially in light of *Korematsu* and recent Supreme Court decisions.

A. *Korematsu's Legacy*

One lesson of *Korematsu* is that grave social injustice is possible in America during times of national frustration and fear if the government is given wide rein over the fundamental liberties of American civilians and is not held closely accountable to constitutional

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112. 323 U.S. at 246 (Jackson, J., dissenting). *See also* L. Tribe, American Constitutional Law 1000 (1978) ("The [Korematsu] decision represents the nefarious impact that war and racism can have on institutional integrity and cultural health.").

113. Noonan, Persons & Masks of the Law 67 (1976).

standards by the courts.[114] Despite this lesson and Justice Jackson's "loaded weapon" warning, *Korematsu's* principle of diminished government accountability lingers.[115]

The Supreme Court, perhaps lacking the opportune controversy, has not overruled or formerly discredited the *Korematsu* decision or its principle of judicial deference to government claims of military necessity. Nor has the Court announced in principle that the demanding standards of review now normally applicable to government restrictions of constitutionally protected liberties are unaltered by the government's claim of military necessity or national security. At best, the decisions on these issues reflect an acceptance of the Court's role as guardian of constitutional liberties during times of war and upheaval, with notable exceptions. At worst, they reflect ambiguity and vacillation.[116] Indeed, reminiscent of *Korematsu*, the

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114. As stated by Judge Patel:

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress, the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

584 F. Supp 1406, 1420.

115. Diminished government accountability is *Korematsu*'s legal legacy, whether the case is viewed as articulating a strict scrutiny standard of review, but according almost total deference to the military's unsubstantiated assertion of "necessity" or as applying a rational basis standard of review due to the ostensible absence of racial animus as motivation for the exclusionary orders. *See supra* notes 73-77 and 96-99 and accompanying text. *Compare* Brown v. Board of Education, 347 U.S. 294 (1954) (racial segregation in the field of education held unconstitutional without showing of racial animus or bad faith). *See generally* Brest, *Foreward: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976).

116. The Court's approach to the clash of war powers and civil liberties has produced a seemingly eclectic array of cases. The Court has generally subjected the military necessity rationale of civil liberties restrictions to careful scrutiny. In notable exceptions, however, it has appeared to be extremely deferential.

Concerning first amendment freedoms, see, *e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (rejecting presidential authority in the name of national security to restrain publication of the Pentagon Papers); United States v. Robel, 389 U.S. 258 (1967) (invalidating blanket prohibition of employment of communist party members in defense facilities); United States v. O'Brien, 391 U.S. 367 (1968) (applying a heightened first amendment standard of review in upholding a federal statute prohibiting draft card burning). *But see* Scheck v. United States, 249 U.S. 47 (1919) (the existence of war lessens first amendment protections); Greer v. Spock, 424 U.S. 828 (1976) (upholding military discretion to ban political speeches on open and unguarded public sidewalks on military bases).

Concerning fourth and fifth amendment freedoms, see *e.g.*, United States District Court v. United States, 407 U.S. 297 (1972) (prohibiting warrantless electronic surveillance of civilians in the interest of domestic security); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (invalidating blanket provision of Subversive Activities Control Act prohibiting issuance of pass-

Supreme Court's recent opinions in *Rostker v. Goldberg*,[117] *Haig v. Agee*,[118] *Regan v. Wald*,[119] and *United States v. Albertini*[120] have fueled perception of a trend towards diminished government accountability for national defense[121] and national security[122] restrictions of

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ports to members of communist organizations); Kent v. Dulles, 357 U.S. 116 (1958) (construing a federal statute as not authorizing secretary of state's blanket denial of passports to communist party members). *But see* Regan v. Wald, 104 S. Ct. 3026 (1984); Haig v. Agee, 453 U.S. 280 (1981); and Rostker v. Goldberg, 453 U.S. 57 (1981) (discussed *infra* in section IIIA); Zemel v. Rusk, 381 U.S. 1 (1965) (upholding executive branch's denial of all passports to Cuba following the Cuban missle crisis).

Concerning the sixth amendment see *Ex Parte* Milligan, 71 U.S. (4 Wall.) (1867) (setting aside the military conviction of a civilian rebel because civil courts were accessible and freely functioning); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (setting aside military convictions of civilians under martial law after the threat of invasion had clearly passed). *But see Ex Parte* Quirin, 317 U.S. 1 (1942) (upholding presidential authority under the Articles of War to require accused "enemy belligerent" civilians to submit to military rather than civil trials).

117. 453 U.S. 57 (1981).

118. 453 U.S. 280 (1981).

119. 104 S. Ct. 3026 (1984). *Cf.* Wayte v. United States, 105 S. Ct. 1524 (1985) (Marshall, J., dissenting) (draft registration protestor's claim of selective prosecution rejected because of his failure to prove discriminatory intent, even though he was denied review of allegedly important government documents on that issue).

120. 105 S. Ct. 2897 (1985).

121. In providing for national defense, the Constitution confers exclusive and joint war powers upon Congress and the President. Article I, Section 8, gives Congress the power to raise funds to "provide for the common defense" (cl. 1); declare war (cl. 11); raise and support the Army and Navy (cls. 12-13); make rules for governing the armed forces (cl. 14); organize and call forth the militia (cls. 15-16); and enact laws "necessary and proper" to the execution of those powers (cl. 18).

Article I, Section 9 empowers Congress to suspend the writ of habeas corpus. Article II, Section 2 designates the President "Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual Service of the United States." Article IX, Section 4 confers power jointly to protect the states against invasion and domestic violence.

The Constitution's lack of specific guidelines for exercises of war powers has contributed to long-standing tension between Congress and the President. For an excellent discussion of how this tension has "resulted in political and judicial definitions and redefinitions of the constitutionally acceptable exercise of the war power—both in terms of which branch is empowered to act and in terms of the proper scope of its authority," see Comment, *supra* note 19, at 128-33.

122. The government's power to protect the "security" of the nation has no specific textual basis in the Constitution and its emergence has not been tied to any specific constitutional provision. Instead, the government's power to protect itself and society's democratic institutions against domestic and foreign threats, as "national security" may be broadly defined, is generally considered in part an extension of the government's aggregation of war and foreign affairs powers and in part an attribute of sovereignty. *See* Note, *supra* note 16, at 1131; ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (1976).

War power measures in furtherance of national defense generally involve the military in some capacity. In contrast, national security measures generally involve executive or legislative action without direct military involvement. Combined, they comprise the self-protective powers of the federal government.

civil liberties. Viewed most critically, they suggest a judicial value judgment that the government's self-protective concerns, whether latent or explicit, specific or general, justify essentially unreviewable government restrictions of civil liberties.[123] Although these recent cases have not cast this apparent value judgment into constitutional principle—nowhere has the Court given doctrinal credence to former Justice Douglas' statement that war powers "may be the great leveler of other rights"[124]—a hands-off judicial attitude is discernable.

B. *Recent Cases*

1. *Rostker v. Goldberg*[125]

The controversy in *Rostker* centered upon the Selective Service Act which empowered the President to require draft registration of males but not females. The foreword to Justice Rehnquist's majority opinion is replete with language alluding to the special degree of judicial deference to Congress' authority over national defense and military affairs.[126] The Court acknowledged that Congress cannot

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123. *See generally* Graney, *supra* note 68, at 733 ("The impact of *Rostker* on the constitutional safeguards of individual liberties *vis-a-vis* the war power is enormous. The Court set a dangerous precedent by relaxing the constitutional safeguards of civilians when Congress acts pursuant to the war power.").

124. DeFunis v. Odegard, 416 U.S. 312, 340 n.20 (1974) (Douglas, J., dissenting). *See also* Brandenburg v. Ohio, 395 U.S. 444, 451 (1969) (Douglas, J., concurring). The *Korematsu* majority opinion and the *Hirabayashi* opinion also ignored Sterling v. Constantin, decided only 12 years earlier. The Texas government had ordered military control over production operations, claiming that the producers were engaged in enormous physical waste and were contributing to "insurrection." The Court rejected the state's contention that courts may not review the sufficiency of the factual basis of military orders affecting civilians. *Id.* at 400. Upon review of the record, the Court affirmed the district court's finding that "there was no military necessity which, from any point of view, could be taken to justify the actions of the Governor." *Id.* at 403-04. Interestingly, the Court was willing to require a sound factual foundation in *Sterling* for military actions affecting property interests but was unwilling to do so in *Korematsu* for military actions affecting personal freedom. *Cf.* Moyer v. Peabody, 212 U.S. 78 (1909) and cases following it, *e.g.*, United States *ex rel.* Seymour v. Fischer, 280 F. 208 (D. Wis. 1922); United States *ex rel.* McMaster v. Wolters, 268 F. 69 (S.D. Tex. 1920).

125. 453 U.S. 57 (1981).

126. The Court stated:

> This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the court accorded Congress greater deference . . . . This Court has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies . . . . Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked.

Rostker, 453 U.S. at 65.

This non-interventionist view of the Court's role differed markedly from the Court's earlier conception of its role in United States v. O'Brien, 391 U.S. 367 (1968) and Kennedy v.

disregard the Constitution when it acts concerning military affairs. It implied, however, that a lessening of judicial scrutiny is appropriate. "In that area, as in any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context."[127]

In addressing the gender discrimination claims, the Court refused to specify the standard of review and declined any further "refinement" of the level of scrutiny.[128] Without saying so explicitly, the Court seems to have applied the rational basis standard[129] instead of the intermediate standard ordinarily applied in gender discrimination cases.[130] Despite the gender classification and despite the President's official recommendation to expand registration to include women, the Court stated that it deferred to congressional judgment because Congress had fully debated the gender issue.[131] The Court found that Congress did not act "unthinkingly" or "reflexively and not for any considered reason."[132]

Mendoza-Martinez, 372 U.S. 144 (1961). *O'Brien* noted Congress' "broad and sweeping" power to raise armies. 391 U.S. at 377. It nevertheless deemed it appropriate to apply an exacting first amendment standard, given the importance of the liberty involved, to evaluate indirect government restrictions on symbolic political speech. *Mendoza-Martinez* noted Congress' plenary power to raise armies. It also acknowledged, however, the "greatest temptation to dispense with fundamental constitutional guarantees" during emergencies and the judiciary's role in providing "watchful care" in protecting constitutional liberties. 372 U.S. at 165.

127. 453 U.S. at 67 (citations omitted).

128. *Id.* at 69. Justice Rehnquist did not specify the standard of review for reasons which seemed to contradict the entire first section of his opinion concerning the substantial deference accorded congressional war power action: "Announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications . . . may all too readily become facile abstractions used to justify a result." *Id.* at 69-70.

129. "In deciding the question before us, we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68.

130. In addition, the Court hinted, without expressly stating so, that the exemption of women satisfied the intermediate standard of review. "No one could deny that under the test of Craig v. Boren, *supra*, the Government's interest in raising and supporting armies is an 'important governmental interest' "; *Id.* at 70, and "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose [raising combat forces] in authorizing registration . . . Craig v. Boren." *Id.* at 79. *Cf.* Sedlock, *Recent Decisions — Rostker v. Goldberg,* 20 DUQ. L. REV. 519, 533 (1982) (indicating that the Court in *Rostker* adopted the "middle-tier" standard of review).

131. *Id.* at 65.

132. *Id.* at 71. In attempting to distinguish other cases involving illegal gender classifications, the Court concluded that the decision of congressional committees to exclude women "clearly establishes" that the decision to exempt women from registration was not an "accidental byproduct of the traditional way of thinking about females." *Id.* at 74 (citations omitted). This conclusion is dubious. Unanimity of decision by congressional committees can hardly be said to "clearly establish" that a decision is free from outmoded sexist views. Indeed, in the

Finally, the Court concluded that the Act passed constitutional muster because women and men are not similarly situated groups since federal statutes and tradition prohibited women from combat.[133] The Court, however, failed to examine the validity of those statutes other than to cite the practices of other countries and congressional preference. Concerning conscription of women for noncombat roles, the Court accepted Congress' conclusion, based on military representations, that the inclusion of women recruits for noncombat roles would create significant administrative problems concerning military preparedness and future mobilization.[134] The district court had found this conclusion to be illogical and unsupported by evidence, especially because the military had embarked on an active program to recruit women.[135] The Court reversed the district court's judgment which had invalidated the all-male draft, and stated that the district court "was quite wrong in undertaking an independent evaluation of this evidence [whether the inclusion of women would be "positively detrimental to the important goal of military flexibility"] rather than adopting an appropriate deferential examination of Congress' evaluation of that evidence."[136]

Taken most narrowly, *Rostker* seems to fit the established and limited principle of judicial deference concerning governmental controls over military personnel,[137] as distinguished from military control over civilians. The opinion denotes Congress' paramount power to raise armed forces[138] as "control over military operations and personnel."[139]

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context of racial concerns, a near unanimous Congress passed the criminal statute involved in *Korematsu* and was deemed to have ratified the curfew and exclusion.

133. *Id.* at 78. The Court thereby implied that the male-only draft provision did not present a suspect gender classification because it did not treat differently persons "similarly situated." *Cf.* Schleslinger v. Ballard, 419 U.S. 498 (1975).

134. *Rostker*, 453 U.S. at 81.

135. *Id.* at 63.

136. *Id.* at 83.

137. *See infra* note 174.

138. Nor can it be denied that the imposing number of cases from this Court previously cited suggest judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.

453 U.S. at 70.

Involuntary military service is the one sacrifice of civilian freedom specifically contemplated by the Constitution. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1961) ("One of the most important of these [obligations of citizenship] is to serve the country in time of war and national emergency.").

139. *Rostker* cited the following cases: Schlesinger v. Ballard, 419 U.S. 498 (1975) (pro-

Rostker's broad language, however, can also be construed expansively: congressional war power measures that intentionally discriminate against civilian women are subject to the toothless rationality test. This implies that the exercise of congressional war powers attenuates the standard of review.[140]

2. *Haig v. Agee*[141] and *Regan v. Wald*[142]

The breadth of *Rostker*'s language and its ambiguous message about standards of review are especially unsettling in light of two recent cases involving executive responses to increasing tensions with Cuba.

Haig upheld the Secretary of State's discretion to revoke passports of citizens deemed to pose a threat to national security. Chief Justice Burger's 1981 opinion is replete with conflicting signals. The opinion acknowledged that the President's power over foreign relations is subject to constitutional limitations.[143] It then declared, however, that the "freedom to travel abroad with . . . a passport . . . is subordinate to national security and foreign policy considerations."[144] Integral to the Court's value ordering was the premise that "no governmental interest is more compelling that the security of the Nation . . . . Protection of the foreign policy of the United States is a governmental interest of great importance."[145]

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motion policies for navy personnel); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("composition, training, equipping and control of a military force"); Parker v. Levy, 417 U.S. 733 (1974) (Uniform Code of Military Justice applicable to military personnel); Middendorf v. Henry, 425 U.S. 25 (1976) (summary court-martial of military personnel); Brown v. Glines, 444 U.S. 348 (1980) (restraint of right to petition by military personnel); Simmons v. United States, 406 F.2d 456, 459 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969) ("necessity method of selection, and composition of our defense forces.") *See supra* note 179. Greer v. Spock, 424 U.S. 828 (1976) is the only case discussed which involved liberties of civilians, and that case involved activities on a military base and was justified by the need to maintain discipline over military personnel.

140. *Rostker*'s sweeping language of minimal judicial scrutiny was reiterated recently in Chappell v. Wallace in the context of internal military affairs. 462 U.S. 296 (1983). *Chappell* held that enlisted military personnel cannot maintain a damage suit against superior officers for alleged constitutional violations. The unique disciplinary structure of the military establishment and Congress' failure to provide a statutory remedy in such situations constituted "special factors" which precluded the availability of a *Bivens*-type remedy. *See generally* Selective Service System v. Minnesota Public Service Research Group, 104 S. Ct. 3348 (1984) (upholding the Department of Defense Authorization Act of 1983 which denies federal financial aid to male students failing to register for the draft.)

141. 453 U.S. 280 (1981).

142. 104 S. Ct. 3026 (1984).

143. 453 U.S. at 289 n.17.

144. *Id.* at 306.

145. *Id.* at 307. In view of this value ordering, the Court stated, "[m]atters intimately

Haig's apparent subordination of the right to travel abroad to national security interests as a matter of constitutional principle is explained technically by the Court's relegation of that right to the category of "non-fundamental" rights.[146] In the larger view, the opinion's sweeping language of judicial deference concerning national security matters and its diminution of the right restricted suggest a semantic weighing approach in which asserted security interests of the nation inevitably prevail over an individual's readily contractable liberty interests.[147]

The Court's recent decision in *Regan* is also illustrative. *Regan* involved the Department of Treasury's unilateral restriction of American currency transactions in Cuba. The restriction had the anticipated although unspecified effect of precluding all business and political, and most tourist travel to Cuba. Its purpose was to shrink Cuba's pool of resources for supporting "armed violence and terrorism." The restriction was rooted in the Trading with the Enemy Act and the executive's foreign policy power.[148]

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related to foreign policy and national security are rarely proper subjects for judicial intervention." *Id.* at 292. *See also* Wayte v. United States, 105 S. Ct. 1524, 1533 (1985). ("Few interests can be more compelling than a nation's need to ensure its own security . . . . Unless a society has the capability and will to defend itself from aggressions of others, constitutional protections of any sort have little meaning.")

146. "The freedom to travel outside the United States must be distinguished from the right to travel within the United States." 453 U.S. at 306. The Court reasoned that the privileges and immunities clause of the fourteenth amendment, made applicable to the federal government by the fifth amendment's due process clause, protects only interstate travel. *But see* Aptheker v. Secretary of State, 378 U.S. 500 (1964) and Kent v. Dulles, 357 U.S. 116 (1958) which included travel abroad among constitutionally protected liberties.

147. *See* Paust, *supra* note 18, at 739 (commenting on *Haig* and the illusion of constitutional limits to executive power "if previously recognized constitutional freedoms are interpreted away or depleted in order to . . . assure that 'governmental interests' in 'national security and foreign policy' will always prevail.").

In Greer v. Spock, 424 U.S. 828 (1976), the Court avoided careful judicial scrutiny of the military necessity justification for restrictions of civilian political speech by narrowing the scope of first amendment protections on military bases. *Greer* upheld military regulations that prohibited civilian distribution of literature which "appeared" to the military base commander to present a "clear danger" to military loyalty or discipline.

In apparent conflict with Flowers v. United States, 407 U.S. 197 (1972), *Greer* deferred to the military's control over civilian speech because it deemed the site of distribution of political literature—an open, uncontrolled street and sidewalk of a military base—not a public forum for expressive activity.

The dissent by Justices Brennan and Marshall suggested that the majority's approach was motivated by an excessively deferential attitude towards all national defense-related matters, cautioning that the first amendment should not evaporate with "the mere intonation of interests such as national defense, military necessity or domestic security." *Id.* at 852.

148. A 1982 amendment to Regulation 560 of the Cuban Assets Control Regulations (CACR) severely restricted travel-related expenditures in Cuba. The CACR, which were originally promulgated under the Trading with the Enemy Act (TWEA), arose out of a declara-

Through an arduous analysis of legislative history, the Court found that Congress intended to exempt the particular restriction from the International Emergency Economic Powers Act which required prior congressional consultation and a declaration of national emergency. In disposing of the right to travel issue, Justice Rehnquist, joined by four justices, found that the restriction was justified by "weighty concerns of foreign policy."[149] As to the legitimacy of those concerns, the opinion cited *Zemel v. Rusk*[150] and stated: "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' "[151] Citing *Haig v. Agee*, the Court found a State Department affidavit opining that Cuba supported terrorism in the Western Hemisphere to provide "an adequate basis under the Due Process Clause . . . to sustain the President's decision."[152]

The executive's broad authority to conduct diplomatic and economic relations with foreign countries is well-established.[153] *Regan*, however, appears to wander beyond safe borders. Unlike *Haig*, the government in *Regan* made no attempt to establish that the restricted individuals, by traveling to Cuba, personally posed a national security risk.[154] *Regan* implies that the Court will uphold blanket restric-

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tion of "peace time emergency" following the Cuban Missile Crisis in 1962. 104 S. Ct. 3026 (1984). In 1977, Congress enacted the International Emergency Economic Powers Act (IEEPA) which required a declaration of national emergency and consultation with Congress prior to the promulgation of restrictive measures such as amended section 560. The IEEPA, however, exempted from these requirements then existing "authorities" conferred upon the President by the TWEA. *Id.* at 3027. Section 560 at that time did not restrict travel expenditures in Cuba. *Id.* The plaintiffs in *Regan* challenged the amendment to section 560 was violative of IEEPA requirements, claiming that the exemption provision was inapplicable and was violative of the fifth amendment right to travel.

149. *Id.* at 3038-39.

150. 381 U.S. 1 (1965). The *Regan* opinion equated the two cases because their respective restrictions "made no effort to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic relations." Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

151. 104 S. Ct. 3026, 3038-39.

152. *Id.* at 3039. McCarthy era cases Carlson v. Landon, 342 U.S. 524 (1951) and Harisiades v. Shaughnessy, 342 U.S. 580 (1952) concerned statements about the expansive scope of congressional and executive foreign policy control over Communists in the United States.

153. The Court has acknowledged the executive's expansive scope of authority over the "vast external realm" of "foreign policy and national defense," implicitly distinguishing external relations from control over domestic threats to national security. Haig v. Agee, 453 U.S. 280, 291 (1981). "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Id.* (quoting Curtiss-Wright Export Corp. v. United States, 299 U.S. 304, 319 (1936)).

154. Juxtaposed to *Haig*'s expansive language concerning foreign policy and its devalu-

tions of civil liberties imposed under the aegis of the executive's foreign policy power even if the restrictions are justified by vaguely-defined and largely unsubstantiated threats to national security.

3. *United States v. Albertini*[155]

Most recently, in the context of national defense, a majority of the Supreme Court appeared to emasculate the third prong of the heightened first amendment standard for incidental regulations of political speech. James Albertini was convicted of violating a military base commander's bar order prohibiting Albertini from entering an Air Force base in Hawaii. The bar order was issued in 1972 because Albertini had poured blood on Air Force records as a protest against the Vietnam War. In 1981 Albertini entered the base to distribute anti-nuclear war materials during a base open-house in which military weaponry and preparedness were displayed to the public.

In evaluating the constitutional validity of the procedures authorizing the bar order, Justice O'Connor, writing for five other justices, appropriately cited the heightened first amendment standard articulated in *United States v. O'Brien*.[156] The third prong of that standard requires that the "incidental regulation of First Amendment freedoms [be] no greater than essential to achieve the [substantial government] interest."[157] In *Robel v. United States*,[158] the Court forcefully articulated the policies underlying the "less drastic impact" standard for first amendment cases in a national defense context, and applied that standard in invalidating a congressional prohibition of employment by government contractors of communist party

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ation of the right to travel abroad, was the Court's finding of a definite and immediate threat to members of the United States intelligence services posed by a particular individual restricted from travel. That individual, a former CIA agent, openly vowed to disrupt CIA activities abroad, *id.* at 282, n.2, and his prior disclosures of sensitive intelligence information abroad led to violence. *Id.* at 285, n.7. He had been deported from other countries for threatening their security. *Id.* at 308 n.59. The Court affirmed the Secretary of State's findings of "a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities" and no other "avenue open to the government to limit these activities." *Id.* at 308-09.

155. 105 S. Ct. 2897 (1985).

156. 391 U.S. 367 (1968) (rejecting a first amendment challenge to a federal statute prohibiting, inter alia, draft card burning, finding no narrower means of furthering the government's important interest in assuring immediate draft status identification); Wayte v. United States, 105 S. Ct. 1524 (1985) (rejecting a draft registration protestor's challenge of selective prosecution of only persons actively opposing registration).

157. *Id.* at 377.

158. 389 U.S. 258 (1968).

members on private premises deemed "defense facilities."[159] The analytical construct established in *Robel* focused on furthering the government's security interest without unnecessarily restricting the first amendment freedoms at stake.

The *Albertini* Majority, however, ignored *Robel* and in effect rewrote the "no greater than essential standard" by focusing solely upon whether the government's interest was furthered at all by the restriction. No consideration was given to the restriction's impact upon the constitutional liberty:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. . . . Instead, an incidental burden on speech is no greater than essential, and therefore is permissible under *O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.*[160]

The Court seems to be saying that if the government's interest alone is better served with the restriction than without it, the restriction passes constitutional muster. This decision appears to relegate the previously heightened first amendment standard to its rational basis step-cousin.

Whether the *Albertini* majority intended to make a sweeping revision of first amendment standards is unclear. What does emerge, however, is an apparent value judgment favoring expansive, if not unfettered government authority to restrict civil liberties when the government asserts a national defense or security rationale.[161]

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159. Recognizing that the government's interests in protecting security at defense facilities was "not insubstantial," the Court focused on "less drastic impact," noting that "precision of regulation must be the touchstone in an area so closely touching our most precious freedom." *Id.* at 265. The Court found that the provision's blanket employment prohibition encompassed inactive Communist Party members and those members who disagreed with the Party's unlawful goals; it also encompassed jobs unconnected to sensitive security matters. *Id.* at 266. The Court thus determined that the restriction could be more narrowly drawn to achieve its purpose. It could prohibit employment of individuals who by personal belief and job opportunity posed a threat of espionage and sabotage to sensitive operations, without prohibiting employment of those who did not. So narrowed, the restriction would address the government's asserted security concerns and have a less drastic impact on the first amendment right of association. *Robel* followed the approach outlined in Aptheker v. Secretary of State, 378 U.S. 500 (1964) (invalidating as overly broad a section of the Subversive Activities Control Act making it unlawful for any member of a communist organization to apply for a passport), and Kent v. Dulles, 357 U.S. 116 (1958) (construing a federal statute as not authorizing the Secretary of State's blanket denial of passports to members of the Communist Party).

160. 105 S. Ct. 2897 (emphasis added).

161. *See also* CIA v. Sims, 105 S. Ct. 1881 (1985). *Sims* upheld the CIA director's refusal to disclose, pursuant to a Freedom of Information Act request, the names of institutions

The apparent value judgments and expansive language of *Rostker*, *Haig*, *Regan* and *Albertini* signal potentially diminished government accountability over matters involving "national security." This raises serious concerns about the accommodation of government self-protective power and civil liberties and about guidelines to future government conduct.

IV. Toward a Better Accommodation of Government Self-Protective Powers and Civil Liberties

As global tensions continue,[162] a clear articulation of constitutional principles is needed. These principles must afford the government ample leeway to tackle legitimate national dangers and, at the same time, reduce the potential of *Korematsu*-type government overreaction to limited or illusory threats in the name of military necessity or national security.

A. *The Proposal*

Suggested here is an organizing principle concerning selection of standards of judicial review. It represents a synthesis of existing principles and requires neither the development of new substantive doctrine nor the direct overruling of case law. The principle has been neither adopted nor rejected by the Supreme Court. The principle is this: Except as to actions under civilly-declared martial law, the standard of judicial review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that "military necessity" or "national security" justifies

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and individuals participating in the CIA-financed MKULTRA project established in the 1950's to counter perceived Soviet advances in brain-washing techniques. Several Americans died as a result of tests administered to them without their knowledge. The Court held that under the National Security Act of 1947, the Director had "wide-ranging authority to protect intelligence sources" and that "it is the responsibility of the Director . . . not that of the judiciary to weigh the variety of complex and subtle factors." *Id.* at 1894. Justice Marshall's stinging dissent addressed the Majority's view that courts are not appropriate or competent bodies to review the "weighing" process. The Majority, he noted, completely ignored Congress' express intention in amending the National Security Act to have courts scrutinize executive determinations of confidentiality as a means of balancing government security needs with the public's interest in disclosure.

> At one time, this Court believed that the judiciary was not qualified to undertake this task . . . . Congress, however, disagreed, overruling both a decision of this Court and a Presidential veto to make clear that precisely this sort of judicial role is essential if the balance that Congress believed ought to have been struck between disclosures and national security is to be struck in practice.

Id. at 1898.

162. *See supra* notes 15-19.

the challenged restrictions.

In operation, this means that the standard of review of governmental action is to be determined according to the existing constitutional doctrine which focuses on the right restricted. That standard is not altered by the government's assertion that its powers of self-protection are involved. The nature of the government's self-protective justification and the significance of the government interest asserted are but ingredients in the application of the fixed constitutional calculus. Thus, a heightened standard of review will be applied to evaluate government restrictions of constitutionally-protected liberties[163] ostensibly justified by military necessity or national security. Government restrictions of other individual interests, when justiciable, will be evaluated by the rational basis standard, whatever the justification for the restrictions.

Is this proposed principle functional? Is it viable? Several rudimentary questions require examination:

Does the principle in operation protect recognized civil liberties at the expense of the government's ability to defend the country against legitimate dangers?

Does the principle broaden the courts' historical role beyond that in constitutional adjudication and embroil the judiciary in matters beyond its competence?

Does the principle synthesize existing case law or does it require an overruling of precedent?

The following discussion of these questions suggests that the proposed principle is viable and indeed salutary for four reasons. First, it structures an accommodation of competing constitutional concerns—government self-preservation and individual liberties—without creating or expanding existing constitutional rights.[164]

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163. As discussed *supra* note 11, "constitutionally protected personal liberties" are the civil liberties deemed essential to a functioning democracy and just society and are accorded special protection from governmental interference by the amendments to the Constitution, either by textual reference or judicial construction. *See generally* Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1962) (individual liberties fundamental to American institutions are not to be destroyed under the pretext of preserving those institutions). That special protection is manifested in heightened standards of judicial review. United States v. Robel, 389 U.S. 258, 272 (1967) (each regulation must be examined in terms of its potential impact on fundamental rights, the importance of the end sought and the necessity for the means adopted) (Brennan, J., concurring).

164. In operation, the suggested principle by-passes the debate about judicial identification of fundamental rights not explicitly recognized by the text of the Constitution. *See supra* note 11 and *infra* note 195. In a particular dispute, an evolving body of law identifying fundamental liberties is first applied independent of the suggested principle. Potential government justifications for restrictions of fundamental liberties, such as military necessity or national

Second, it is rooted in the law's historical recognition of a judiciary "watchful" over civil liberties during times of national stress.[165] Third, it does not extend the judiciary beyond the boundaries of its competence. Finally, especially in view of the ambiguity created by recent court decisions reminiscent of *Korematsu*, it brings a measure of clarity to the law without requiring direct overturning of well-settled doctrine.

B. *An Accommodation of Government Self-Protective Powers and Civil Liberties*

The government needs flexibility to counter threats to its institutions and people, and to deal with national emergencies. Just as important, especially during times of national stress, cherished democratic rights to speech, association, and religion; racial and gender equality; unfettered voting; and imprisonment only upon indictment and trial and due process need safeguarding. Such an accommodation is essential to a functioning democracy. Overemphasis on the latter leaves the government weak in defense of the country against actual danger.[166] Overemphasis on the former means that the very liberties the country is attempting to defend against external threat are lost.[167]

The importance of the suggested principle is that it accommodates competing values and establishes parameters for guiding future government conduct.[168] It says that, according to existing constitu-

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security, are not factors in this threshold analysis. When the liberty involved is deemed fundamental according to existing doctrine, the suggested principle applies to assure that the government's asserted self-protective justification does not attenuate the standard of review.

165. *See infra* section IV D.

166. United States v. United States District Court, 407 U.S. at 312. ("[U]nless government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered."). *Id.*

167. As acknowledged in United States v. Robel: "[T]his concept of national defense cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term national defense is the notion of defending those values and ideals which set this Nation apart." 389 U.S. at 264. Former President Eisenhower defined the problem as the "coalescence of military and industrial power" and its threat to democratic liberties and processes:

> [T]his conjunction of an immense military establishment and a large arms industry is new in the American experience . . . . [W]e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex . . . . We must never let the weight of this combination endanger our liberties or democratic process.

N.Y. Times, Jan. 18, 1961, p. 22 (cited in *Warren*, *infra* note 176, at 202-03).

168. To a certain extent, a standard of review is a concept malleable in the hands of those who apply it in a particular instance. It can be stretched and twisted into a "facile

tional doctrine, the government is generally free to undertake reasonable or even merely expedient action in defense of the country when "fundamental liberties" of Americans are not restricted. For example, in enacting war-related measures regulating the civilian economy;[169] initiating and conducting war or hostilities abroad;[170] in deciding upon military weaponry, manpower needs and deployment;[171] in dealing with aliens of enemy countries;[172] or in undertaking for-

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abstraction . . . used to justify a result." Rostker v. Goldberg, 453 U.S. at 70. In the larger view, however, a standard of review, and particularly a heightened standard of review, is an expression of societal value-ordering. It functions as a guidepost to future conduct both for the government to assess the likely validity of an intended restriction, and for individuals to assess the propriety of their response to government restrictions.

This appears to have been a salient effect of a heightened standard of review in gender discrimination cases. *See Women's Issues Survive Supreme Court's Swing to the Right*, San Francisco Examiner, August 19, 1984, at A-12, col. 1-6.

169. War power regulations of civilian economic interests are accorded considerable judicial deference. *See, e.g.*, Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146 (1919) (upholding federal war power legislation prohibiting the sale of liquor after termination of World War I but before the end of military demobilization); McKinley v. United States, 249 U.S. 397 (1919) (upholding the Secretary of War's delegated authority to prohibit houses of prostitution in civilian areas near military installations); Northern Pacific Railway Co. v. North Dakota, 250 U.S. 135 (1919) (upholding strict congressional regulation of railroads during war); Bowles v. Willingham, 321 U.S. 503 (1944) (the existence of war and attendant "national defense and security needs" deemed sufficient justification for the Emergency Price-Control Act which authorized administrative determination of rents for defense area housing); Woods v. Miller, 333 U.S. 138 (1948) (upholding federal legislation which continued rent control after the end of the war, noting that Congress' war power extends to the remediation of evils arising out of the exigencies of war). Economic interests, at least since the essential demise of doctrines of economic due process and liberty of contract, (*see* Nebbia v. New York, 291 U.S. 502 (1934); Dandridge v. Williams, 397 U.S. 471 (1970) do not fall within the special category of fundamental liberties.

170. Executive and legislative decisions about the initiation and conduct of military hostilities are generally deemed "political questions" and therefore non-justiciable issues. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d. Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (the President's decision to bomb Cambodia after removal of American forces is a "military and diplomatic" matter beyond the competency of the court); Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923) ("[T]he power which declared the necessity [of war] is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time.") For an excellent discussion of the classical and prudential formulations of the political question doctrine, see Thomas, *Presidential War-Making Power: A Political Question?* 35 S.W.L.J. 897 (1981).

171. *See, e.g.*, Gillian v. Morgan, 413 U.S. 1 (1975) (the "training, weaponry and order of the Ohio National Guard" is non-justiciable); Bertlesen v. Cooney, 213 F.2d 161 (5th Cir.), *cert. denied*, 348 U.S. 856 (1954) (the level of military manpower is non-justiciable).

172. The federal government's plenary power over aliens during hostilities derives from the executive's conferred authority over foreign affairs and the inherent authority of a sovereign nation dealing with threats from foreign nations. *See, e.g.*, Harisades v. Shaughnessy, 342 U.S. 580 (1951); Johnson v. Eisentrager, 339 U.S. 763 (1950); *Narenji v. Civiletti: Equal Protection and the Iranian Crisis*, 31 CATH. U.L. REV. 101 (1981).

eign policy measures to meet foreign threats to national security.[173] Under existing doctrine, the government can also act upon "some rational basis," for the most part, to restrict the liberties of military personnel.[174]

Much more is required, however, to justify impositions upon those liberties of American *civilians* deemed most fundamental by general constitutional doctrine.[175] According to the suggested princi-

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173. *See supra* note 153.

174. Courts have long recognized the need for special rules of conduct and discipline for military personnel whose "primary business" is to "fight or be ready to fight" in defense of the country. Toth v. Quarles, 350 U.S. 11, 17 (1955); Middendorf v. Henry, 425 U.S. 25 (1976). That recognition is rooted in the Constitution (Subsections 12 and 13 of Section 8, Article I of the Constitution give Congress the power to raise and support the Army and Navy, and subsection 14 empowers Congress to create special rules for governance of the armed services); the congressional enactment of the Uniform Code of Military Justice (10 U.S.C. § 801 (et seq. (1983)), and the historically-established difference between the needs of a military system and those of civilian society. Parker v. Levy, 417 U.S. 733, 743 (1974) (discussing in depth the historical roots of the Court's acknowledgment that "the military is, by necessity, a specialized society separate from civilian society"); Schlesinger v. Councilman, 420 U.S. at 757. ("The laws and traditions governing [military] discipline have a long history . . . they are founded on unique military exigencies as powerful now as in the past."); Middendorf v. Henry, 425 U.S. at 38 (noting "the difference between the diverse civilian community and the much more tightly regimented military community.").

In view of the military's need for special rules, the Court has indicated its general reluctance to scrutinize carefully the administration of those rules. Middendorf v. Henry, quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress."). 425 U.S. at 43. The Court thus has on occasion narrowed its scope of inquiry and deemed restrictions "permissible within the military that which would be constitutionally impermissible outside it." Parker v. Levy, 417 U.S. at 758. *See generally* Martin v. Mott, 12 U.S. 19 Wheat. (1827) (approving military law based on custom and usage); Smith v. Whitney, 116 U.S. 167 (1886); United States v. Fletcher, 148 U.S. 84 (1893); Swaim v. United States, 165 U.S. 553 (1897).

Not all restrictions of liberties of military personnel, however, are immune from demanding judicial scrutiny. Indeed the Court has indicated that under certain conditions restrictions of military personnel are subject to exacting judicial scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1974) (declaring discriminatory measures against women "inherently suspect," the Court subjected Congress' advantageous treatment of male military personnel in conferring dependency benefits to "strict scrutiny"). Unfortunately, the Court has not adopted a principled means of determining when full constitutional protection is to be afforded the rights of military personnel and when it is not. *See, e.g.*, Parker v. Levy, 417 U.S. at 769 (1974) (Douglas, J. dissenting) (Douglas noted that while in some circumstances limitations on speech of military personnel are justified, the government cannot prohibit free speech by personnel at all times.); *cf.*, Dronenburg, v. Zeck, 746 F.2d 1579 (D.C. Cir. 1984) (the constitutional right of privacy does not encompass homosexuality and therefore a heightened standard of review should not be applied to Navy regulations authorizing discharge of homosexuals in the Navy).

175. When threats to the nation's security become so overwhelming that the "branches of the government are unable to function, or their functioning would itself threaten the public safety," such as during war, civil authority can declare rule by martial law to "preserve order and to insure public safety." Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946) (Stone,

ple, the government is empowered to restrict fundamental liberties for reasons of military necessity or national security only when the restriction is justified by compelling or substantial government interests which can be established by a credible basis in fact and when the restriction is tailored narrowly to the government's justification.[176] Conversely, the government cannot justify such restrictions, as it did in *Korematsu*, if they are based on stereotypes, half-truths, archaic tradition, ill-supported rumor, supposition, or conjecture.[177]

The overall impact of the suggested principle on the government's vast self-protective powers would be relatively minimal. Checks to governmental excesses in the name of military necessity or national security through exacting judicial scrutiny would apply only when constitutional doctrine ordinarily demands heightened scrutiny. And if the country is at war, surely the most exigent of circumstances, and the defense of the country or part of the country requires the suspension of civil liberties, the government can do so by declaring martial law. Until conditions become so extreme that martial law is appropriate, the ordinary standards of judicial review apply.

C. *The Role of a "Watchful" Judiciary During Times of National Stress*

Two premises about judicial function underlie the suggested principle. The first, which concerns the judiciary's role in constitutional adjudication, is that the dangers inherent in congressional or executive restrictions of fundamental liberties of Americans during times of national stress impel careful judicial scrutiny of such restrictions. The second premise, which concerns judicial competence, is that the judicial method of decisionmaking lends itself to fair evaluations of government determinations of military necessity and national security. This section examines the first premise and its roots in judi-

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C.J., concurring). Martial rule temporarily suspends the exercise of most civil liberties. By requiring the declaration of martial law as a triggering device for lessened judicial scrutiny, the principle guarantees that the danger involved is more real than perceived and that civil authorities have ultimate control over the liberties of the civilian population.

176. Former Chief Justice Warren acknowledged the "separation and subordination of the military establishment" to be a "compelling principle" of democracy. Warren, *The Military Bill of Rights*, 37 N.Y.U. L. REV. 181, 197 (1962). Upon historical review he found that judicial deference to claims of "military necessity in defense of the nation" demonstrated "that such a restriction upon the scope of review is pregnant with danger for individual freedom" and that the "danger inherent in the existence of a huge military establishment" required that the courts apply an "exacting standard" of review. *Id.*

177. *See infra* notes 214-15.

cial history. The following section examines the second premise.

Two conflicting views emerge in the debate about the judiciary's role in reviewing clashes of government war powers and civil liberties. One is a non-interventionist view of almost total judicial deference to the war power judgments by the political branches.[178] Its basic rationale is that the Constitution does not expressly empower the politically unaccountable judiciary to second-guess the popularly elected political branches, and that the political branches, unencumbered by the judicial method, are better equipped to deal with the exigencies underlying war power and national security actions.[179] Integral to this view is a belief in the able functioning of the political branches' system of checks and balances, buttressed by an informed electorate that can express through the ballot any displeasure with the political branches.

The other view—a view predominantly reflected in the Supreme Court's decisions—is that the judiciary provides "watchful care" over constitutional liberties, especially during apparent crises.[180] Under this rationale, political checks and balances against government excesses are predicated either on executive self-restraint or on majority rule by elected representatives with specific constituencies. Without careful judicial review, those in the minority and those without political influence are vulnerable to a military or president supported by "intemperate [political] majorities," especially during crises.[181] The tension between these views is an offspring of

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178. In his concurring opinion in *Korematsu*, Justice Frankfurter noted the adage that the "war power of the government 'is the power to wage war successfully' " and suggested that courts should refrain from scrutinizing government exercises of its war power: "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours." Korematsu v. United States, 323 U.S. at 224-25. Justice Rehnquist's opinion in Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) articulates a similar view: "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other areas has the Court accorded Congress greater deference."

179. *See generally* Keynes, *supra* note 104, at 69-70.

180. *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 8 (1867). *Milligan* noted that the existence of war or generally exigent circumstances, of themselves, do not abrogate constitutional guarantees: "No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government." *Id.* at 121; *accord* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring). Accordingly, during commotion, when "the passions of men are aroused and the restraints of law weakened," constitutional liberties "need and should receive, the watchful care of those intrusted [sic] with the guardianship of the Constitution and laws" — the courts. 71 U.S. (4 Wall.) at 124.

181. *See* Keynes, *supra* note 104, at 75 ("Since a basic objective of American consitutionalism is to advance the individual's freedom or liberty, judicial review can serve to protect individuals and minorities against repressive and intemperate majorities"); REVELEY, WAR

the general debate about the judicial role in constitutional adjudication.[182]

Wisdom can be drawn from both views. Courts generally should refrain from interfering in the war power and national security decisions of the elected political branches. Mistakes generally should be corrected through political checks and balances and through the vote of political constituencies. Careful judicial scrutiny, however, is appropriate if not essential in special situations—when profound and irreparable consequences will flow directly from excesses of the moment by the popularly elected political branches.[183] The question, therefore, is not whether but when, and in what special situations, are courts to impose themselves upon the political process and to scrutinize the self-protective judgments of the political branches. The answer must allow judicial action "in situations where there is the most at stake in terms of personal freedom and the political branches are most likely to over-react"—when the government deems it necessary to restrict the most cherished liberties of American civilians to guard the nation's security.[184]

In this special situation, heightened judicial scrutiny is appropriate because it addresses the inherent weakness in the system of

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POWERS OF THE PRESIDENT AND CONGRESS — WHO HOLDS THE ARROWS AND OLIVE BRANCHES 206 (1981) ("Judges are . . . better able than politicians to avoid the dangers accompanying constitutional evolution by practice. When ruling on the authority of the President or Congress, courts are less likely to adopt self-servicing interpretations.").

182. That debate, whether labeled strict constructionism versus activism, interpretivism versus non-interpretivism, or positivism versus natural law, centers upon the undemocratic character of judicial invalidation of decisions by the elective branches, especially when the individual rights protected are not specifically enumerated in the Constitution. *See* J. ELY, *supra* note 11.

183. Calling for a "more searching judicial inquiry" in his much-discussed footnote in United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), former Chief Justice Stone cited the precarious political position of "discrete and insular minorities" in a democratic society as distinguished from those with access to the political process. Notwithstanding Justice Rehnquist's objection to the vagueness of this formulation of "suspect classifications" (Sugarman v. Dougall, 413 U.S. 643, 657 (1973) (Rehnquist, J., dissenting)), the Court has on at least three recent occasions suggested that those groups excluded from the institutional political process are deserving of particular judicial solicitude. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (quoting San Antonio Independent School District v. Rodriquez, 411 U.S. 128 (1973)) ("[the class to be a suspect must be, among other alternatives,] relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process."); Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate"; *but see* Foley v. Connelie, 435 U.S. 291, 296 (1978)). Concerning the practical problems with Justice Stone's formulation see J. ELY, *supra* note 11, at 151.

184. *See supra* notes 15-18.

majority rule;[185] it is consistent with the principle of separation of powers as modified by some overlap of jurisdiction to provide checks to excessive power in any branch;[186] it is consistent with the purpose of the Bill of Rights—to protect the most precious freedoms of individuals from unwarranted intrusions by the executive and legislative branches; and it is consistent with the bulk of the Supreme Court's war powers decisions over the last 130 years.[187] Even joint congressional and executive war power action[188] does not eliminate the role of a "watchful" judiciary when fundamental liberties are at stake. The force of political constituencies on the elective branches can be overwhelming during crisis.[189] Congress, like the President, is subject to pressure from political constituencies, and its system of majority

185. *See supra* notes 181 and 183. *See also* Note, *supra* note 16, at 1294. ("A legislature as well as an executive is subject to popular pressures to overreact to a disturbance"). *See generally* Keynes, *supra* note 104, at 70. ("Judicial review is an important element in a constitutional system that restrains democratic impulses . . . . Indeed, the purpose of constitutionalism is to limit popular sovereignty and governmental power."); THE FEDERALIST No. 78 (A. Hamilton) (argued for judicial review of constitutional disputes because the judiciary was uniquely positioned to protect the rights of individuals against excesses by the political branches).

186. The Constitution's framers opted for a modified system of separation of powers to assure adequate checks to excessive power. *See* Freidman, *supra* note 15, at 214 (citing Myers v. United States, 272 U.S. 252, 293 (1926) (Brandeis, J., dissenting).

187. *See, e.g., Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1867); Sterling v. Constantin, 287 U.S. 385, 401 (1932) ("[W]hat are the allowable limits of military discretion [where civil liberties are restricted], and whether or not they have been overstepped in a particular case, are judicial questions."); United States v. Robel, 389 U.S. 258, 263-64 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation . . . [and] the concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal."); New York Times Co. v. United States, 403 U.S. 713 (1971) (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."); United States District Court v. United States, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect "domestic security."); Scheur v. Rhodes, 416 U.S. 232, 246-48 (1974) (discussing traditional "suspicion and skepticism" of military power "since it often involves suspension of our most cherished rights.").

188. Justice Jackson's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) delineated levels of executive authority depending on its "conjunction or disjunction" with congressional action. Under this scheme, presidential power is at its maximum when the President acts pursuant to congressional authorization; it is in a zone of "twilight" when the President acts solely upon his inherent powers while Congress is silent; it is at its "lowest ebb" when the President contravenes the will of Congress. *Id.* at 637. *Accord* Dames & Moore v. Regan, 453 U.S. 654 (1983) (upholding the President's freeze under the Trading with the Enemy Act on Iranian assets in the United States).

189. The argument is unpersuasive that courts should not intervene in crisis decisionmaking because the executive is better able than Congress, and because Congress is better able than the courts to deal with crises. The issue is not who is able to deal with crises most swiftly and thoroughly, but whether constitutional standards are followed in doing so.

rule provides no inherent protection of minorities lacking access to political processes.[190] Indeed, *Hirabayashi* and *Korematsu* involved joint action.[191] Rapid congressional enactment of criminal penalties following Executive Order No. 9066 hardly served as a check to executive and military excesses.[192] Even the replacement provision of the now repealed Emergency Detention Act of 1950[193] would not have prohibited the evacuation and internment because Congress was deemed to have ratified the executive and military orders.

D. *The Judicial Method*

Through textual construction of the Constitution and interpretation of societal values, courts have demonstrated competence to make the threshold identification of constitutionally protected liberties.[194] Outside the national security context, a substantial body of law has developed which identifies those personal liberties that deserve special constitutional protection in the form of heightened judicial solicitude.[195]

The more complicated issue follows the threshold determination. In applying a heightened standard of review to restrictions of selected civil liberties, are courts competent to scrutinize the govern-

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190. *See supra* notes 181-83.

191. Hirabayashi v. United States, 320 U.S. at 102-04.

192. For an analysis of the powerful constituent political forces influencing the executive and military orders, including agribusiness and anti-Asian organizations, see CWRIC, *supra* note 10, at chapters 1 and 2.

193. "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." PUB. L. No. 91-128 § I(a) (1971), 85 Stat. 346 (amending 18 U.S.C. § 4001 (1970)).

194. *See generally* Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection*. 86 HARV. L. REV. 1 (1972).

195. The Court has identified several "fundamental rights." Roe v. Wade, 410 U.S. 113 (1973) (privacy regarding abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy regarding contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Bullocks v. Carter, 405 U.S. 134 (1972) (the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to interstate travel); William v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the first amendment); Douglas v. California, 372 U.S. 353 (1963) (right to an adequate criminal defense). *Compare* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (right to work is not a fundamental right); San Antonio School District v. Rodriquez, 411 U.S. 1 (1973) (education is not a fundamental right).

See generally Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977) ("Constitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental."). *But see* J. ELY, *supra* note 11 (criticizing the non-interpretivist approach of ascertaining fundamental values not specifically embodied in the text of the amendments to the Constitution).

ment's claim of military necessity or national security as justification for the restriction? The principal concern sometimes raised is whether independent scrutiny will quickly embroil courts in policy choices concerning constantly changing technical, political and security concerns which are not subject to judicially manageable standards.[196]

When the government asserts military necessity or national security as justification, it asserts that "although this restriction would be impermissible under ordinary conditions, the existence of extraordinary danger to the nation's security compels it and thus legitimates it."[197] Judicial inquiry therefore should focus first on the danger: whether credible information establishes that Americans intentionally or otherwise pose a danger to legitimate government security interests.[198] If the danger exists, then the government has a compelling interest[199] in eliminating it, and the inquiry shifts to the

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196. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973) (the Court deemed it beyond its competence to establish detailed rules for the training, weaponry and order of National Guard troops and to supervise implementation to assure compliance). *See generally* Baker v. Carr, 369 U.S. 186, 217 (1962) (a "lack of judicially discoverable and manageable standards for resolving" the dispute indicates a non-justiciable political question).

Disputes about justiciability generally concern government actions which do not directly affect fundamental liberties of American civilians, such as the initiation and conduct of hostilities, the weaponry, manpower and training of armed forces, external foreign policy matters, and control over military personnel. *See supra* notes 169-74 and accompanying text.

197. "Necessity," as used here, encompasses the exigencies of war and national emergencies. Government actions purportedly justified by such exigencies are usually initiated by the executive branch which is able to respond more quickly to crises than the legislative branch. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 79 (1952). "Necessity" also encompasses situations which could not properly be characterized as "emergency," but which nevertheless appear to be of pressing concern to the security of the country. *See, e.g.*, Robel v. United States, 389 U.S. 258 (1967); New York Times v. United States, 403 U.S. 713 (1971).

198. This formulation is limited to restrictions justified by danger posed by Americans to government security interests because restrictions justified by the need simply to restore order, such as temporary curfews following riots, may be appropriately evaluated by existing principles of emergency law. For an excellent discussion of the predicates to emergency government action see Note, *supra* note 16, at 1294. Emergencies often call for far-reaching government action. To prevent overreaching, emergency measures must pass muster as to "whether the emergency existed, and, more important, whether the measures taken were necessary to restore order." *Id.* at 1296.

Outside of martial law the restriction of liberties of civilians "for their own benefit," has only once been presented to the Supreme Court as a basis of military necessity and the Court there rejected that basis. *See Ex Parte* Endo, 323 U.S. 283 (1944) (the congressionally-sanctioned War Relocation Authority lacked inherent or delegated authority to continue to detain concededly loyal Japanese Americans until it could find a "safe" place for their release).

199. Although the phrase "compelling interest" suggests the strict scrutiny standard of review in equal protection challenges, its use here is not meant to be thus limited. It is used broadly to reflect the significance or importance of dealing with a verifiable danger to legiti-

tailoring of the restriction to the danger.[200] These determinations are essentially factual. They can be made in most instances on the basis of proffered evidence according to judicially manageable standards,[201] with due concern to the sensitivity of national security information.[202]

1. *Existence of the Danger*

Courts have a long history of adjudging the existence of *bona fide* danger,[203] whether the initial determination is made by the military, the executive branch or Congress.

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mate government security interests.

200. At least two post-World War II commentators recommended careful factual scrutiny by courts. Professor Rostow recommended that "there should be evidence in court that . . . military judgment had a suitable basis in fact." Rostow, *supra* note 9, at 516. Nanette Dembitz cited the need for a "strong affirmative showing in support" of a measure "affecting fundamental liberties" rather than "merely the absence of a showing against it." Dembitz, *supra* note 9, at 187. Although Dembitz used "reasonableness" as the standard, her definition of reasonableness included government proof of the absence of "less stringent and more limited alternatives." *Id.* at 188.

201. Another approach is the "hard look" principle of review which is used in administrative law. *See* generally Leventhal, *Environmental Decisionmaking and the Role of the Courts*, U. PA. L. REV. 509 (1974); 5 DAVIS, ADMINISTRATIVE LAW TREATISE 410-11 (2d ed. 1984).

Under the "hard look" approach, the court requires that government decisionmakers seriously and thoroughly consider all appropriate sources of information and alternative courses of action, respond meaningfully to significant opposing viewpoints, and articulate the policy bases for their choice of action. Responsibility for interpreting gray area information and for weighing conflicting policies rests with the executive and not with the courts. This approach imposes a certain procedural discipline upon decisionmakers and thereby assures accountability by exposing government decisionmaking to the harsh light of the public eye without injecting the judiciary into a realm of purely policy or highly technical matters. This approach plays to the well-established procedural competence of the courts.

202. A thorough analysis of the problems with disclosure of sensitive information and of methods for remedying those problems is beyond the scope of this article. See *supra* section IV(c) for a general discussion of the issues and an outline of possible responses.

203. Has the government asserted a legitimate defense or security interest? Conceptually, the resolution of this issue might entail judicial inquiry into military or security operations. Practically, the issue arises rarely, if ever. The government's practice is to allege a threat to an indisputably legitimate government interest, such as a functioning justice system (Duncan v. Kahanamoku, 327 U.S. 304 (1946)), or confidentiality concerning strategy about the conduct of military hostilities (New York Times Co. v. United States, 403 U.S. 713 (1971)). It makes little sense for the government to assert an arguably trivial security interest, and the government has not done so in its cases so far. Judicial attention is thus focused on the veracity of the government's contention that its concededly legitimate interest is threatened.

(It will be interesting to see the position adopted by the government should litigation result from the State Department's withdrawal of the security clearance of a homosexual employee of a contractor providing stenographical services to the White House because, according to the employee, the government deemed his avowed homosexuality a "security risk." Washington Post, November 18, 1984, cols. 1-2).

This inquiry essentially concerns the compelling circumstances alleged by the government.[204] The actual state of mind (good faith intentions) of those involved is irrelevant. There must be objective evidence of the "nature and character" of the necessity at the time of action.[205]

Justice Jackson's dissenting opinion in *Korematsu* suggested that "military decisions are not susceptible to judicial appraisal" because they "are made on information that often would not be admissible and on assumptions that could not be proved."[206] The contents of the government documents concealed from the Court and Justice Murphy's analysis in his dissenting opinion indicate that Justice Jackson was incorrect, at least in the *Korematsu* case, about judicial appraisal of military decisions controlling ostensibly dangerous American civilians.

In contrast, Justice Murphy's dissent scrutinized the DeWitt Final Report, and subjected the military's determination of the danger of espionage and sabotage posed by West Coast Japanese Americans to accepted judicial methods of proof. He examined the military's assumption that ethnicity determines disloyalty and found it to be based on "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from unwarranted use of circumstantial evidence."[207] Citing the British system of loyalty hearings during World War II[208] and the plodding pace of the Japanese evacuation, Justice Murphy found inadequate the DeWitt Re-

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204. *See, e.g., Ex Parte* Milligan, 71 U.S. (4 Wall.) (1867); Mitchell v. Harmony, 13 How. 115 (U.S. 1851); Sterling v. Constantin, 287 U.S. 385 (1932); Duncan v. Kahanomoku, 327 U.S. 304 (1946); New York Times Co. v. United States District Court, 407 U.S. 297 (1972).

205. Mitchell v. Harmony, 13 How. 115, 134-35 (U.S. 1851) (the government "must show by proof the nature and character of the emergency, such as [the government] had reasonable grounds to believe it to be.").

Judicial inquiry into the nature and character of the "necessity" takes into account the pressures of the moment underlying the government's action. Flexibility in accounting for exigent circumstances is necessary to prevent heightened scrutiny from being "strict in theory and fatal in fact." Gunther, *supra* note 194, at 8. *See* Bakke v. Regents of the University of California, 438 U.S. at 360-61 (opinion that a strict level of scrutiny could be applied without being fatal in fact) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring).

206. Korematsu v. United States, 323 U.S. at 245 (Jackson, J., dissenting). Justice Jackson deemed the evacuation unconstitutional not because of a lack of objective proof of military necessity, but because of the harsh racial classification involved. This approach amounted to an absolutist view of restrictive racial classifications since the government's asserted military justification for the restriction was irrelevant to the analysis.

207. *Id.* at 242 (Murphy, J., dissenting).

208. *Id.* at 241-42 n.16.

port's unsubstantiated conclusion about "insufficiency of time."[209] He also found a complete lack of proof that the government's intelligence agencies did not already provide adequate safeguards against espionage and sabotage.[210]

The concealed original DeWitt Report and the ONI, FBI and FCC reports filled the informational gaps identified by Justice Murphy.[211] They contained precisely the type of information amenable to judicial methods of proof. The former impeached General DeWitt's credibility concerning his conclusion of insufficiency of time. The latter provided solid, if not overwhelming, factual information contradicting DeWitt's pivotal conclusions about the widespread and uncontrollable danger of espionage and sabotage posed by Japanese Americans. Competence to evaluate this type of information did not fall exclusively within the realm of "military expertise."[212]

This conclusion, of course, is reached in hindsight, with knowledge of the undisclosed documents. It does, however, demonstrate the danger of automatically deeming "unsusceptible to judicial appraisal" all decisions of military necessity or national security—especially those decisions involving the restriction of fundamental liberties of American citizens.

Indeed, in a variety of situations the Supreme Court has shown an inclination to review congressional and executive determinations of necessity, whether in examining the factual foundation of the asserted exigency or in defining the limits to the government's self-protective executive power.[213] Most recently in *New York Times Co.*

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209. *Id.* at 241.

210. *Id.*

211. *See supra* notes 30-51 and accompanying text.

212. Although certain military decisions fall exclusively within the realm of military expertise, such as battlefield decisions and strategic troop and weaponry deployment (*see supra* notes 171 and 174 concerning non-justiciability of such decisions), many other military decisions do not. *See, e.g., Ex Parte* Milligan, 71 U.S. (4 Wall) (1866).

213. *See, e.g., Ex Parte* Milligan, 71 U.S. (4 Wall.) (1866) (*see supra* notes 105-09 and accompanying text); Mitchell v. Harmony, 13 How. 115 (U.S. 1851) (scrutinizing the government's broad contention of military necessity and finding insufficient credible information verifying the allegedly exigent circumstances); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (construing a federal statute under which the governor of Hawaii declared martial law, as not authorizing the continued supplanting of civil courts with military tribunals after the threat of invasion passed); Toth v. Quarles, 350 U.S. 11, 23 (1955) (reversing the post-discharge conviction of a former serviceman, noting the limit to congressional power to authorize military trials of civilians to be "the least possible power to the end proposed"); Sterling v. Constantin, 287 U.S. 385 (1932) (finding insufficient evidence of "necessity" to justify a state military takeover of private oil production during rebellion by oil producers); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring) (denying presidential authority to seize and operate steel mills in the interest of national security because Congress had earlier, in

v. United States,[214] the Court rejected the President's claim that the executive branch, under its war and foreign policy powers and "in the name of national security" could prohibit the publication of the classified Pentagon Papers. The Court, however, could not agree on a prevailing rationale, and its views were badly fragmented.[215] Most interesting of the Court's seven opinions were those of Justices Brennan and Stewart.

Justice Brennan held that the first amendment tolerates no prior judicial restraint on the press predicated on the mere surmise or conjecture that untoward consequences may result. He declared that although earlier cases had created a narrow exception when the "nation is at war,"[216] prior restraints should be deemed proper only upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event

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adopting a system of labor laws, expressly declined to confer that authorization of the executive branch).

214. 403 U.S. 713 (1971).

215. Justice Black's opinion took the absolutist approach to the first amendment. No prior restraint is permissible. Justice Douglas acknowledged the power to wage war is the "power to wage war successfully," *Id.* at 722. However, he found that the war power stems from the declaration of war by Congress and that Congress had not declared war in this instance. He therefore refused to decide "what leveling effect the war power of Congress might have." *Id.* Justice White emphasized that at least in the absence of proper congressional authorization, the Executive bore a heavy burden in justifying prior restraints upon the press. In concurring, Justice Marshall conceded that the President has broad powers by virtue of his primary responsibility for the conduct of foreign affairs and his position as Commander-in-Chief. *Id.* at 741. Justice Marshall found, however, that Congress twice rejected proposals to confer upon the President the very powers he ostensibly exercised in this instance, and, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), he concluded that the President therefore lacked authority to impose prior restraints in the interests of national security. 403 U.S. at 746-747.

216. 249 U.S. 47 (1919). *Schneck* upheld the Espionage Act conviction and ten-year sentence of a socialist accused of obstructing military enlistment by distributing literature urging draftees to oppose conscription peacefully, such as by petitioning for repeal of draft legislation. In articulating the "clear and present danger" test of the first amendment, Justice Holmes implied that the danger need be less serious or impending to justify first amendment restrictions if America is involved in war. *Id.* at 52.

The test is of doubtful vitality now — it operated to stifle "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions," Brandenburg v. Ohio, 397 U.S. 444, 452 (1969) (Douglas, J., concurring) (discussing cases expansively applying the test). The Court's significant implication that constitutional rights may be diminished by the existence of war abroad was contradicted in United States v. Cohen Grocery Co., 255 U.S. 81 (1921). *Cohen* invalidated as unconstitutionally vague a World War I federal criminal statute concerning unreasonable pricing of goods. Citing *Ex Parte* Milligan and Hamilton v. Kentucky Distilleries & W. Co., the Court noted, in apparent conflict with *Schneck*, that constitutional guarantees are not diminished by the mere existence of war. *Accord*, Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 425-26 (1934) ("[The Constitution's] grants of power to the Federal Government and its limitations upon the power of the States were determined in the light of emergency and they are not altered by emergency").

kindred to imperiling the safety of a transport already at sea . . . . In no event may mere conclusions be sufficient."[217]

Justice Stewart noted the executive branch's broad power over national defense and international relations. He also acknowledged that the prohibition of disclosure of some of the documents involved appeared to be in the national interest. Justice Stewart nevertheless deemed this insufficient grounds for prior restraint. His review of the documents did not indicate that disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[218]

United States District Court v. United States,[219] decided the following year, also limited the reach of executive authority. The Court denied the executive branch unilateral authority to declare domestic threats to national security to justify warrantless electronic surveillance of civilians. The Court acknowledged the president's power to protect the government from internal subversion but, echoing Justice Black's concern about the vague parameters of "national security" in *New York Times Co.*, the Court also noted the inherent dangers of that power.[220] In light of the danger of unchecked executive authority in conducting surveillance of civilians, the Court held that the fourth amendment contemplates prior judicial approval of the necessity for domestic security surveillance.[221]

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217. 403 U.S. 714, 726-27 (citing Near v. Minnesota, 283 U.S. 697 (1931)).

218. *Id.* at 730. The first amendment, according to the gist of these opinions, at least during undeclared wars, does not tolerate prior restraint by the executive branch of political publications, despite claims of national security, unless the government proffers proof of impending and material harm to the security of the country as a consequence of publication. *See generally* Scheuer v. Rhodes, 416 U.S. 232 (1974). *Scheuer*, a civil rights damage action against state officials, arose out of the Ohio National Guard's killing of Kent State students during an anti-war demonstration. The Court reversed the trial court's dismissal of the damage claim on "executive immunity" grounds. The Court held that public officials are only entitled to "qualified immunity" (based on reasonable grounds coupled with good faith) for accidents arising out of attempts to control the public's exercise of first amendment rights. *Id.* at 246-48. The Court also held that the propriety of such immunity is a justiciable issue. *Id.* at 248-49.

219. 407 U.S. 297 (1972).

220. *Id.* at 314. The opinion carefully limited its holding to "domestic security" surveillance and left undecided the warrant requirement for surveillance connected to foreign threats to national security. *Id.* at 311.

221. Judicial review was limited to a probable cause determination. *Id.* at 321. Extending this principle, offspring of the Watergate era, Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981), and Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), effectively held that damage actions are maintainable against officials of the executive branch as a result of warrantless surveillance violative of the Omnibus Crime Control Act. *See also* Laird v. Tatum, 408 U.S. 1 (1972) (holding that a general challenge to Army surveillance of civilian political dissidents did not present a case

In the cases discussed above, and in notes 187-88 the Court faced general situations of considerable urgency—whether war at home or overseas or domestic unrest. The Court nevertheless looked beyond the general situation and examined the circumstances surrounding the specific government restriction at the time of its undertaking, and measured the government's contention of "necessity" according to the information then available. The pivotal issue, whether expressly stated or implied, appeared to be the existence of available credible evidence of the asserted exigency—did the information show that the threat posed by American civilians was real? If so, of what magnitude and imminence? These were essentially issues of fact rather than policy—issues the Court then deemed were within its province to resolve. These decisions did not entangle the Court in the kind of determinations of political and military policy which underlie decisions to initiate war or to train and deploy troops.[222]

2. *Less Restrictive Alternatives*

The debate[223] appears to have quieted concerning judicial competence to make the "difficult evaluation of relative costs, effectiveness, and restrictiveness of alternative measures."[224] Judicial review of less restrictive alternatives is now a generally accepted principle. The Supreme Court has undertaken that analysis in many contexts: under the equal protection clause in applying a strict scrutiny standard of review;[225] under the commerce clause;[226] under the contracts

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or controversy, but cautioning that, at least in peacetime, such surveillance would present a justiciable controversy when individuals are actually injured).

222. *See supra* Section III(B) concerning areas of political and military policy deemed beyond judicial competence.

223. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969) (courts are not competent to evaluate effectiveness of alternative measures); Struve, *The Less Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) (the judicial method provides adequate tools for evaluating alternative measures).

224. Note, *supra* note 16, at 1298-99 ("[W]hile a court will inevitably encounter some difficulty in evaluating the cost, effectiveness and restrictiveness of various . . . measures, the application of a less-restrictive alternative test is not beyond judicial competence.").

The author maintains that the cost of alternative measures should be irrelevant to the Court's analysis at least as long as there is no question of exhausting available resources. Higher costs are acceptable because of the "value we place on the protection of individual liberties." *Id.* at 1299. Restrictiveness can be evaluated through overbreadth analysis or through comparison of the alternative with restrictions of the same liberty in other situations. *Id.* at 1300.

225. Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement for voting not narrowly tailored to state's interest in fair elections and knowledgeable voters); Kramer v. Union Free School District, 395 U.S. 621 (1969) (voting requirement of property ownership or parentage of school children not precisely tailored to state's interest in voters

clause;[227] under the first amendment;[228] and in other situations.[229]

The general analytical approach to less restrictive alternatives is substantially unaltered by the infusion of national defense or security concerns. Indeed, the Court has applied "less drastic impact" and "no greater than essential" standards in several cases involving national security restrictions imposed on first and fifth amendment freedoms.[230] Restrictiveness can be assessed through analysis of overinclusiveness—is the restriction so broad that it catches not only individuals who pose a threat to the government's security but also those who do not?[231] Restrictiveness can also be assessed through analysis of overkill—does the restriction of those posing some threat go beyond what is necessary to meet the danger?[232] If the answer is affirmative in either situation, the inquiry proceeds to whether the restriction can be reformulated in concept to cure the problems of overinclusiveness or overkill. If it can, the final query is whether the narrowed restriction effectively meets the danger.[233]

This determination does not entail a detailed projection of the restriction's effect on all possible situations. Rather it simply assures

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"primarily interested" in school affairs).

226. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (alternative measures could have promoted community health without prohibiting certain interstate sales of milk).

227. United States Trust Co. v. New Jersey, 347 U.S. 1 (1977) (state subsidy of rail passenger transportation could be accomplished by available means other than a repeal of statutory covenants).

228. Shelton v. Tucker, 364 U.S. 479 (1960) (moral fitness of teachers could be determined without requiring disclosure of all organizational connections); Talley v. California, 362 U.S. 40 (1960) (ban on distribution of all handbills imprecisely tailored to state's interest in preventing fraud and false advertising).

229. For a collection of other cases, predominantly concerning analysis of reasonable alternatives to economic regulations, see Wormouth & Merkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964).

230. United States v. Robel, 389 U.S. 258 (1968); Aptheke v. Secretary of State, 387 U.S. 500 (1964); United States v. O'Brien, 391 U.S. 367 (1968) (upholding a federal statute prohibiting draft card burning because, *inter alia*, that means for assuring immediate draft status identification was no greater than essential in view of the limited intrusion upon the first amendment freedoms involved); Wayte v. United States, 105 S. Ct. 1524 (1985) (following the *O'Brien* formulation in rejecting a draft registration protester's claim of selective prosecution of only those nonregistrants actively opposing registration). *Cf.* United States v. Albertini, 105 S. Ct. 2897 (1985).

231. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (relocating concededly loyal Japanese Americans allegedly due to insufficiency of time to identify the disloyal); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 342, 351-52 (1949) (over-inclusiveness analysis in equal protection context).

232. *See, e.g.*, Schneider v. Smith, 390 U.S. 17 (1968) (suggesting invalidity of a merchant marine security screening program requiring disclosure of membership in 250 listed organizations).

233. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1968).

that the reformulated restriction is designed *in concept* to achieve "the same basic purpose" as the original restriction.[234] The Court does not approve the specific structure and operation of any alternative.[235] It merely sets the conceptual guidelines that the Constitution will tolerate and leaves implementation to the political branches.[236] The Court thus avoids advisory opinions[237] and immersion into a quicksand of technical detail and political policy.[238]

3. *Confidentiality*

Related to the analysis of judicial competence is confidentiality. What standards determine the government's obligation to disclose relevant, although sensitive, information? What protective measures assure confidentiality when limited disclosure is appropriate? This article does not examine closely the first issue.[239] Rather, it identifies some of the problems concerning confidentiality upon disclosure and

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234. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (the restriction "must be viewed in light of less drastic means for achieving the same basic purpose").

235. The Court has been criticized for invalidating restrictions without "specifying with particularity the less restrictive alternative upon which it based its decision." Note, *supra* note 16, at 1298.

236. In finding that a restriction can be reformulated to have less drastic impact on fundamental liberties, the court delineates conceptual guidelines for reformation. It leaves implementation to the responsible body intimately familiar with the intricacies and nuances of the problem. Within the constitutional parameters set by the court, those involved with implementation have considerable room to assure maximum effectiveness. *See* discussion of United States v. Robel, *supra* note 151(d) and accompanying text.

237. Note, *supra* note 223, at 471.

238. Consideration of the government's often subtle, often changing political message underlying the restriction is unnecessary. The government's storehouse of domestic political and foreign policy messages is vast. If fundamental liberties of Americans are unduly restricted, the government should shoulder the burden of finding alternative means for conveying its political messages.

239. Standards concerning disclosure are somewhat ambiguous and implicate significant policy conflicts. Exhaustive analysis is beyond the scope of this article. In brief, Nixon v. United States, 418 U.S. 683 (1974) determined that the executive has no absolute privilege to ignore judicial process requiring disclosure of relevant information. The weighing approach suggested in *Nixon* identifies the competing concerns but provides little practical guidance. Justice Marshall, dissenting in Wayte v. United States, 105 S. Ct. 1524 (1985) suggested a three-part inquiry: "The first is whether *Wayte* made a sufficient showing of [the merits of his claim] to be entitled to any discovery. The second is whether the documents and testimony ordered released were relevant to Wayte's . . . claim, that is, whether the scope of discovery was appropriate. The third is whether Wayte's need for the materials outweighed the Government's assertion of executive privilege." *Id. But see* CIA v. Sims, 105 S. Ct. 1881 (1985) in which Chief Justice Burger indicated that courts are not competent to "weigh" the various "subtle" factors involved in determining whether disclosure of assertedly confidential national security information is appropriate. Justice Marshall's dissent argued that Congress in amending the National Security Act of 1947 expressly provided for judicial scrutiny of executive determinations of confidentiality. *Id.*

outlines existing judicial procedures.

As demonstrated by the Watergate scandal, disclosure of the foundations of government action is a positive value in a democratic society. For most actions disclosure serves as a check to abuses of the political process and entails little or no resulting public harm. Disclosure of sensitive national security material in satisfaction of judicial proof requirements, however, can be harmful. Are there procedures for assuring strict confidentiality when necessary? For context, it should be noted that of the multitude of war power and national security cases, extremely few have seriously raised the disclosure issue.[240]

Generally adequate procedures exist for protecting materials in court possession. *In camera* review of sensitive material and sealing of records limit access to the judge and possibly her law clerks. The procedure has been successfully employed in several cases. In *New York Times*,[241] the Supreme Court reviewed *in camera* the Pentagon Papers and determined that their contents did not justify prior restraint of publication. Federal district court Judge John Sirica in *Nixon*[242] listened *in camera* to the Nixon Watergate tapes to determine if national security would be imperiled by public disclosure. In *United States District Court*,[243] the district court reviewed *in camera* transcripts of tapes of an informant to determine that domestic security concerns did not justify warrantless electronic surveillance. Most recently the federal court established a procedure involving panels of three federal appellate judges for review of government claims of confidentiality.[244]

When disclosure is deemed appropriate for litigation purposes, a gag order is another response to any continuing concern about confidentiality. A court can order nondissemination of pretrial discovery materials under a threat of criminal contempt without violating a party's first amendment rights, even if the party is the press.[245] No

240. *See, e.g.*, United States v. United States District Court, 407 U.S. 297 (1972) (potential security risks in disclosing confidential information to a magistrate or judge are insufficient justification for eliminating the search warrant requirement; adequate protective measures exist), Wayte v. United States, 105 S. Ct. 1524 (1985) (Marshall, J., dissenting) (Majority ignored pivotal issue concerning propriety of District Court's discovery order requiring disclosure of governmental documents pertaining to defendant's charge of selective prosecution).

241. 403 U.S. 713 (1971).

242. 418 U.S. 683 (1974).

243. 407 U.S. at 301.

244. Classified Information Procedures Act, 18 U.S.C. § 1982 (originally enacted as PUB. L. No. 96-456, 94 Stat. 2025 (1980)).

245. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2209-10 (1984) ("[W]here . . . a

further public disclosure is then made. Justice is served as to the individual litigant. Although first amendment concerns are implicated, this concern would arguably be tempered by the continuing concern about confidentiality.

4. *Summary*

The judicial method appears to be flexible and sturdy enough to accommodate the suggested principle. When heightened scrutiny is called for, courts will be able to draw on a history of demonstrated competence in reviewing the existence of the danger and the tailoring of the means, and will have several options for addressing concerns about confidentiality.

V. Synthesis and Conclusion

The need for the judicial adoption and clear articulation of the suggested principle arises out of salutary policy and sound constitutional values. Its adoption would bring a measure of clarity to now ambiguous guidelines for future governmental conduct. The potentially disastrous ramifications of continued ambiguity are illustrated by the *Korematsu* case itself in which the Court deferred to the government's unexamined assertion of military necessity and thereby sanctioned the tragic and unjustified deprivation of personal liberty.

Significantly, the suggested principle may be adopted without upsetting settled doctrine. None of the recent cases, or other precedents upholding government deprivations of civil liberties, have held as a matter of general constitutional principle that the standard of judicial review normally applicable is obviated or attenuated by the government's assertion of military or national security concerns. Nor have any of these cases explicitly held that judicial deference to government self-protective actions is appropriate, especially when fundamental liberties of civilians are curtailed.

The suggested principle will not upset settled doctrine because in most cases prior to 1978, the Supreme Court's level of scrutiny implicitly was determined by ordinary constitutional doctrine which focused on the liberty interest involved. Demanding judicial scrutiny, when ordinarily appropriate, was not obviated by military or national security concerns underlying the government's restrictions in those cases. Those concerns were accounted for within the frame-

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protective order is entered on a showing of good cause, . . . is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the first amendment.").

work of the heightened standard of review.[246] While recent cases might suggest a new value judgment by the Court in giving greater weight and deference to the government in cases involving alleged national security interests, no constitutional doctrine explicitly providing such deference has yet been created.[247]

An accommodation of government self-protective powers and civil liberties is essential to a functioning and humane society. The government must be empowered to repel actual threats to its existence. At the same time, especially in an era of expanding government control over its own citizens in response to perceived threats to national security, a constitutional democracy cannot afford to have its courts withdraw from their historically "watchful" role over the most cherished liberties of its people. *Korematsu* attests to this danger. In the final analysis, the significance of the suggested principle of judicial review may lie in its articulation of important competing constitutional values in a manner that attempts to accommodate rather than subordinate them, and in its step toward clarifying currently murky standards of government accountability.

246. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying the heightened first amendment standard); United States v. Robel, 389 U.S. 258, 267 (1967) (applying the least restrictive alternative test in a first amendment challenge); United States v. United States District Court, 407 U.S. 297, 321 (1972) (the fourth amendment requires prior judicial approval of electronic surveillance of Americans); Sterling v. Constantin, 287 U.S. 378, 403 (1932) (scrutinizing a state's finding of military necessity to control private oil production in upholding a fifth amendment due process challenge); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-35 (1852); (requiring proof of the military emergency to justify a taking of property); *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 124-26 (1867) (acknowledging the judiciary's role as guardian of constitutional liberties during times of commotion in upholding a fifth and sixth amendment challenge to a military trial of a civilian).

247. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).