Solzhenitsyn's Submissive Sheep of Today: The United States' Susceptibility to Dictatorial Takeover and Presidential Overreach

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ABSTRACT: The expansion of executive power in the United States began in the aftermath of the nation's involvement in World War II. Slightly earlier, the Soviet Union's expansion of executive power began in 1917 with the Bolshevik Revolution. Aside from chronology, there were few differences between the expansion of executive power fostered by both global superpowers early in their nationhood. For example, both countries pride themselves in strong executive power, including primarily the ability to detain perceived enemies, convicts, and war criminals. The United States judiciary has repeatedly given enormous deference to the President on these issues, allowing the President to detain individuals nearly absolutely. Furthermore, the ostensible constraints the Constitution places on presidential power have been weakened by judicial precedent, such that the President can easily evade those constraints. Lastly, without a firm definition of what constitutes war, the President has acquired the authority to exercise wartime prerogatives and commit troops without congressional authorization. This Note posits a hypothetical scenario, mirroring the Stalin regime's Gulags, against which to test current United States law's weak constraints. The few limitations that have been placed on the Executive Branch have been inadequate and are in desperate need of repair. In the face of little congressional opposition, Presidents have expanded executive power. One such power is virtually unlimited discretionary detention power. In order to reign in this expansive power, the United States should pass and ratify a new constitutional amendment aimed at limiting executive power. In this way, the United States can do what the Soviet Union failed to do—prevent massive political incarcerations in Gulag concentration camps.

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I. INTRODUCTION

> "We do not have courts so that presidents can be checked in situations of national emergency. . . . There's nobody that can check that. That's the President's responsibility."[1]
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> —Judge Richard Posner, Seventh Circuit Court of Appeals

Despite the desire to view the Constitution as a perfect safety net against injustice, the United States is neither invulnerable nor immune to dictatorial takeover; instead, the United States is as susceptible to a power-hungry leader as many prior nations throughout history. To illustrate, this Note will consistently refer to the Stalin regime in the Soviet Union, specifically examining the Gulag system for detaining citizens. Although many circumstances in the development of that regime differ from the executive power jurisprudence in the United States, there are stunning similarities in the way the Executive is capable of exercising enormous power. The Constitution ostensibly grants Congress the exclusive power to declare war[2] and prohibits forced labor institutions.[3] These constitutional safety nets, however, are far weaker than they appear. This Note seeks to bring these holes to light by positing a hypothetical scenario against which to test the limited safeguards provided by the Constitution and Congress. The identified shortcomings of the Constitution should be amended despite the public's feeling of invulnerability. The United States is vulnerable and needs to respond to the dangerous executive power precedent first seen in *Hirabayashi* and *Korematsu* after the attack on Pearl Harbor, and since applied, despite the 2018 abrogation of *Korematsu*.[4]

This Note first analyzes the evolution of executive power jurisprudence in both the Gulag-era Soviet Union and the United States.[5] These expansive powers undercut the separation of powers doctrine[6] and highlight the danger of congressional inaction related to checking executive power. To demonstrate this danger, this Note offers a hypothetical scenario ("Scenario") mirrored after Stalin's development of the Soviet Gulags, against which to assess any current protections against the executive detention of United States

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1. *Radiolab Presents: More Perfect–American Pendulum I*, WNYC STUDIOS, at 36:51 (Oct. 1, 2017), http://www.radiolab.org/story/radiolab-presents-more-perfect-american-pendulum-i.

2. *See infra* note 172 and accompanying text (highlighting that Article I also grants Congress significant wartime authority).

3. *See infra* notes 194–96 and accompanying text.

4. *See infra* text accompanying notes 122–41.

5. *See infra* Part II.

6. For a definition and explanation of the separation of powers doctrine, see Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 593 (1986) ("Separation of powers certainly encompasses the notion that there are fundamental differences in governmental functions—frequently but not universally denoted as legislative, executive, and judicial—which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.").

citizens.[7] Part III begins this analysis by, first, assessing how the President can carry out the Scenario under current law in times of peace, and, secondly, finding that even more citizen detentions may be permissible in times of war. Finally, Part IV suggests several changes for both the courts and Congress in order to curb executive power.

II. HISTORICAL DEVELOPMENT OF CONSOLIDATED EXECUTIVE POWER

Section II.A first highlights the development of the Gulag system in the Soviet Union, focusing on the underlying rationales for Stalin's actions. Next, the Note addresses the expansion of executive power within the United States.[8] Lastly, Section II.C poses a Scenario against which to test U.S. precedent by evaluating the boundaries and dangers of expansive executive power.

A. *THE DEVELOPMENT OF THE USSR'S GULAG SYSTEM*

Over a century ago, the Bolshevik Revolution of 1917 put a protectionist ideology at the forefront of the Soviet Unions' development.[9] The revolutionaries had first identified a division between the bourgeoisie[10] and the proletariat.[11] Seeking "uninterrupted growth of the well-being of the

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7. *See infra* Section II.C.

8. *See infra* Section II.B.

9. *See* YURI NAUMKIN, HOW SOVIET LAWS ARE MADE 7 (1978) ("The Decree on Peace proclaimed the underlying principles of the peaceful foreign policy of the state."); Nicholas W. Balabkins, *Forced Labor Under the Gulag Regime (1918-1990)*, *in* THE LIBERATION OF THE SERFS: THE ECONOMICS OF UNFREE LABOR 65, 66 (J.G. Backhaus ed., 2012) ("Beginning with the Bolchevik Revolution in 1917, the Soviet Union was a closed country. Information on its economy, politics, and society was hard to come by. Travel to and inside the USSR was subject to many restrictions. Many cities and areas were closed to foreigners. Access to libraries and archives was difficult."). This standoffishness could result from two factors: (1) Marx's doctrine directing revolutionaries to first fight the bourgeoisie in their own country before going global, KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 79 (Signet Classics 2011) (1848); and (2) according to Communist theorist Rosa Luxemburg, "Russia is not supposed to be ripe for the social revolution!" ROSA LUXEMBURG, THE RUSSIAN REVOLUTION (1922), *reprinted in* REFORM OR REVOLUTION AND OTHER WRITINGS 181, 189 (2006).

10. "By bourgeoisie is meant the class of modern capitalists, owners of the means of social production and employers of wage labour." MARX & ENGELS, *supra* note 9, at 62 (quoting Friedrich Engels in his note for the 1888 English edition).

11. *See id.* at 63 ("Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other—bourgeoisie and proletariat."); *see also* VSEVOLOD KURITSYN, THE DEVELOPMENT OF RIGHTS AND FREEDOMS IN THE SOVIET STATE 17 n.1 (Progress Publishers 1987) (1983) (identifying two more specific camps: "Until the October Revolution all Russian subjects were divided into four social estates: the nobility, the clergy, the petty bourgeoisie (an urban estate including merchants), and the peasantry."); V. I. LENIN, THE STATE AND REVOLUTION 11 (Robert Service trans., Penguin Books 1992) (1918) (recognizing "the splitting of society into irreconcilably hostile classes"); 4 J. V. STALIN, *Two Camps*, *in* WORKS (1953), *available at* https://www.marxists.org/reference/archive/stalin/works/1919/02/22.htm ("The world has definitely and irrevocably split into two camps: the camp of imperialism and the camp of socialism. . . . The struggle between these two camps constitutes the hub of

working people,"[12] the early Soviet Union prioritized a strong criminal enforcement scheme. The first step in accomplishing the Communist Party goal of unifying the Soviet Union under a single worker-controlled party[13] was to criminalize and punish "anti-Soviet elements" under these enforcement mechanisms.[14] To advance this need, Lenin and the Bolsheviks established the Cheka, an institution founded to fight those counter-revolutionary activities.[15] Stalin would ultimately use these criminal backdrops when he

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present-day affairs, determines the whole substance of the present home and foreign policies of the leaders of the old and the new worlds. . . . The weakness of imperialism lies in its powerlessness to end the war *without* catastrophe, *without* increasing mass unemployment, *without* further robbery of its own workers and peasants, *without* further seizures of foreign territory.").

12. ENVER HOXHA, *The Demagogy of the Soviet Revisionists Cannot Conceal Their Traitorous Countenance*, *in* THE SELECTED WORKS OF ENVER HOXHA 395, 396 (2011); KURITSYN, *supra* note 11, at 13 ("Lenin and the Party he had created made ensuring the rights and freedoms of the individual the primary demands in the revolutionary struggle of the working people against tsarist autocracy, the landowners and the capitalists, for political, social and national emancipation.").

13. *See* MARX & ENGELS, *supra* note 9, at 82 ("The immediate aim of the Communists is the same as that of all other proletarian parties: Formation of the proletariat into a class, overthrow of the bourgeois supremacy, conquest of political power by the proletariat."); *see also* LENIN, *supra* note 11, at 78 (demanding "the revolutionary dictatorship of the proletariat"); LUXEMBURG, *supra* note 9, at 195 (recalling that the Revolution requires the revolting party "to achieve two diverse things: to break down large land-ownership[] and immediately to bind the peasants to the revolutionary government").

14. Balabkins, *supra* note 9, at 66 (noting that Paragraph 58 of the First Soviet Criminal Code was frequently used to detain workers in the "Gulag network"). Paragraph 58 explicitly prohibits "counter-revolutionary intentions." SOBRANIE UZAKONENII I RASPORIAZHENII RABOCHE-KRESTIAN'SKOGO PRAVITEL'STVA [RSFSR] [First Soviet Criminal Code] art. 153, para. 58 (1922) (U.S.S.R.), *translated in Seventeen Moments in Soviet History: An On-line Archive of Primary Sources*, http://soviethistory.msu.edu/1924-2/socialist-legality/socialist-legality-texts/first-soviet-criminal-code (last visited Jan. 21, 2019). The criminalized element of individualized thought seems to be a hallmark of the Gulag structure. Notably, post-Stalin Soviet Union criminal law "on high treason, taken broadly, ha[d] remained the same as it was in s. 58 of the Code of 1926." J.M. Van Bemmelen, *Introduction* to THE FEDERAL CRIMINAL LAW OF THE SOVIET UNION 27, § 33 (F.J. Feldbrugge trans., A.W. Sythoff 1959). The 1958 law provides that:

> High treason, that is to say an act intentionally committed by a citizen of the USSR against the national independence, the territorial inviolability, or the military power of the USSR: desertion to the enemy, espionage, the giving away of state or military secrets to a foreign power, flight across the frontiers and refusal to return to the USSR, assistance given to a foreign state in the conduct of hostile operations against the USSR, as well as conspiring to overthrow the government
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> . . . is punishable by deprivation of liberty for a period of from ten to fifteen years with confiscation of property, or by death and confiscation of property.

Law on the Criminal Responsibility for Crimes Against the State, *in* THE FEDERAL CRIMINAL LAW OF THE SOVIET UNION, *supra*, at 73. This same type of ideological oppression will be assessed in the context of the United States in Section III.A.1.

15. Balabkins, *supra* note 9, at 69; *see also* NAUMKIN, *supra* note 9, at 11 ("[M]ake it clear to them that anarchy will not be countenanced by Soviet power." (quoting Vladimir Lenin)). The Cheka was later abolished and replaced with the People's Commissariat for Internal Affairs, and the prosecutions continued. KURITSYN, *supra* note 11, at 160.

pursued collectivization[16] and dekulakization.[17] The Russian Socialist Federative Soviet Republic, one of the member states of the Soviet Union, first established a system of collectivizing land by establishing in its constitution a mandatory prohibition against holding land for profit.[18] The 1936 Soviet Union Constitution,[19] also provided that "[t]he land occupied by the collective farms is made over to them for their free use for an unlimited time, that is, in perpetuity," referring to the general population.[20] The 1936 Constitution also declared that "[p]ersons committing crimes in respect of public, socialist property are enemies of the people."[21] Premised on the 1936 Constitution and Criminal Code of the Soviet Union, when a family or kulak failed to meet their agricultural quota, they would have committed a crime against the nation.[22] These crimes prompted Stalin to start the Gulags,[23] a set

16. 11 J. V. STALIN, The Right Danger in the C.P.S.U.(B.): Speech Delivered at the Plenum of the Moscow Committee and Moscow Control Commission of the C.P.S.U.(B.) (Oct. 19, 1928), *in* WORKS (1954), https://www.marxists.org/reference/archive/stalin/works/1928/10/19.htm ("[I]t is necessary to consolidate the dictatorship of the proletariat[,] strengthen the alliance between the working class and peasantry, develop our key positions from the standpoint of industrialising the country, develop industry at a rapid rate, electrify the country, place the whole of our national economy on a new technical basis, organise the peasantry into co-operatives on a mass scale and increase the yield of its farms[,] gradually unite the individual peasant farms into socially conducted, collective farms, develop state farms, restrict and overcome the capitalist elements in town and country . . . ."); *see also* JOHN HOSTETTLER, LAW AND TERROR IN STALIN'S RUSSIA 77 (2003) ("In the result collectivization, which had a dynamic of its own, was carried through like a military operation.").

17. Dekulakization was the policy of eliminating, deporting, and forcibly resettling Russian farm-owning peasants (known as kulaks). *See* Lynne Viola, *The Role of the OGPU in Dekulakization, Mass Deportations, and Special Resettlement in 1930*, *in* CARL BECK PAPERS RUSSIAN & E. EUR. STUD., no. 1406, 2000, at 1. Kulaks, Russian for "fist," HOSTETTLER, *supra* note 16, at 55 n.11, were the wealthy farmers Stalin ideologically fought by collectivizing their land for what he believed to be the good of the people of the Soviet Union. Victor Margolin, *Stalin and Wheat: Collective Farms and Composite Portraits*, 3 GASTRONOMICA 14, 14 (2003). "The kulaks actively resisted collectivization. They stepped up counter-revolutionary activities, committing acts of terrorism . . . ." KURITSYN, *supra* note 11, at 166. This criminal characterization of the kulaks would follow them unceasingly. *See* HOSTETTLER, *supra* note 16, at 59 ("[I]t is possible and necessary to make a transition to an accelerated offensive against the capitalist elements, primarily the kulaks." (quoting Nikolai Bukharin speaking at the Eighth Moscow Trade Union Congress in 1927)).

18. CONSTITUTION (FUNDAMENTAL LAW) OF THE RUSSIAN SOCIALIST FEDERATIVE SOVIET REPUBLIC of July 10, 1918, art. 3(a), *in* USSR: SIXTY YEARS OF THE UNION, 1922–1982: A COLLECTION OF LEGISLATIVE ACTS AND OTHER DOCUMENTS, at 69, 70 (1982) [hereinafter 1918 RSFSR CONSTITUTION] ("In effecting the socialisation of land, private ownership of land is hereby abolished; all land is proclaimed the property of the whole people and is handed over to the working masses, without any compensation and on the basis of equitable land use.").

19. This is sometimes referred to as the "Stalin Constitution." HOSTETTLER, *supra* note 16, at 142.

20. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS of Dec. 5, 1936, art. 8, *in* USSR: SIXTY YEARS OF THE UNION, 1922–1982, *supra* note 18, at 229, 231 [hereinafter 1936 USSR CONSTITUTION].

21. *Id.* art. 131, at 256.

22. HOSTETTLER, *supra* note 16, at 74–76.

23. STEVEN A. BARNES, DEATH AND REDEMPTION: THE GULAG AND THE SHAPING OF SOVIET SOCIETY 10 (2011).

of labor camps disguised as a criminal institution and further defended as promoting the fresh Soviet economy. Essentially, Stalin wanted to eliminate the well-off kulaks and the Gulags stemmed from this ideological background.[24]

With these foundational institutions in place, Stalin filled the Gulags with "perceived enemies,"[25] bolstering proof that Gulag inmates were put there primarily for political motives rather than economic incentives.[26] "[P]owerful political and ideological undercurrents" generally controlled Soviet law,[27] and the Gulags were thereby no different. The priority that politics and ideology played in criminalizing and detaining members of the Soviet populace was intentionally covered by the "proliferation of padded statistics and false reports" regarding the motives and success of the Gulag system.[28] Perhaps surprisingly, the Soviet Union was not a lawless society at this time.[29] In fact,

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24. *Id.* at 7–8.

25. *Id.* at 7; *see also* RESOLUTION OF THE ALL-UKRAINE CENTRAL EXECUTIVE COMMITTEE: ON JOINING THE MILITARY FORCES OF THE SOVIET REPUBLICS of May 18, 1919, *in* USSR: SIXTY YEARS OF THE UNION, 1922–1982, *supra* note 18, at 112 ("All existing Soviet republics should wage a joint armed struggle against the enemies of the Soviet republics.").

26. *See* ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO: 1918–56, at 9 (2002) ("For several decades political arrests were distinguished in our country precisely by the fact that people were arrested who were guilty of nothing and were therefore unprepared to put up any resistance whatsoever. There was a general feeling of being destined for destruction, a sense of having nowhere to escape from the GPU-NKVD (which, incidentally, given our internal passport system, was quite accurate). And even in the fever of epidemic arrests, when people leaving for work said farewell to their families every day, because they could not be certain they would return at night, even then almost no one tried to run away and only in rare cases did people commit suicide. And that was exactly what was required. A submissive sheep is a find for a wolf."). Ignoring that he uses a lack of suicides as a standard of measuring public acquiescence, Solzhenitsyn's accounts of the Gulag-era Soviet Union portray the danger of ideologically-driven detentions.

27. William Partlett, *Re-Classifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field*, 2 COLUM. J.E. EUR. L. 1, 18 (2008); *see also* 1936 USSR CONSTITUTION, *supra* note 20, art. 4, at 230 ("The economic foundation of the USSR is . . . firmly established as a result of abolishing the capitalist system of economy, the private ownership of the instruments and means of production, and the exploitation of man by man.").

28. Oleg Khlevnyuk, *The Economy of the Gulag*, *in* BEHIND THE FAÇADE OF STALIN'S COMMAND ECONOMY: EVIDENCE FROM THE SOVIET STATE AND PARTY ARCHIVES 126 (Paul R. Gregory ed., 2001).

29. ANDREI Y. VYSHINSKY, THE LAW OF THE SOVIET STATE 50 (1948), http://ciml.250x.com/archive/ussr/english/1948_vyshinsky-the_law_of_the_soviet_state.pdf (defining Soviet law as "the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will"). "The effective operation of these rules in guaranteed by the entire coercive force of the socialist state in order to defend, to secure, and to develop relationships and arrangements advantageous and agreeable to the toilers, and completely and finally to annihilate capitalism and its remnants in the economic system, the way of life, and human consciousness—in order to build a communist society." *Id. But see* SOBRANIE UZAKONENII I RASPORIAZHENII RABOCHE-KRESTIAN'SKOGO PRAVITEL'STVA [RSFSR] [First Soviet Criminal Code] art. 6 (1922) (U.S.S.R.), *translated in Seventeen Moments in Soviet History: An On-line Archive of Primary Sources*, http://soviethistory.msu.edu/1924-2/socialist-legality/socialist-legality-texts/first-soviet-criminal-code (last visited Jan. 21, 2019) (defining crime as "any socially dangerous act or omission which threatens the foundations of the Soviet structure and that system of law which has been established by the Workers' and Peasants' Government for the period of transition to

their government structure was substantially similar to that of the United States. The 1936 Constitution provided "[t]he legislative power [would be] exercised exclusively by the Supreme Soviet of the USSR,"[30] which "consists of two Chambers: the Soviet of the Union and the Soviet of Nationalities."[31] Furthermore, most Soviet states created a Council of the People's Commissars to run the general administrative affairs of the state.[32] These Councils were all tasked with issuing decrees and orders,[33] similar to an administrative agency in the United States. Additionally, by the end of Stalin's reign, "Soviet military law resembl[ed] that of the United States and [many] European countries."[34] Lastly, at least in terms of how government was supposed to carry out its obligations, "[n]o one may be arrested except by a court decision or on the warrant of a procurator," according to Article 54 of the Constitution of the Soviet Union.[35]

In allegedly pursuing the goals of a Marxist-Leninist structure,[36] the evolution of Soviet law took on a political bite.[37] Soviet leaders focused on several overarching themes. First, they emphasized the removal of "those deemed unfit or dangerous from Soviet society."[38] Second, they tried to foster

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a Communist structure"). Lenin discussed the transition from capitalism to communism too, stating that "[d]emocracy for the gigantic majority of the people, and suppression by force . . . this is the transformation witnessed in democracy in the *transition* from capitalism to communism." LENIN, *supra* note 11, at 80. Perhaps the Soviet Union's broad definition of crime was merely a consequence of what Soviet leaders perceived as the transition by force.

30. 1936 USSR CONSTITUTION, *supra* note 20, art. 32, at 236.

31. *Id.* art. 33, at 236.

32. 1918 RSFSR CONSTITUTION, *supra* note 18, § 37, at 75.

33. *See, e.g.*, *id.* § 38, at 75 ("In the performance of this task, the Council of People's Commissars issues decrees, orders and instructions, and in general takes all measures necessary for the correct and speedy running of state affairs."); CONSTITUTION (FUNDAMENTAL LAW) OF THE TRANSCAUCASIAN SOCIALIST FEDERATIVE SOVIET REPUBLIC of Dec. 13, 1922, art. 25, *in* USSR: SIXTY YEARS OF THE UNION, 1922–1982, *supra* note 18, at 98, 104 ("In the performance of its task the Transcaucasian Council of People's Commissars issues decrees, orders and instructions and in general takes all measures necessary for the correct and speedy running of state affairs.").

34. HAROLD J. BERMAN & MIROSLAV KERNER, SOVIET MILITARY LAW AND ADMINISTRATION 44 (1955).

35. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS of Oct. 7, 1977, art. 54, https://www.departments.bucknell.edu/russian/const/77cons02.html#chap07.

36. Robert Service, *Introduction* to THE STATE AND REVOLUTION, *supra* note 11, at *xlvii* ("Stalin[] claim[ed] that Marxism-Leninism-Stalinism—as he insisted on calling it—was a seamless intellectual web.").

37. HOSTETTLER, *supra* note 16, at 83 ("[F]or us revolutionary legality is a problem which is 99 per cent political." (quoting Evgenii Pashukanis)); Partlett, *supra* note 27, at 19. "When we say that . . . a decision has been made on 'political' grounds, we always mean . . . . that the interests involved in the distribution or preservation of power, or a shift in power, play a decisive role . . . in influencing that decision . . . ." MAX WEBER, *Politics as a Vocation*, *in* THE VOCATION LECTURES 32, 33 (Rodney Livingstone trans., Hackett Publishing Co., Inc. 2004); *see also* MARX & ENGELS, *supra* note 9, at 76 ("[E]very class struggle is a political struggle."); *cf.* BERMAN & KERNER, *supra* note 34, at 63 ("[P]olitical and military matters may overlap in the life of the Soviet soldier.").

38. BARNES, *supra* note 23, at 8.

and promote ideological unison of a supreme party.[39] Lastly, leaders stressed the political agenda of a fully developed socialist system, instead of the codification of so-called "bourgeois" law, as described by Soviet legal scholar Evgenii Pashukanis.[40] Through these founding principles, "[o]nly the most dangerous prisoners, with the longest sentences, were [supposed] to be sent to the camps,"[41] however, in practice many more were sent.[42] The concern of the general population during the time of the Soviet Union rested with the bearer of power—the Executive.[43] Stalin effectively controlled all branches of government through his appointment power, which he used to appoint cronies;[44] establish a strong dictatorship of the proletariat;[45] and encourage

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39. *See* ENVER HOXHA, *We Shall Go to Moscow Not with Ten Banners, But with Only One, with the Banner of Marxism-Leninism*, *in* THE SELECTED WORKS OF ENVER HOXHA, *supra* note 12, at 129, 132 ("[Liri Belishova] does not understand the vital importance to our Party, as to any Marxist party, of the question of the ideological and political unity in the Party and, all the more so, the question of the unity of the Central Committee and the Political Bureau itself."). This same push for unison can extend beyond political parties to a national level. In this way, executive entities can push for national unison through their detention-focused policies.

40. Partlett, *supra* note 27, at 14. This perception of bourgeois law relates back to the failed overthrow of the Provisional Government in place before the Bolshevik Revolution. In fact, "[a]fter the February revolution, the bourgeois Provisional Government in Russia preserved the tsarist legal system almost intact. Such survivals of serfdom as estate and religious privileges and restrictions, women's lack of rights and national oppression were maintained in Russia right up to the October Revolution of 1917." KURITSYN, *supra* note 11, at 17. The October revolutionaries therefore followed Marx's roadmap that "the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat." MARX & ENGELS, *supra* note 9, at 79; *see also id.* at 82 ("The distinguishing feature of communism is not the abolition of property generally, but the abolition of bourgeois property."); KURITSYN, *supra* note 11, at 29 ("The Soviet government unconditionally banned bourgeois parties.").

41. Khlevnyuk, *supra* note 28, at 116.

42. HOSTETTLER, *supra* note 16, at 74–76 (reporting that 10 million kulaks were deported to the Gulags, where at one point 18% of the Soviet workforce resided).

43. *See id.* at 80 ("Prosecutors, [Nicolai Krylenko] said, who protested at being by-passed were accused of right-wing deviationism and removed from office. The judiciary, of which [Krylenko] was the head, functioned, he admitted, as an adjunct to the administrative apparatus."); *see also* KURITSYN, *supra* note 11, at 166–67 (demonstrating that the resolution to remove "[a]ctive kulaks . . . to remote parts of the USSR"—to the Gulags—was adopted "in accordance with extra judicial procedure"); J.R. Jones, The Death of Stalin *Shines a Light on Lavrenti Beria, Head of the Soviet Union's Dreaded Secret Police.*, CHI. READER (Mar. 15, 2018), https://www.chicagoreader.com/chicago/death-of-stalin-armando-iannucci-stevebuscemi/Content ("As Stalin's right-hand man, [Lavrenti] Beria ran the gulag network of forced labor camps, supervised the evacuation of Soviet defense industries as the Nazis drove eastward in World War II, and oversaw the Soviet's' atomic bomb program.").

44. ROBERT CONQUEST, THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES 32–33 (Collier Books rev. ed. 1973) (1968) (describing the men Stalin decided to appoint to his administration).

45. *See id.* at 604 (discussing how Stalin "turned [his] attention to the remnant of opposition at the top" of the party); GEORGI IVANOV, NOTES OF A PEOPLE'S JUDGE 56–57 (1950) (explaining a Soviet Union judge's use of Lenin and Stalin literature: "I constantly read and reread the works of Lenin and Stalin. To some of them, for instance Lenin's *The Immediate Tasks of the Soviet Power* and Stalin's *The Foundations of Leninism*, I refer time and again. I am absolutely convinced that failing this neither I nor any other brain worker would be capable of accomplishing much. What

"[t]he use of terror."[46] The development of Stalinism and the Gulag network demonstrates that if the Executive controls the active branches of government, the Executive could control detention.

B. *The Consolidation of U.S. Executive Power*

In the United States, executive power did not expand through a political revolution, but through judicial review of congressional and presidential action. With its roots established early in the nation's history, executive power began fully expanding during World War II.[47] After World War II, the Court and Congress never back-pedaled; they continued to recognize expanded executive detention power. The recent Global War on Terrorism is modern evidence of this expansion. Section II.B.1 describes different kinds of laws and under which category of law(s) detention has been held to be permissible. Section II.B.2 explains how the fluid definition of war has allowed the President to exercise wartime prerogatives, including that of citizen detention, absent a formal congressional declaration of war.

1. Detention Through Criminalized Activity

Based on the conflict between individual freedom and government efficiency,[48] several themes of detention precedent indicate that the majority of detentions, whether judicially-compelled prisons or militarily-compelled institutions, have been criminal.[49] Non-criminal detention is expressly prohibited by federal law.[50] This Note considers three non-exhaustive, non-exclusive circumstances in which criminal detention has been upheld: (1) the Executive feels threatened by the detainee's alleged un-American activities; (2) the detainee has specific demographic characteristics that relate to a substantial and compelling government interest; and (3) society is concerned about the detainee's ideology or political involvements, specifically related to Communist sympathies.[51] If the President acts pursuant to one of these categories of authority, those detentions would likely be constitutional. This Note will discuss each category in turn.

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kind of a lawyer would I make, for instance, if I did not know Lenin's and Stalin's most important theses regarding law and the state, the court and revolutionary law?"). Judge Ivanov goes on to say: "Every time I refresh in my memory Lenin's and Stalin's teachings on revolutionary law and justice, I ask myself: Did I act correctly in such-and-such a case?" *Id.* at 57.

46. HOW DID STALIN EXERCISE POLITICAL CONTROL?, at 1, http://ww2.ecclesbourne.derbyshire.sch.uk/ecclesbourne/content/subsites/history/files/Mr%20Mcs%20Russia%20Themes%20Resources/Stalins%20exercise%20of%20control.pdf (last visited Jan. 21, 2019).

47. *See infra* Section II.B.2.

48. *See* Jack F. Williams, *Process and Prediction: A Return to a* Fuzzy *Model of Pretrial Detention*, 79 MINN. L. REV. 325, 327, 359 (1994).

49. *See* 18 U.S.C. § 4001(b)(1) (2012).

50. *See id.*

51. *See infra* Section III.A.

i. Classification and Detention for un-American Activities

The Court has permitted the criminal detention of citizens convicted of crimes related to un-American activities. The three examples this Note discusses are (1) the House Committee on Un-American Activities; (2) the conviction and detention of Eugene V. Debs; and (3) "enemy combatant" status given when the interests of the state are at stake.

First, during legal scholar John Hazard's research on the Soviet Union, his mere connections with the Soviet Union led him to be "called in front of The House Committee on Un-American Activities."[52] The Committee investigated criticisms from both foreign and domestic origins that "attack[] the principle of the form of government" of the United States.[53] Hatred and persecution of those disloyal to the government had previously led to the Soviet revolution,[54] the criminalization of the bourgeoisie,[55] and subsequent pro-Stalin literature.[56] The Committee on Un-American Activities and the expansion of the "dictatorship of the proletariat" therefore appear to have developed through governments feeling threatened.

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52. Partlett, *supra* note 27, at 23.

53. Barenblatt v. United States, 360 U.S. 109, 116 n.6 (1959) (citing H.R. Res. 5, 85th Cong. (1957)). The Committee was later terminated in 1975 when all its files were transferred to the House Judiciary Committee. CHARLES E. SCHAMEL, NAT'L ARCHIVES & RECORDS ADMIN., RECORDS OF THE U.S. HOUSE OF REPRESENTATIVES: RECORD GROUP 233, at 4 (1995), https://ia902700.us.archive.org/17/items/RecordsOfTheHouseUn-americanActivitiesCommittee-NaraFindingAid/RecordsOfTheHouseUn-americanActivitesCommittee1945-19761.pdf (last visited Jan. 21, 2019).

54. *See* MARX & ENGELS, *supra* note 9, at 111 ("Let the ruling classes tremble at a communist revolution. The proletarians have nothing to lose but their chains. They have a world to win."); *see also* LENIN, *supra* note 11, at 13 ("[T]he Kerenski government in republican Russia . . . has proceeded to persecute the revolutionary proletariat . . . .").

55. *See* KURITSYN, *supra* note 11, at 28–29 ("The experience of the October Revolution and of the revolutions in the fraternal socialist countries has shown that bourgeois parties and other bourgeois social organisations tend to support the overthrown exploiter classes and act as the ideological and organising centres of counter-revolution. Hence the need to resolutely put an end to their hostile activity.").

56. *See* ENVER HOXHA, *Theory and Practice of the Revolution*, *in* THE SELECTED WORKS OF ENVER HOXHA, *supra* note 12, at 433, 451 ("[W]e have to exploit the great contradiction between the enemies correctly for our sake, for the sake of the socialist states and the peoples rising for the revolution, have to unmask the enemies constantly and must not be content with the so-called concessions and cooperations the imperialists and revisionists make perforce until they have left the danger behind them to take revenge afterwards. Therefore we have to keep the iron steadily in the fire and forge it constantly." (citation omitted)). Stoking the fire of the fight against the perceived enemy, using speech like the kind Hoxha exhibited here, can be one tactic to preserve power already attained. This power can then be used to exacerbate any of the detention classifications discussed in Section II.C, can push for increased congressional and presidential relationships, and can further defend any presidential proclamation or declaration of war.

Second, during the World War I era, Eugene V. Debs—former and future presidential candidate for the Socialist Party[57] and very popular orator[58]—was arrested for "caus[ing] and incit[ing] insubordination, disloyalty, mutiny," and other allegations under the Espionage Act of 1917.[59] In a scantily precedential opinion, Justice Holmes affirmed the conviction despite purported ideologically-driven themes of Debs' speech.[60] The crux of the decision was based on the alleged un-American nature of the speech, which supposedly contradicted the principles set forth in the Constitution.[61] The Court failed to define what constituted un-American activities. Instead, the Court deferred to Congress's and the Executive's judgment on what constituted un-American activities.

Third, while the Soviet Gulags were in full swing, the United States Supreme Court indicated that many rights and protections may be subservient to the interests of the state.[62] This idea first presented itself in cases dealing with economic protectionism,[63] but the basic principles that the interests of the state may be able to trump certain individual rights have been extended to a detainee charged with "enemy combatant" status. The most prominent example of this extension involved a district court finding that the government had authority to detain Jose Padilla, an individual for whom President George W. Bush had issued a detention order, alleging that Padilla was an "enemy combatant."[64] In blindly deferring to the judgment of the

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57. EUGENE V. DEBS, WALLS & BARS: PRISONS & PRISON LIFE IN THE "LAND OF THE FREE" 100–01 (Charles H. Kerr Publ'g Co. 2000) (1927).

58. HENRY R. MARTINSON, COMES THE REVOLUTION: A PERSONAL MEMOIR OF THE SOCIALIST MOVEMENT IN NORTH DAKOTA 20 (photo. reprint 2008) (1969) (describing that Debs' visit to Minot, North Dakota was extremely successful).

59. Debs v. United States, 249 U.S. 211, 212 (1919). President Woodrow Wilson even asked the nation to respect the laws of the United States, keep it untarnished, and condemn the actions of those rebelling against the state. Letter from Woodrow Wilson, President of the U.S., to the Nation (July 26, 1918), *available at* https://iowaculture.gov/history/education/educator-resources/primary-source-sets/americas-involvement-world-war-i/letter.

60. *Debs*, 249 U.S. at 212–13. The ideological nature of speech, similar to the speech Debs participated in, will be discussed more thoroughly in Section III.A.

61. *Id.*

62. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934) ("The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."). Basic rights that are provided for in the Constitution, which does not expressly include any right to contract, seem to take a less important role in executive power jurisprudence than economic and protective interests offered by the President.

63. *See id.*

64. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 589 (S.D.N.Y. 2002). An enemy combatant during times in which the courts are shut down need not be given any judicial review of enemy combatant status. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 80–81 (1866). A later 2004 Supreme Court case clarified "that Milligan was not a prisoner of war, but a resident of Indiana . . . . [and] [t]hat fact was central to [the 1866 Court's] conclusion" that Milligan needed a criminal trial in the U.S. court system. Hamdi v. Rumsfeld, 542 U.S. 507, 521–22 (2004) ("*Ex parte* Milligan does not undermine our holding about the Government's authority to seize enemy combatants, as we define the term *today*." (emphasis added) (citation omitted)).

political branches,[65] the courts have effectively withdrawn themselves from cases like *Padilla*. If the courts are not ensuring these defendants receive appropriate rights, the authority of the political branches is not being checked. This withdrawal has resulted in executive actors having enormous deference. Recognizing the enormous deference, Congress has tried to define an unprivileged enemy combatant for detention litigation purposes as anyone who "has engaged in hostilities against the United States or its coalition partners" or "has purposefully and materially supported hostilities against the United States or its coalition partners."[66] Effectively, if an individual

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65. The courts have withdrawn themselves in their adherence to early precedent. *Padilla* relies on the determination that an enemy combatant is one actively supporting the United States' opposition in an active war. *Padilla*, 233 F. Supp. 2d at 588–89. The court relied on early decisions laying framework for determining whether there was a war. *Id.* In adjudicating what constituted a war, there was no strong consensus. First, Justice Moore raised a philosophical argument that a word used to communicate "the idea of the relative situation of America and France" would be war. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39 (1800) (emphasis omitted). Justice Washington believed a public war could be declared by Congress, an imperfect war can be characterized by "hostilities . . . being limited as to places, persons, and things," but both circumstances are war. *Id.* at 40 (Washington, J.). Lastly, Justice Chase suggests without a Congressional declaration of war, the hostilities can only be called a partial war, but still constitute a public war. *Id.* at 43 (Chase, J.). Legal Adviser Harold Hongju Koh, testifying in front of the Senate Foreign Relations Committee in 2011, argued that there are four elements of hostilities that do not require a Congressional declaration of war: "the mission is limited," "exposure of [U.S.] armed forces is limited," "risk of escalation is limited," and "the military means [the United States] us[es] are limited." U.S. DEP'T OF STATE, TESTIMONY BY LEGAL ADVISER HAROLD HONGJU KOH ON LIBYA AND WAR POWERS BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE 7–10 (2011), http://www.law.uh.edu/faculty/eberman/NSL/HaroldKohTestimony-Libya-and-War-Powers-June-28-2011.pdf. The government therefore perpetuates a view that both political branches can enter into international hostilities unilaterally. Federal courts have further grappled with defining war and when war exists, and they repeatedly defer these ultimate determinations to the political branches of government. *See, e.g.*, The Brig Amy Warwick, 67 U.S. (2 Black) 635, 670 (1862) (Grier, J.) ("Whether the President in fulfilling his duties, as Commander in-chief . . . has met . . . a civil war of such alarming proportions as will compel him to accord to [enemy combatants] the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. He must determine what degree of force the crisis demands. . . . If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861 . . . ." (internal quotation marks omitted) (emphasis omitted)); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) ("For the judicial branch to enunciate and enforce such a standard would be not only extremely unwise but also would constitute a deep invasion of the political question domain."); Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) ("[T]he duty must, of necessity, rest in the discretion of the president."). In other words, the courts have long removed themselves from addressing the limits of war, and the ability to enter into it. *Padilla* merely demonstrates adherence to this view that the political branches ought to be the decisionmakers, and it did so in the context of detention.

66. 10 U.S.C. § 948a(7) (2012). The statute also considers any member of al Qaeda as an "[u]nprivileged enemy belligerent." *Id.* This statute provides statutory support to the idea that the President has more authority to act defensively than offensively. *See infra* note 180 and accompanying text (recognizing that the President needs to respond quickly in emergencies).

reasonably poses a security risk to the country in the eyes of an executive actor, that individual is detainable.[67]

This section so far has only considered affirmative actions taken by both Congress and the President in response to perceived un-American activities; however, the President may also influence detentions through political pressure and influence.[68] A current, practical example of this is President Trump's condemnation of NFL players' national anthem protests, highlighting executive pressure against an allegedly un-American, yet lawful, action.[69] The difference in this circumstance is that the President is merely calling for the activity to stop; he is not detaining participating individuals.[70] Ultimately, because of language crafted by the political branches of government, it is likely that this kind of political influence is permissible.[71] In summary, the United States government has permitted detentions of citizens on account of criminalized, allegedly un-American, activities.

ii. Classification and Detention for Demographic Characteristics

Before taking on demographic-based detentions, it is important to outline the varying levels of scrutiny with which the courts review constitutional challenges on Equal Protection Clause and Due Process Clause grounds. The least demanding level of scrutiny is rational basis review.[72] Rational basis review requires the courts to see whether "the legislative classification . . . bears a rational relation to some legitimate end."[73] Rational basis review applies to classifications that do not warrant heightened scrutiny and is effectively the default standard of review.[74] There are two identified

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67. 3 VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 14A:27, Westlaw (database updated Apr. 2018).

68. *See, e.g.*, JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM 3 (2010) ("Often, partisan strategy . . . is the reason for congressional decisions to use military force.").

69. *See* Benjamin Hoffman et al., *After Trump Blasts N.F.L., Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html.

70. Susan Heavey et al., *Trump Urges NFL to Ban Players Kneeling During Anthem*, REUTERS (Sept. 26, 2017, 7:43 AM), https://www.reuters.com/article/us-usa-trump-sports/trump-urges-nfl-to-ban-players-kneeling-during-anthem-idUSKCN1C11LT.

71. Michael McCann, *Can President Donald Trump Legally Command the NFL to Suspend, Fire Players?*, SPORTS ILLUSTRATED (Sept. 24, 2017), https://www.si.com/nfl/2017/09/24/donald-trump-nfl-comments-fire-players-protests; *see also* 18 U.S.C. § 227(a) (requiring undue influence to be "solely on the basis of partisan political affiliation").

72. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 605 (2008) (discussing caselaw of Equal Protection Clause analysis warranting rational basis review).

73. Romer v. Evans, 517 U.S. 620, 631 (1996).

74. *See id.*

levels of heightened scrutiny—intermediate scrutiny and strict scrutiny.[75] Intermediate scrutiny applies when there is a narrower set of acceptable reasons for making a distinction between two classes of people and requires the government to demonstrate the "classification[] . . . serve[s] important governmental objectives and must be substantially related to achievement of those objectives."[76] The hallmark classification that receives intermediate scrutiny is a classification that distinguishes people by gender.[77] Lastly, and most demanding for the government to satisfy, is strict scrutiny. Strict scrutiny applies whenever a fundamental right or "suspect class" is at issue.[78] Fundamental rights are those that, at the most elementary level, are guaranteed by the Constitution.[79] "Suspect classes" are those classes of individuals for which there exist few acceptable reasons for distinctions.[80] Courts determine suspect class applicability by weighing a series of factors: the history of discrimination against that class of individuals, the ability of the members of the class to contribute to society, whether the classification is made on the grounds of immutable characteristics, and the discrete and insular minority characteristics that render a classification closed to the political process.[81]

Having established the framework by which the Court must address Equal Protection and Due Process claims, detentions based on demographic characteristics can be assessed. The hallmark cases upholding detention based on race/national origin are *Hirabayashi* and *Korematsu*.[82] Through the previous analysis, the Court has found that classifications based on race and national origin warrant strict scrutiny analysis.[83] Detention authority on the

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75. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 219–20 (1995) (outlining the history of when heightened scrutiny applied and discussing how it has played out through certain cases over the years).

76. Craig v. Boren, 429 U.S. 190, 197 (1976).

77. *See id.*

78. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 605 (2008); Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1141 (9th Cir. 2011).

79. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) ("[T]he Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." (quoting Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring))).

80. *See* Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made . . . an invidious discrimination . . . .").

81. Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 314–33 (D. Conn. 2012). This balancing test comes from Marshall's concurrence in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 472–73 & n.24 (1985) (Marshall, J., concurring in part and dissenting in part).

82. *See infra* Section II.B.2.i. It is important to note that *Korematsu* has been officially abrogated and is no longer good law. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). *Korematsu* did, however, apply strict scrutiny to an executive order and military order that distinguished people on the basis of national origin. Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying "the most rigid scrutiny").

83. *See* Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955).

basis of race and national origin had also been recognized more recently in 1985,[84] and again ironically in the case that abrogated the original *Korematsu* holding.[85] Although the government must meet a difficult strict scrutiny standard of review, the government has been found to do so historically.

iii. Classification and Detention for Ideology

Lastly, ideology and ideologically-driven speech are hallmarks of American discourse. This speech, however, may not always be protected by the First Amendment.[86] In fact, the Supreme Court upheld convictions under the Smith Act[87] for American citizens seeking to organize a Communist Party, with the intent of establishing an ideological/economic system in the United States.[88] Regardless of whether an ideological classification originates with Congress or the Executive, Equal Protection Clause claims based on ideology are addressed in the same manner as with race; the court must determine whether there is a fundamental right or suspect class at issue.[89] Through the numerous Smith Act convictions, however, it seems the government has historically had the authority to detain individuals based on their ideology.

2. How the Expanding Definition of War Creates Too Much Power

War changes everything. This Section seeks to outline expanded executive power during wartime. First, Section II.B.2.i. describes the two hallmark executive wartime detention cases, *Hirabayashi* and *Korematsu*. Although formally abrogated in 2018,[90] the foundation of wartime detention power began with these cases, which have influenced action well beyond World War II.[91] Section II.B.2.ii. discusses the subsequent application of the

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84. Jean v. Nelson, 472 U.S. 846, 852 (1985) ("According to the [Eleventh Circuit Court of Appeals,] the [statutory] grant of discretionary authority . . . permitted the Executive to discriminate on the basis of national origin in making parole decisions."). The U.S. Supreme Court affirmed the Eleventh Circuit. *Id.* at 857.

85. *Trump*, 138 S. Ct. at 2404–05; *see also infra* notes 123–41 and accompanying text.

86. *See* Roth v. United States, 354 U.S. 476, 483 (1957) ("[U]nconditional phrasing of the First Amendment was not intended to protect every utterance.").

87. 18 U.S.C. § 2385 (2012) (imposing criminal penalties for individuals who advocate the overthrow of government). Nearly 130 individuals were prosecuted under the Smith Act until 1957. Barbara J. Falk & Jeremy Patrick, *The 'Red Menace' on Trial: Jury Discrimination in* Dennis, 37 U. LA VERNE L. REV. 285, 286 (2016). In 1957, the United States Supreme Court ruled that successful prosecutions under the Smith Act must meet a rigorous standard. Yates v. United States, 354 U.S. 298, 321–24 (1957), *overruled on procedural grounds*, Burks v. United States, 437 U.S. 1, 8 (1978).

88. Dennis v. United States, 341 U.S. 494, 516–17 (1951) (finding that the Smith Act did not violate the First or Fifth Amendment because the Communist Party would seek overthrowing the United States government in order to establish their desired economic system).

89. *See supra* text accompanying notes 72–81 (discussing the levels of scrutiny under the Equal Protection Clause).

90. *Trump*, 138 S. Ct. at 2423.

91. *See infra* Section II.B.2.ii.

wartime detention doctrines developed during World War II. Lastly, Section II.B.2.iii. discusses war powers generally, analyzing under what conditions wartime detention power may apply.

i. World War II Detentions: Hirabayashi *and* Korematsu

In the aftermath of the attack at Pearl Harbor, the United States sought to consolidate potential enemies into particular military zones and imposed a curfew for broadly-categorized racial groups.[92] This was done under the guise of national defense "in a critical hour,"[93] seeking to "protect[] certain vital national defense interests."[94] The curfews and detentions that resulted were litigated extensively in front of the United States Supreme Court, which upheld the detention in both *Hirabayashi* and *Korematsu*.[95] Both of these exercises of detention and prosecutorial power were upheld as constitutional in light of a perceived necessity.[96] *Hirabayashi* involved an American citizen of Japanese ancestry who "failed to remain in his place of residence in the designated military area," as was required by a military commander acting under the authority of an Executive Order.[97] Hirabayashi was also charged with "fail[ing] to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area."[98] The Supreme Court offered no relief to Hirabayashi.[99]

Korematsu challenged the underpinnings laid out in *Hirabayashi* under similar facts. For example, "Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center."[100] Korematsu admitted to knowingly violating the curfew order, similar to the circumstances of *Hirabayashi*.[101] Once again, the United States Supreme Court upheld the conviction.[102] Amongst the different opinions filed in *Korematsu* and *Hirabayashi*, three different entities were attributed the authority to pass this military order. In the *Korematsu* majority opinion, "the properly constituted military authorities feared an invasion," thereby rendering dubious military

92. Korematsu v. United States, 323 U.S. 214, 215–16 (1944).

93. *Id.* at 218.

94. Hirabayashi v. United States, 320 U.S. 81, 90 (1943).

95. *Korematsu*, 323 U.S. at 224; *Hirabayashi*, 320 U.S. at 105.

96. *See Korematsu*, 323 U.S. at 219 ("[E]xclusion of the whole group was . . . a military imperative."); *Hirabayashi*, 320 U.S. at 86 (finding that "the present situation requires as a matter of military necessity" actions considered by Congress and the President (quoting Pub. Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 2, 1942))).

97. *Hirabayashi*, 320 U.S. at 83–84.

98. *Id.* at 84.

99. *Id.* at 105 ("The conviction under the second count is without constitutional infirmity.").

100. *Korematsu*, 323 U.S. at 223.

101. *Id.* at 216–17.

102. *Id.* at 224 ("We cannot . . . now say that at that time these actions were unjustified.").

authorities as the decisionmakers.[103] Contrarily, Justice Frankfurter's concurring opinion identifies Congress as the decisionmakers, "find[ing] nothing in the Constitution which denies to *Congress* the power to enforce such a valid military order,"[104] understanding that such valid military orders give the U.S. broad power during wartime.[105] Under this theory, Congress has permitted executive orders to be used as a means to effectuate legislative enactments, therefore rendering Congress the decisionmaker. Finally, Justice Rutledge's *Hirabayashi* concurrence identifies the actors as the officers who made the determination that such an order was necessary because "[t]he officer of course must have wide discretion and room for its operation."[106]

Korematsu and *Hirabayashi,* widely thought to be a couple of cases based on race, actually represent the conception of a long-standing consolidation of power under the Executive. Here, the President claimed expanded executive powers in the face of Japanese enemies, just as Stalin claimed expanded executive powers against his perceived ideological and economic enemies —the kulaks.[107] The claim of expanded powers in the United States occurred years after the development of the Gulags in the Soviet Union, and the United States simply did not heed the warning of the danger of a strong executive. As a result, these cases formed the foundation for future scholarship and for development of strong presidential power, specifically in times of war, despite recent abrogation.

There is something unique about war in that it "demand[s] the type of swift action achieved most readily through executive action."[108] In times of war, the President, and the government generally, was authorized to exercise enormous powers. First, Justice Murphy, in his concurrence, found that the limitations on Presidential power during wartime are only those explicit in the Constitution.[109] Justice Murphy also found that "[m]odern war"[110] does not allow the country to sit by idly while the government satisfies "procedural requirements that are considered essential and appropriate under normal conditions."[111] Instead, the Court held that war powers must be construed as

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103. *Id.* at 223. The President, through executive order, had granted these military authorities the power to promulgate orders like the one at issue in the case. *Id.* at 216–17.

104. *Id.* at 225 (Frankfurter, J., concurring) (emphasis added).

105. *Id.* at 224–25.

106. Hirabayashi v. United States, 320 U.S. 81, 114 (1943) (Rutledge, J., concurring).

107. *See supra* notes 17, 22–24 and accompanying text.

108. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 282 (2001).

109. *Hirabayashi*, 320 U.S. at 110 (Murphy, J., concurring).

110. *Id.* at 113. This phrase is quoted to highlight the technological advances that have been made since this decision in 1943, and that the modern war rapidity-of-action defense is even more heightened. Extrapolating Murphy's argument to the present suggests the Executive deserves even more deference than in the 1940s, since technology has once again revolutionized warfare.

111. *Id.*

"the power to wage war successfully."[112] It then follows the political branches of government have the power to regulate anything that would "substantially . . . affect [the war's] conduct and progress."[113] Even Justice Murphy, who dissented in *Korematsu*, agreed that the Court should not impose too high a burden on the government's military action and decision-making.[114]

In adjudicating exercises of war power, *Korematsu* asked courts to look to whether there exists "a definite and close relationship to the prevention of espionage and sabotage,"[115] which the United States Supreme Court deemed the most crucial characteristic of "the successful prosecution of the war."[116] The earlier *Hirabayashi* Court had found that an executive actor need only have reasonable ground for believing a threat is real during wartimes.[117] Still, the *Korematsu* Court held "the power to protect [the country] must be commensurate with the threatened danger."[118]

All of this "must be judged wholly in the context of war."[119] Additionally, none of this renders a U.S. citizen as immune from government exercise of war power.[120] The *Hirabayashi* Court decided it should not "attempt to define the ultimate boundaries of the war power" despite already giving extensive deference to the President.[121]

The *Hirabayashi* and *Korematsu* precedents are not far-flung. Both of these cases have been cited throughout wartime detention, and have left their mark on the Supreme Court.[122] In 2018, the Supreme Court finally decided to

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112. *Id.* at 93 (majority opinion) (quoting Charles Evan Hughes, *War Powers Under the Constitution*, 40 A.B.A. REP. 232, 238 (1917)); *see also* Korematsu v. United States, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) (approving of the use of the Hughes quote).

113. *Hirabayashi*, 320 U.S. at 93.

114. *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

115. *Id.* at 218.

116. *Id.* at 217 (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942)).

117. *Hirabayashi*, 320 U.S. at 94–95.

118. *Korematsu*, 323 U.S. at 220.

119. *Id.* at 224 (Frankfurter, J., concurring); *see also Hirabayashi*, 320 U.S. at 107 (Douglas, J., concurring) ("But military decisions must be made without the benefit of hindsight."). This lens through which to assess military decisions mirrors the type of perspective necessary to view administrative due process decisions. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 547 (1978) (discussing that by "Monday morning quarterbacking" a justice would be taking knowledge from the present and using it in assessing a decision of the past. In that past decisions, the knowledge was significantly less than that of the present). Applying this to war, the decision of the military actors will receive a lot of deference because after-the-fact information obtained will not be able to render a military decision unlawful; it is dependent on the knowledge at the time of the decision.

120. Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-*Hamdi *World*, 54 U. KAN. L. REV. 307, 371 (2006).

121. *Hirabayashi*, 320 U.S. at 102.

122. *See, e.g.*, Ludecke v. Watkins, 335 U.S. 160, 187 (1948) (Douglas, J., dissenting) ("The needs of the hour may well require summary apprehension and detention of alien enemies."); Culver v. Sec'y of Air Force, 559 F.2d 622, 636 n.7 (D.C. Cir. 1977) (describing the balancing of rights and necessity in the *Korematsu* case, impliedly criticizing the decision, but noting its

abrogate the *Korematsu* decision.[123] The *Trump* Court upheld an executive order which banned foreign nationals of countries with heavy Muslim populations from traveling to the United States, requiring a three-step review process for these identified nations.[124] "The order explained that those countries had been selected because each 'is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.'"[125]

The Court further held that the Immigration and Nationality Act ("INA") "exudes deference to the President in every clause,"[126] explaining that "[t]he sole prerequisite set forth in [the INA] is that the President 'find[]' that the entry of the covered aliens 'would be detrimental to the interests of the United States.'"[127] This law upheld in *Trump v. Hawaii*, however, had been defended during the 2016 presidential campaign when then-candidate Trump cited to *Korematsu*. "On December 8, 2015, [then-candidate] Trump justified his ["Muslim ban"] proposal during a television interview by noting that President Franklin D. Roosevelt 'did the same thing' with respect to the internment of Japanese Americans during World War II."[128] While the circumstances between *Trump* and *Korematsu* may be drastically different, the two practical applications of expanded executive power follow similar trends.

Considering the power of the Executive generally, the *Trump* Court held that the President can properly act as the decisionmaker "[b]ecause decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' [and therefore] such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'"[129] The Court continued to recognize the expansion of executive power, applying *Kleindienst v. Mandel* by noting that "'when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification' against the asserted constitutional interests of U.S. citizens."[130] This line of thinking exhibited by the *Trump* Court is not unique,

importance in wartime jurisprudence); Sullivan v. Murphy, 478 F.2d 938, 959 (D.C. Cir. 1973) (distinguishing antiwar demonstration convictions from *Korematsu* on the basis that the officers in the present case acted beyond the scope of the actors permissible in *Korematsu*).

123. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

124. *Id.* at 2404–05.

125. *Id.* at 2404 (quoting Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,210 (Mar. 6, 2017)).

126. *Id.* at 2408.

127. *Id.* (second alteration in original) (quoting 8 U.S.C. § 1182(f) (2012)).

128. *Id.* at 2435 (Sotomayor, J., dissenting).

129. *Id.* at 2418–19 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

130. *Id.* at 2419 (alteration in original) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

however, as "[l]ower courts have similarly applied *Mandel* to broad executive action."[131]

The *Trump* Court broadly deferred to the political branches of government in "the national-security realm."[132] The Court decided that "our cases in this context are clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained."[133] Lastly, the Court determined it "cannot substitute its own assessment for the Executive's predictive judgments on such matters."[134]

There are several similarities in how the *Trump* Court and the *Korematsu* Court addressed executive power. In attempting to distinguish *Korematsu*, the *Trump* Court decided "it is wholly inapt to liken that morally repugnant order [issued in *Korematsu*] to a facially neutral policy denying certain foreign nationals the privilege of admission."[135] The Court in *Korematsu* similarly recognized that "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[136] In other words, the *Korematsu* Court, by upholding Korematsu's conviction, therefore assumes the law was not passed through racial antagonism.[137] In fact, the orders at issue in *Trump* were similar to the World War II orders which "declared that 'such persons or classes of persons as the situation may require' would, by subsequent proclamation, be excluded from certain of these areas . . . ."[138] President Trump's order did just that, too, by excluding a group of individuals of an immutable class under the premise of national security.[139]

The Court's reliance on facial neutrality and over-inclusiveness in *Trump* relates to the findings made in *Korematsu*.[140] Finally, even Justice Breyer's dissent in *Trump* left the door open for enormous executive power under the

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131. *Id.*

132. *Id.* ("For one, '[j]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs." (alteration in original) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017))); *see also id.* at 2409 ("[P]laintiffs' request for a searching inquiry into the persuasiveness of the president's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.").

133. *Id.* at 2419–20 (quoting *Mathews*, 426 U.S. at 81–82).

134. *Id.* at 2421.

135. *Id.* at 2423.

136. Korematsu v. United States, 323 U.S. 214, 216 (1944).

137. *See id.*

138. Hirabayashi v. United States, 320 U.S. 81, 86–87 (1943).

139. *See Trump*, 138 S. Ct. at 2404–05.

140. *Korematsu*, 323 U.S. at 218–19 ("[E]xclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country.").

guise of national necessity.[141] Therefore, although *Trump v. Hawaii* officially abrogated the condemnable *Korematsu* decision, the reasoning throughout the opinion mirrors the executive power exhibited in *Korematsu*. This is evidenced by the court's ultimate holding of presidential deference in the national security realm and its finding that rights protected by the Constitution, such as race or religion, are subservient to the political branches' national security perceptions.

ii. The Application of World War II Detention Precedent

Whereas *Trump v. Hawaii* may have been the most recent application or reference to *Korematsu*, it is not the only modern example. For example, President George W. Bush drew stark comparisons between the Global War on Terrorism and World War II in claiming strong wartime executive power.[142] This exercise of power culminated in the detention centers at Guantánamo Bay, where detainees were treated in the most atrocious ways.[143] Bush viewed himself as "responding to the threat of terrorism appropriately, fairly, and with due regard for procedural safeguards."[144] The establishment of the detention center at Guantánamo Bay was therefore primarily based on perceived national security interest during wartime.

When faced with a constitutional challenge on due process grounds, the Court in *Hamdi v. Rumsfeld* refused to explicitly deny the President the ability to detain citizen Hamdi as an exercise of war powers, seemingly offering some implicit acquiescence to this exercise.[145] Hamdi's eventual release has been found to be "a rare victory for a detainee in the U.S. Supreme Court during wartime."[146] Through the 60 years between *Korematsu* and the establishment of detention centers at Guantánamo Bay, no branch of government had sought to limit the power of the Executive. Even now, executive power is revered as a "necessity," despite the abrogation of *Korematsu*.[147] The danger of

141. *Trump*, 138 S. Ct. at 2429 (Breyer, J., dissenting) ("If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution.").

142. Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 983–84 (2011).

143. *See* Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y.C. L. REV. 393, 394 (2007) (describing the conditions detainees experienced "hav[ing] been held at Guantánamo for more than five years—sleeping on steel beds, cut off entirely from their families, deprived of intellectual stimulation, slowing [sic] growing insane . . . hav[ing] been abused, religiously humiliated, and denied absolutely their day in court"). Despite these atrocities, there appear to be no widespread uproars, similar to Solzhenitsyn's recollection of Soviet inaction. *See supra* note 26.

144. Gruber, *supra* note 120, at 324.

145. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (finding that the detention of an enemy combatant is generally lawful but, as applied in that case, procedural due process required safeguards through a neutral adjudicator); Gruber, *supra* note 120, at 362.

146. Mark S. Kende, *President Trump's Muslim Fears and Korematsu's Honor*, DES MOINES REG. (Feb. 10, 2017, 3:03 PM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/02/10/president-trumps-muslim-fears-and-korematsus-honor/97707034.

147. *See supra* notes 135–41 and accompanying text.

the broad executive powers during wartime will be discussed in Section II.B.2.iii which analyzes the expanding definition of war and the expanding powers wielded therein.

iii. The Future of Executive Wartime Powers

The wartime detention cases leave one question unanswered: When can a President wield the detention authority? Generally, a President attempting to "unilaterally seize and indefinitely detain any person—citizen or alien —not in the military forces," "face[s] substantial constitutional challenges."[148] As a result of acts of Congress combined with judicial activism, constitutional challenges to executive detention face fluid standards of review.[149] These ambiguous standards create logistical concerns in understanding future limits on executive power. Others argue that the President cannot pass detention orders by use of executive orders or proclamations without constitutional or statutory permission.[150] Without express congressional or constitutional limitations on executive power, the courts are free to make determinations of permissible executive action.[151]

There are many perspectives on what constitutes permissible executive power. The most hands-off approach is the theory of a unitary executive in which "all federal executive power is vested by the Constitution in the President."[152] Under this theory, the Executive personally gets to determine limits to his or her power.[153] A cursory check and balance system on the Executive is what Stalin sought throughout much of his leadership in the Soviet Union.[154] On the opposite side of the spectrum is the Article II view, under which the Executive is strictly limited to the express provisions delegated in Article II of the Constitution. Both of these theories undermine the constitutional delegation of powers. The hands-off unitary executive

148. WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 38:42 (3d ed.), Westlaw (database updated Dec. 2018).

149. *See* NANDA ET AL., *supra* note 67, § 14A:27 (explaining that the Detainee Treatment Act of 2005 required a preponderance of the evidence standard for detention cases, the Military Commissions Act of 2009 provides for no standard of review on appeal, and Judge Silberman of the District of Columbia Circuit Court has essentially said the standard of review is an objective standard that an "individual poses a security risk").

150. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 550 (2005).

151. *See* Falkoff, *supra* note 143, at 397 ("[T]he government[] contend[s] . . . a Guantánamo prisoner may be held in prison *for life* based solely on a [Combatant Status Review Tribunal] panel's determination that the prisoner is an 'enemy combatant.'").

152. Karl Manheim & Allan Ides, *The Unitary Executive*, 29 L.A. LAW., Sept. 2006, at 24, 26 (quoting Justice Samuel Alito in his Senate confirmation hearing).

153. *Id.* at 28.

154. *See* Khlevnyuk, *supra* note 28, at 121–22 (describing the cursory review of documents defending the Gulags); *see also supra* notes 43–46 and accompanying text (demonstrating how Stalin effectively controlled most facets of Soviet government).

approach violates the principles of separation of powers.[155] The strict Article II view ignores inherent ambiguities in the express provisions in the Constitution.[156] However, towards the middle of the spectrum is the Hamiltonian view in which all executive power vested in the President is not solely limited to express constitutional provisions.[157] Under the Hamiltonian view, some extra-Constitutional executive powers come as "necessary concomitants of nationality."[158] Under this view, there is no single definitive bound of executive power, making it a spectrum.

The first wartime case intended to identify the limits of executive power was Justice Jackson's concurrence in *Youngstown*, which formulated an oversimplified three-tiered framework.[159] Justice Jackson explained that Category One includes circumstances where the President is acting under "express or implied authorization [from] Congress."[160] Category Two encompasses situations when the President acts without "either a congressional grant or denial of authority."[161] Category Three involves Presidential action that Congress has expressly prohibited.[162]

Despite *Youngstown*'s framework, there is no firm guidance on where the President's power resides on the spectrum. For instance, although *Youngstown*'s framework offers explicit rules and limitations on executive powers, lower courts have found that the Fifth and Sixth Amendments do not protect defendants in military commissions tasked with punishing war crimes.[163] This is contrary to the historical practice of accepting Justice Jackson's concurrence as law, despite being contained in a concurring opinion.[164] Further, many scholars and courts have recognized that the "*Quirin* precedent, which had allowed a United States citizen to be detained and ultimately electrocuted without any civilian prosecution or suspension of

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155. *See* U.S. CONST. art I, §§ 1, 7. If the Executive can do whatever the Executive feels is necessary, they have not been sufficiently "checked" and the power sufficiently "balanced."

156. *See infra* text accompanying notes 170–72.

157. ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 12 (Martin J. Frisch ed., 2007) (finding that in the Constitution, "[l]egislative power[] herein granted shall be vested in a Congress," but only that "[t]he [e]xecutive [p]ower shall be vested in a President," suggesting that the Legislative Branch is confined to expressly enumerated rights due to the word "herein," but the executive power is broadly granted (quoting U.S. CONST. art. I, § 1, art. II, § 1)).

158. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936); *see also* United States v. Lara, 541 U.S. 193, 201 (2004) (discussing the development of treaty law and Congress' increasingly limited role in foreign policy).

159. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

160. *Id.* at 635 (describing the President's power as being greatest in this realm).

161. *Id.* at 637 (finding the President's power is more middle-ground).

162. *Id.* at 637–38 (determining the President's power is weakest in this area).

163. Green, *supra* note 142, at 1003.

164. *See* Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); Dames & Moore v. Regan, 453 U.S. 654, 661–62 (1981).

habeas [corpus]" seems to grant extraordinary power to the Executive.[165] In fact, even the Supreme Court has not denied the power of the President to detain a citizen the President deems to be an enemy combatant.[166] This ongoing debate culminated when the second Bush Administration compared 9/11 to Pearl Harbor,[167] allowing "military detention without criminal process" for many supposed threats.[168] Several courts have therefore identified this trend of consolidating power under the Executive Branch, specifically in the President.[169]

The exercise of executive power is closer to the unitary executive theory on the power spectrum during wartime. Although "[t]he United States Code is thick with laws expanding executive power 'in time of war,'"[170] the analysis does not end there. Presidential power in wartime tests the limit of the plain, explicit language of the Constitution. For example, the Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[171] Article I, however, contains provisions granting Congress much of the wartime authority.[172] In Justice Jackson's *Korematsu* dissent, he demonstrated the deference awarded executive actors and affirmed his responsibilities as "not requir[ing] [him] to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity."[173]

This field of ambiguity between what the President and Congress can do with respect to war was further exacerbated by the War Powers Act, which, ostensibly limits presidential power to act on war without express authority

165. Green, *supra* note 142, at 1020.

166. *See* Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004) (reaching only the threshold question, never getting to the decision on the merits).

167. Green, *supra* note 142, at 1012.

168. Gruber, *supra* note 120, at 315.

169. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir. 1986) ("[T]he power of the President to delegate his authority to those [executive] departments to act on his behalf is unquestioned. Likewise, the power of the President to disregard international law in service of domestic needs is reaffirmed." (citations omitted)). The President accordingly has the ability to ignore international law in pursuit of the President's goals and own laws. As will be discussed in this Note, the President retains a lot of authority with Congress. *See infra* notes 203–06 and accompanying text. The ability to ignore international law and Congressional influence coupled together gives the President the ostensible ability to pick and choose laws to create, enforce, follow, and ignore from around the world.

170. Campbell v. Clinton, 203 F.3d 19, 29–30 (D.C. Cir. 2000) (Randolph, J., concurring).

171. U.S. CONST. art. II, § 2, cl. 1.

172. *Id.* art. I, § 8, cl. 11 (explicating Congress' ability "[t]o declare War"); *id.* art. I, § 8, cl. 15 (authorizing Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union"); *id.* art. I, § 8, cl. 16 (providing for Congress to "govern[] such Part of [the Militia] as may be employed in the Service of the United States"); *see also supra* note 65 and accompanying text (highlighting the ways in which the president can enter into hostilities, and thereby war, without Congressional authorization).

173. Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

from Congress.[174] The D.C. Circuit had the opportunity to address the legality of the Resolution, however, it ruled that plaintiffs, members of Congress, had no standing.[175] The finding that members of Congress had no standing to adjudicate "the merits of war powers"[176] disputes likely traces its roots back to the early Framers' understanding that disputes between Congress and the President were not "cases" under Article III.[177] This is significant because since the Resolution was passed, "no President has explicitly approved of the War Powers Resolution and all have disputed its constitutionality in light of the Commander in Chief Clause."[178] There is, therefore, an open question as to whether the War Powers Resolution is good law. The Courts seem uninterested in addressing this controversy.[179] Despite this resolution, there is still a recognition "that the President might have to take emergency action to protect the security of the United States," an idea that comes from the time of the Founding Fathers.[180] The President's ability to issue executive orders to work independently provides for this expansion of power.[181] Some scholars have speculated that the prerequisites for exercising wartime authority may fall well below any "formal declaration of war."[182] President Bush issued an unambiguous proclamation of war post-9/11, proclaiming that "[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[183] The President, however, does not retain the constitutional power to declare war—it has been explicitly reserved for Congress.[184] The President, therefore, retains a lot of authority with respect to wartime powers, whether or not Congress has officially declared war. When Congress does declare war,

174. *See generally* 50 U.S.C. §§ 1541–1548 (2012) (outlining procedures for Congress and the President to follow in performing wartime duties and determinations).

175. *Campbell*, 203 F.3d at 23.

176. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 194 (1996).

177. *Id.* at 288.

178. J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 689 (2001).

179. *See supra* text accompanying note 173.

180. Mora v. McNamara, 389 U.S. 934, 936 (1967). This seems to suggest that the President has more latitude to act defensively as opposed to offensively, requiring an imminent (or allegedly imminent) threat before the President acts. *See infra* Section III.B.

181. 44 U.S.C. § 1505(c) (allowing the President to suspend the statute requiring the President to publish executive orders and proclamations in the Federal Register in times in which the President fears an imminent attack. The suspension can only be terminated by the President again or a concurrent resolution in Congress).

182. Gruber, *supra* note 120, at 363.

183. George W. Bush, President of the U.S., Address to a Joint Session of Congress and the American People (Sept. 20, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html. This facially exceeds the boundaries of the congressional enactment authorizing additional executive deference. *See supra* text accompanying note 66.

184. *See supra* text accompanying notes 170–72.

however, the President has unquestionable power. In World War II, Congress declared war by using the language, "[t]hat the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared."[185] The effects of both methods of troop involvement—formal declaration, and unilateral executive action—permit enormous executive authority, such as President Bush's ability to detain "enemy combatants,"[186] and the executive orders during World War II in the aftermath of Pearl Harbor.[187]

The expanding application of war and wartime prerogatives historically strengthens the use of executive detention. This Note seeks to recommend a firm limitation on executive detention by analyzing a hypothetical scenario set forth in Section II.C.

C. The Scenario

In this hypothetical scenario, the President first identifies a number of United States citizens as "enemies."[188] The President first tries to detain three groups of people in the supposed interest of national security: those guilty of un-American activities;[189] those of a specific race or national origin based on perceived danger;[190] and those with a Communist ideology.[191] The President, alleging national security concerns, seeks to detain these citizens in labor-focused institutions, promoting the economy while quarantining the accused.

In attempting to detain these groups of people, the President uses political power, political majorities, and executive influence trying to collaborate with Congress to criminalize these groups of people. Congress does not want to be seen as necessarily complicit in this criminalization. Congress therefore decides not to expressly criminalize un-American activities, particular races/national origins, or Communist ideologies. Instead, Congress decides not to act at all.

Without Congress' help, the President then tries to act in the interest of national security by detaining these individuals in an apparent exercise of wartime prerogatives. Whereas no formal war has been declared, the President declares an ideological war on Communism as it allegedly threatens the sanctity of the United States government. Under this threat to national

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185. S.J. Res. 116, 77th Cong. (1941).

186. *See supra* text accompanying notes 165–67.

187. *See supra* Section II.B.

188. This can relate to the names of the classification the President chooses to make; the President can consider them "enemy combatants" or "kulaks" or whatever that title the President so chooses. It can also relate to the entity to which they are "enemies;" whether they are enemies to the President's political party, to the nation, to a certain sub-group of people, or any other entity the President wants to protect.

189. *See infra* Section III.A.1.

190. *See infra* Section III.A.2.

191. *See infra* Section III.A.3.

security, the President seeks to enforce, through the administrative state and military, this proclamation and detention order.

This is a hypothetical scenario a President of the United States may assert. The following Sections analyze this scenario in an attempt to find a limit to presidential power when the President alleges the national security interest mandates action. If having to secure Congressional cooperation to criminalize unwanted activity is the President's only limitation, the modern political trends and "race to the extremes"[192] might quickly render it moot and require stronger, more explicit limitations.

III. THE LACK OF EXECUTIVE CONSTRAINTS

Part III aims to analyze the Scenario from Section II.C and suggests that the detentions posed would be permissible under current executive power jurisprudence. Section III.A first looks at ways in which United States citizens can be detained based on new criminal convictions. Section III.B then examines how the President can exercise wartime prerogatives in the interest of national security. Section III.B surveys what the President can do in wartimes, with or without congressional acquiescence.

A. *THE CURRENT FORCES SUGGESTING THE SCENARIO IS CONSTITUTIONAL*

The Scenario poses a novel question of executive detention power. In looking for an answer, the courts will have to rely on judicial precedent due to the ambiguity in statutes and the Constitution.[193] History suggests that an executive actor, including the President, can employ detention powers in response to criminal convictions. At the most elementary level, this power to detain ironically derives from the Thirteenth Amendment. Detention which promotes forced labor, slavery, and other involuntary servitude is generally prohibited in the United States, because "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[194] The "except" conjunction included in the Thirteenth Amendment, therefore, does not prohibit the government from imposing involuntary servitude[195] on an individual as punishment for a criminal conviction.[196] In this way, the detention contained in the Scenario would be upheld—a labor-focused camp contributing to the nation's economy while

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192. This phrase is used to highlight the political polarization currently facing the United States. *See* William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 308 (2008).

193. *See supra* text accompanying notes 170–72.

194. U.S. CONST. amend. XIII, § 1 (emphasis added).

195. Involuntary servitude has been interpreted to be the "compulsion of services by the use or threatened use of physical or legal coercion." United States v. Kozminski, 487 U.S. 931, 952–53 (1988).

196. *See* U.S. CONST. amend. XIII. A proposed constitutional Amendment, offered by this Note, would seek to effectively remove this "except" clause from the Constitution. *See infra* Section IV.C.

keeping criminals separated from the rest of society, which seems to be the hallmark of the Gulags.[197]

The United States currently utilizes this Thirteenth Amendment "except" clause by operating a penal labor system for imprisoned convicts.[198] Thousands of prisoners are employed for meager wages, sometimes less than a dollar a day, to perform menial tasks and other high risk jobs, such as fighting wildfires.[199] Some proponents of the use of prison labor deem the opportunity a chance for self-improvement.[200] Despite proponent's "self-improvement" argument, prison labor is an exercise that is taking advantage of the Thirteenth Amendment "except" clause. Taking advantage of penal institutions, when boiled down, is how Stalin was able to start the Gulags.[201]

Further, criminalization has greater longevity than executive orders and proclamations the President can use unilaterally.[202] Because Congress retains the authority to define crimes, the President ostensibly must work with Congress to effectuate crimes that could provide for criminal sentences like those described in the Scenario.

The Court has affirmed the necessity, especially in instances "concerning war or foreign affairs, . . . of the country's speaking with one voice in such matters."[203] The Court is giving credence to the idea that the President has

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197. *See* Khlevnyuk, *supra* note 28, at 115–16.

198. David A. Love & Vijay Das, *Slavery in the US Prison System*, AL JAZEERA (Sept. 9, 2017), http://www.aljazeera.com/indepth/opinion/2017/09/slavery-prison-system-170901082522072.html.

199. *See* Chandra Bozelko, *Think Prison Labor Is a Form of Slavery? Think Again*, L.A. TIMES (Oct. 20, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html; Luis Gomez, *For $1 an Hour, Inmates Fight California Fires. 'Slave Labor' or Self-Improvement?*, SAN DIEGO UNION-TRIB. (Oct. 20, 2017, 4:55 PM), http://www.sandiegounion tribune.com/opinion/the-conversation/sd-how-much-are-california-inmate-firefighters-paid-to-fight-wildfires-20171020-htmlstory.html.

200. Bozelko, *supra* note 199 ("My prison job made me feel like I was fulfilling my existential duty to society: I was contributing.").

201. *See supra* notes 17–19 and accompanying text.

202. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 223 (2015) ("[W]hen turning to executive branch policymaking as a viable alternative to congressional stasis, we should not lose sight of what can be lost when the Executive becomes the primary engine of policy—not just the open and transparent decision making more likely to come from a less disciplined but more multi-faceted congressional debate, but also the collaboration between Congress and the Executive that defines any legislative process.").

203. Baker v. Carr, 369 U.S. 186, 281 (1962). The need to speak with one voice on matters concerning foreign affairs or wars does not mean one branch should be 'speaking.' This characterization misses the point of the political branches of government. For example, the Constitution's requirement of bicameralism and presentment, U.S. CONST. art. I, § 7, cl. 2, expects differences of opinion between the two houses of Congress and the President, ensuring widespread support for legislation before it can be officially passed and enacted. The bicameralism and presentment issues should be considered heightened so that when Congress or the President *does* act it is with such broad support, having been approved by Congress *and* the President, that the country acts with one voice. In interpreting it this way, bicameralism and presentment put constitutional requirements ahead of Executive-desired outcomes.

and should have a lot of political sway.[204] A president may be able to use strong political sway to effectuate a change in the minds of the members of Congress, thereby pressuring them to pass legislation they otherwise may not have.[205] In fact, scholars have recognized enormous presidential political capital with respect to Congress.[206]

There are concerns for the separation of powers doctrine under the political capital theories in which the President can influence the decisions of Congress, thereby undercutting the bicameralism and presentment guarantees. The concern that the President may overstep into Congress' domain is exacerbated by the Court's recognition that the country should act univocally, especially in times of war.

With these underpinnings in place, this Section looks at the three different groups of people the Scenario seeks to criminalize. First, Section III.A.1 assesses whether criminalizing un-American activity would permit executive detention; Section III.A.2 assesses detention based on criminalized racial characteristics; and finally, Section III.A.3 assesses detention based on ideology. Section III.B then assesses executive detention power outlined in the Scenario during times of war.

1. Detention Based on un-American Activity

Under the Scenario, the legislatively-imposed bounds of executive power do not seem to permit detention based on un-American activity outside of wartimes.[207] In other words, despite presidential condemnation, Title 10 of the United States Code[208] should not extend to peacetime. Thus, without something authorizing the exercise of power, some additional declaration of war is needed to render the wartime prerogatives applicable.[209] Alternatively, presidential action in the interest of national security may permit the President to exercise wartime detention prerogatives, thereby allowing the President to authorize detention based on perceived un-American activity.[210]

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204. *See* Myers v. United States, 272 U.S. 52, 123 (1926) ("The President is a representative of the people . . . and it may be . . . that the President[,] elected by all the people[,] is rather more representative of them all than are the members of either body of the Legislature . . . .").

205. *See* Ronald D. Aucutt, *Spending Political Capital*, 32 EST. PLAN. 41, 2005 WL 1231672, at *1 (2005) (defining the limits of what a President can pass through Congress by the amount of political capital accrued).

206. David E. Lewis, *Political Control and the Presidential Spending Power* 10–11 (Vanderbilt Univ. Ctr. for the Study of Democratic Insts., Working Paper No. 1-2017), https://www.vanderbilt.edu/csdi/includes/WP_1_2017_final.pdf.

207. Wartimes typically involved any armed hostilities and did not necessarily require a congressional declaration of war. *See, e.g.*, 20 AM. JUR. LEGAL FORMS 2D *War* § 257:2, Westlaw (database updated Nov. 2018). This is the definition that this Note utilizes.

208. *See generally* 10 U.S.C. (2012) (articulating legislatively-established limits and powers related to the Armed Forces of the United States). If the Armed Forces have no jurisdiction to act, then the specifics of this title in the U.S. Code will not apply.

209. *See supra* Section II.B.2.

210. *See infra* Section III.B.

2. Detention Based on Race

The leading cases for the detention of Americans on the basis of race were *Hirabayashi* and *Korematsu*. In both cases the detention classifications were based on ancestry and national origin.[211] Since these cases, the Court has struck down other classifications based on race[212] and finally abrogated *Korematsu*;[213] however, the Court has still preserved much of the underlying executive detention authority.[214] Under this discrepancy, the President may not actively detain a U.S. citizen by reason of their racial, ancestral, or national origin characteristics because racially-motivated regulations are subject to strict scrutiny.[215] Such detention would be subject to the highest level of scrutiny applied to racially motivated classifications. This does not fully negate the President's ability to detain, however, but rather limits the power to detain other characteristics that do not demand strict scrutiny.

3. Detention Based on Ideology

The Court would also need to consider whether classifications of those with a certain ideology, such as Communists, are included as a suspect class or if ideological traits are protected fundamental rights.[216] First, the Court would be hard-pressed to find an ideologically-driven suspect class. To be declared a suspect class, (1) there must be a significant history of discrimination against the class; (2) the class must lack a substantial ability to contribute to society; (3) the trait must be immutable; and (4) the class must be a discrete and insular minority.[217] If the law burdens a fundamental right, however, strict scrutiny is still appropriate.

Whether or not an ideology-driven class gets strict scrutiny protection is an important determination. For example, in most political gerrymandering cases, the courts have required plaintiffs to prove a stronger case by making some factual contentions to show that a state violated Democratic Party members' Equal Protection Clause protections.[218] This reflects a lower level of scrutiny required to uphold a state law. In other words, Democrats were not a suspect class.

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211. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 83 (1943).

212. *See* Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955).

213. *See supra* note 85.

214. *See supra* notes 121–39 and accompanying text.

215. *See supra* notes 73–83.

216. *See* Romer v. Evans, 517 U.S. 620, 631–33 (1996) (holding that strict scrutiny applies when a law burdens a suspect class or a fundamental right).

217. Pederson v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 314–33 (D. Conn. 2012). This balancing test comes from Marshall's concurrence in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472–73 (1985) (Marshall, J., concurring).

218. Davis v. Bandemer, 478 U.S. 109, 131–34 (1986).

This does not mean that an ideology-driven class can never receive suspect class status. For example, based off the Scenario, Communists arguably have a significant history of discrimination against them.[219] On the second suspect class factor, Communists lack a substantial ability to contribute to society in ways that members of other ideological groups can.[220] Granted, many district courts may disagree that Communists cannot meaningfully contribute to society. These courts often cite age and cognitive disability as precluding an ability to contribute to society, but do not mention other qualifying characteristics.[221] Communists would have to argue that they cannot contribute due to the discrimination experienced and the prohibition from government jobs historically. It is unclear how a court would handle this argument.

The third factor, immutability, deserves more attention for a law classifying Communists. Party affiliation is extremely fluid, easy to change, and does not automatically prevent participation in all elections, including partisan primary elections.[222] Though a substantial burden on an individual's right to association is often assessed under strict scrutiny,[223] any lesser burden will be assessed under rational basis review.[224] Ultimately, an individual's party

219. *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 579–80 (1963) (Harlan, J., dissenting) (describing the wide array of anti-Communist government inquiries in varying facets of American life); Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 55–56 (1961) (finding a statute requiring communist entities to register with the government is permissible under the Constitution); Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1686 (2001) (categorizing anti-Communist sentiments into five distinct, exhaustive groups); Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 571 (1994) (outlining the anticommunist tide pushed by Wisconsin Senator Joseph McCarthy).

220. *See, e.g.*, Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215, 1215 (1948) (describing the increased concern of Communists and Communist activities by the general population); Sophia Bollag, *California May End Ban on Communists in Government Jobs*, WASH. TIMES (May 8, 2017), http://www.washingtontimes.com/news/2017/may/8/california-may-end-ban-on-communists-in-government (receiving national attention for the California Assembly a single state narrowly passing a bill to open up government to those with a Communist ideology, somehow at the forefront of this concept); Sarah Jaffe, *The Unexpected Afterlife of American Communism*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/opinion/american-communism.html (finding that American Communism arose out of the outcasts of society).

221. *See, e.g.*, Whitewood v. Wolf, 992 F. Supp. 2d 410, 428 n.13 (M.D. Pa. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 988 n.14 (S.D. Ohio 2013), *aff'd*, 135 S. Ct. 2584 (2015); *Pederson*, 881 F. Supp. 2d at 320.

222. *See* Guy Danilowitz, Note, *The Party or the People: Whose Ballot Choice Does the Constitution Protect?*, 41 U.C. DAVIS L. REV. 713, 720 (2007) (identifying 24 states with open primary systems, allowing anybody to vote in partisan primaries, regardless of political affiliation). In those states, eligible voters need not be registered with the political party in whose primary they seek to vote. *Id.* This allows voters registered in more obscure third parties to participate in that primary election.

223. This can be thought of as a burden on the fundamental First Amendment right to freely associate, deserving strict scrutiny. *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

224. Danilowitz, *supra* note 222, at 718–19.

affiliation can be readily changed, defeating the immutability of the trait. The immutability concern, therefore, may be fatal to securing suspect class status.[225]

Finally, under the fourth factor, registered Communists would be characterized as a discrete and insular minority.[226] Therefore, the only factor weighing significantly against Communists securing suspect class protection is the immutability of the trait. Communists would need to make arguments based on these four factors in order to secure suspect class protection and, therefore, receive strict scrutiny under the Equal Protection Clause. Ultimately, individuals affiliated with any targeted political party would want to prove these four factors to secure strict scrutiny protection under the Equal Protection Clause, thereby making it more difficult for any court to uphold the law.

In terms of whether classifying Communists impedes on a fundamental right, Communists may be able to make a pitch that the underlying *ideology* of an American citizen, however, may fall under the "right to think for oneself."[227] The right to think for oneself would likely be a fundamental right due to its roots in the First Amendment.[228] If a court were to follow this reasoning, the court would be forced to apply strict scrutiny to the classification. Defining an individual with a particular ideology as the trait to be rectified or categorized, however, produces other problems.[229] Ultimately,

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225. *See* Shaw v. Hunt, 517 U.S. 899, 901–02 (1996) (reaffirming race is subject to strict scrutiny); Frontiero v. Richardson, 411 U.S. 677, 683–84 (1973) (finding gender also warrants heightened scrutiny); Korematsu v. United States, 323 U.S. 214, 216–17 (1944) (likening national ancestry to the racial requirements of strict scrutiny). These classifications weigh heavier in the immutability consideration than other categories. *See Pederson*, 881 F. Supp. 2d at 313, 320.

226. *See, e.g.*, Sergio Alejandro Gómez, *El Comunismo se Niega a Desaparecer en Estados Unidos*, GRANMA (Apr. 6, 2017), http://www.granma.cu/mundo/2017-04-06/el-comunismo-se-niega-a-desaparecer-en-estados-unidos-06-04-2017-18-04-25, *translated in* Sergio Alejandro Gómez, *Communist Party Membership Numbers Climbing in Trump Era*, PEOPLE'S WORLD (Apr. 19, 2017), https://www.peoplesworld.org/article/communist-party-membership-numbers-climbing-in-the-trump-era (finding there are around 5,000 members nationally now); Vivian Gornick, *When Communism Inspired Americans*, N.Y. TIMES (Apr. 29, 2017), https://www.nytimes.com/2017/04/29/opinion/sunday/when-communism-inspired-americans.html (calling American Communists "histor[ical]"); Aidan Lewis, *The Curious Survival of the US Communist Party*, BBC (May 1, 2014), http://www.bbc.com/news/magazine-26126325 (supposing there are only 2,000–3,000 registered Communist Party members in the United States).

227. Jeffrey M. Shaman, *On the Waterfront: Cheese-Eating, HUAC, and the First Amendment*, 20 CONST. COMMENT. 131, 147 (2003).

228. *Id.*; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) ("[T]he Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." (quoting Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring))).

229. The significant history of discrimination discussed with respect to registered and affiliated Communists would be nullified because the discrimination took place primarily, if not solely, against registered Communist Party members. There would be no history to rely on in securing a suspect class of unregistered citizens sharing that ideology. Individuals with a communist ideology can still contribute to society, as well. Lastly, although they may be a discrete

defining individuals strictly by their ideology as opposed to partisan affiliation or registration would threaten their First Amendment fundamental right to think for oneself, and therefore require strict scrutiny, despite the difficulty of establishing a suspect class.[230] Subsequently, there would be practical problems in identifying, gathering, trying, and detaining individuals with a particular ideology. Identifying individuals by their registered party affiliation would be easier in this regard as this information is often stored with different state government agencies,[231] pursuant to the federal Motor Voter Act.[232]

Overall, however, most political parties will fail to secure strict scrutiny unless the detention scheme is aimed at individuals with that specific *ideology* as opposed to that specific *party affiliation*. Assuming that prospective plaintiffs were able to secure strict scrutiny analysis—either as registered Communist Party members or as citizens with a Communist ideology—allegations that Communists seek to overthrow the U.S. government,[233] sometimes advocating

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and insular minority, identifying an individual with a communist ideology is challenging, and the weak enforcement mechanisms of any such classification would render this law effectively dead on arrival.

230. *See supra* notes 79–81 and accompanying text.

231. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/4-8 (Lexis Nexis 2018) (defining voter record cards as public records); *id.* at 5/5-7 (concluding the same); *id.* at 5/6-35 (concluding the same).

232. 52 U.S.C. §§ 20501–20511 (2012).

233. *See, e.g.*, Schneiderman v. United States, 320 U.S. 118, 191–93 (1943) (Stone, C.J., dissenting) (characterizing the Communist ideology as focused on the forceful overthrow of the U.S. government); CRAIG LOCKARD, SOCIETIES, NETWORKS, AND TRANSITIONS: A GLOBAL HISTORY 987 (2006); Irene Blankenship, *Capitalism Destabilized—How Do We Prepare to Overthrow the U.S. Government*, ENCYCLOPEDIA ANTI-REVISIONISM ON-LINE, https://www.marxists.org/history/erol/ncm-5/cwp-overthrow.htm (last visited Jan. 23, 2019) (discussing the historical development of the American Communist and the ideas to carry out the Marxist ideology).

violent revolts,[234] might be sufficiently compelling to pass strict scrutiny.[235] Therefore, detention of those with Communist *ideologies* might get strict scrutiny, by which a court may or may not find the law unconstitutional, whereas detention of *registered* Communists may be more permissible. Either one may be permissible if the President can assert the national security interest is compelling enough to survive strict scrutiny.

B. The President's Declaration of War Strengthens the Likelihood of Upholding the Scenario.

Based on the recent development in war power jurisprudence,[236] the Scenario offers another outlet for the President to detain Americans. Instead of negotiating with Congress, the President can detain individuals by utilizing wartime prerogatives in the interest of national security. Since the citizenship of individuals does not matter in war power jurisprudence, the President would be able to fully wield this power against U.S. citizens.

The Global War on Terror is an example of an undeclared war; although it demonstrated serious concerns for the country's safety.[237] The courts could distinguish modern war power jurisprudence from the actions taken in the Scenario by utilizing the underlying logic for the Global War of Terror: finding an affirmative attack uniquely threatens the safety of the country. To date, however, that distinction has not been made. A President can currently, in limited circumstances, take unilateral action to enter hostilities against a

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234. *See, e.g.*, MARX & ENGELS, *supra* note 9, at 72 ("But not only has the bourgeoisie forged the weapons that bring death to itself; it has also called into existence the men who are to wield those weapons—the modern working class—the proletarians."); *see also* LENIN, *supra* note 11, at 21 ("The replacement of the bourgeois state by the proletarian state is impossible without a violent revolution."); LUXEMBURG, *supra* note 9, at 191 ("[T]he Russian Revolution has but confirmed the basic lesson of every great revolution, the law of its being, which decrees: either the revolution must advance at a rapid, stormy and resolute tempo, break down all barriers with an iron hand and place its goals ever farther ahead, or it is quite soon thrown backward behind its feeble point of departure and suppressed by counter-revolution."); Thomas Sankara, Speech at the United Nations (Oct. 4, 1984), *available at* http://afrolegends.com/2015/10/02/discours-de-thomas-sankara-aux-nations-unies-thomas-sankaras-speech-at-the-united-nations (last visited Jan. 23, 2019). It has even been said that revolution *must* predate Communist rule; reforms are insufficient. LUXEMBURG, REFORM OR REVOLUTION, *reprinted in* REFORM OR REVOLUTION AND OTHER WRITINGS, *supra* note 9, at 1, 57 ("Legislative reform and revolution are different *factors* in the development of class society. They condition and complement each other, and are at the same time reciprocally exclusive, as are the north and south poles, the bourgeoisie and proletariat. Every legal constitution is the *product* of the revolution. In the history of classes, revolution is the act of political creation, while legislation is the political expression of the life of a society that has already come into being.").

235. *Cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) ("For one, '[j]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs." (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017))) (alteration in original).

236. *See supra* Section II.B.2.

237. *See* Bush, *supra* note 183 (applauding Congress' allocation of $40 billion to help recover from the deadly terrorist attacks on September 11, 2001).

foreign state or an allegedly foreign state,[238] having done so against an ephemeral entity that threatens the United States.[239] If an entity threatens the sanctity and safety of Americans and the country as a whole, the President could be warranted in proclaiming wartime prerogatives out of necessity.[240]

The potential classifications the President seeks in the Scenario share a common theme—the legality of the classification characteristic could be made stronger.[241] During times of war, the chance that the Courts will uphold the validity of these classifications increases as concerns for the safety and well-being of the nation take center stage.

Gulag-era Soviet Union leader, Joseph Stalin, used the same principles of wielding stronger executive power when there are perceived threats to national security to effectively declare war against kulaks, the wealthy farmers opposing his ideological disposition.[242] It is not wholly out of the question that a United States President could make a similar proclamation against a group of citizens. For example, President Bush acted against an ephemeral enemy of terrorism, found to be advanced primarily by the group al-Qaeda.[243] To retain the example of Communists discussed in Section III.A.3, the President could declare "war" against alleged violence, espionage, and danger that Communists allegedly entertain, promote, and spread. The President's ability to enter into such "war"[244] would not be challenged due to the balance of the four suspect class factors of the Equal Protection Clause.[245] The President can

238. Such as the Confederacy during the Civil War, for example.

239. Although no formal war has been congressionally declared, the President has the authority to take unilateral action to enter into hostilities. *See supra* notes 64–65 and accompanying text. This then gives the President the powers provided during wartime. *See supra* notes 64–67 and accompanying text.

240. *See supra* notes 182–87 and accompanying text.

241. *See supra* Section III.A.

242. *See supra* notes 17–18 and accompanying text. Revolutionary Nikolai Bukharin, speaking to a joint plenum of the Central Committee and the Central Control Commission, stated that "[t]his peculiar theory takes the bare fact that an intensification of the class struggle is now taking place and elevates it into some sort of inevitable law of our development." HOSTETTLER, *supra* note 16, at 57. This is exactly what occurred. 1936 USSR CONSTITUTION, *supra* note 20, art. 133, at 256 ("To defend the country is the sacred duty of every citizen of the USSR. Treason to the Motherland—violation of the oath of allegiance, desertion to the enemy, impairing the military power of the state, espionage—is punishable with all the severity of the law as the most heinous of crimes."). In this way, "[i]f the reason [for a crime] is an anti-Soviet attitude, such a threat constitutes a counterrevolutionary crime." BERMAN & KERNER, *supra* note 34, at 71. Furthermore, "Stalin's famous call for 'stability of laws' was evidently considered inapplicable to the law of counterrevolutionary crimes." *Id.* at 158.

243. *See supra* note 66 and accompanying text.

244. Surely this would not be a perfect war. *See* Bas v. Tingy, 4 U.S. 37, 40 (1800) (Washington, J.). Rather, the "war" spoken of here is more a public condemnation of certain activities impacting the perceived national security interest of the United States, allowing the President to exercise authority to protect that interest.

245. *See supra* text accompanying notes 81, 216–17.

effectively declare or proclaim war in the supposed interest of national security against whomever, whenever, wherever.

IV. STEPS TO LIMIT EXECUTIVE OVERREACH

There are several ways to slow and reverse executive power expansion. First, the courts could overturn, or limit to their facts, *Trump v. Hawaii* and *Rumsfeld v. Padilla*. Second, Congress could pass a legislative enactment that pushes presidential action into *Youngstown* Category Three.[246] This legislative enactment, however, would need to be more widely accepted than the War Powers Resolution, or else it will continuously be discarded by the Executive.[247] Lastly, and most effectively, Congress should pass a constitutional amendment, limiting executive interference into the objectives and powers of Congress.

A. Repeal Dangerous Precedential Decisions

Although the *Korematsu* decision has finally been abrogated, some of its underlying rationales of strong executive power remain intact.[248] Ironically, the best example of this is in the case that abrogates it—*Trump v. Hawaii*.[249] *Trump*'s application of rational basis review and acquiescence to expanded executive power should therefore be overruled.[250]

Another case the Supreme Court should overrule is *Padilla*, in which a district court decided because "[n]either [plaintiff] nor any of the amici denies directly the authority of the President to order the seizure and detention of enemy combatants in a time of war," the court would not raise the issue sua sponte.[251] Due to the principle of stare decisis, it is important to prevent lower courts from reaching similar decisions under *Padilla* and *Hamdi*, where a United States citizen was detained.[252] Judicial deference in cases of executive unilateral action sets dangerous precedent in light of the checks and balances system of government in the United States.[253] In

246. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring); *supra* notes 159–62 and accompanying text. *Youngstown* Category Three is applicable when Congress has expressly denied the President the permission to do something, rendering the President's authority at its weakest. *Youngstown*, 343 U.S. at 637–38.

247. *See supra* text accompanying notes 174–80.

248. *See supra* text accompanying notes 122–41.

249. *See supra* text accompanying notes 122–41.

250. *See* Centro Presente v. U.S. Dep't of Homeland Sec., No. 18-10340, 2018 WL 3543535, at *12 (D. Mass. July 23, 2018) (distinguishing *Trump v. Hawaii* to limit its application of rational basis review to immigration entry disputes).

251. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 588 (S.D.N.Y. 2002).

252. *See supra* notes 64, 145 and accompanying text.

253. *See* David Cole, Youngstown *v.* Curtiss-Wright, 99 YALE L.J. 2063, 2081–82 (1990) (book review) ("Justice Sutherland's dicta [in *Curtiss-Wright*], however, goes much further, suggesting that the executive is the 'sole organ' of the United States in foreign affairs and that the courts

overruling these decisions, the Supreme Court can acknowledge the broad powers delegated to the President in dealing with foreign relations,[254] while still limiting the President's authority to detain individuals.

The issue with overruling these decisions is that they are not based on archaic provisions or statutes that are no longer applicable today; the constitutional authority the Court discussed in those cases still exists.[255] The Court has recognized that there are times when stare decisis should be disregarded, however, and articulated a factor test for courts to follow.[256] In deciding to overrule precedent, the Court looks at four factors: whether (1) the test created is simply unworkable since being handed down; (2) there is reliance on the old holding that would create hardship if overruled; (3) the rule of law has changed since then, abandoning the old doctrine; and (4) facts have changed to warrant a different test.[257]

An analysis of these factors does not support overturning precedent that favors expansive executive power. Of these four factors, assessing presidential authority is not unworkable (first factor),[258] presidents may rely on the delegation of power interpreted in these cases (second factor), and the rule of law has not changed (third factor). The fourth factor depends on the nature of the case brought to the Court to see if the facts have sufficiently changed. Thus, as it stands, there is no strong contention that the doctrine of stare decisis should be disregarded. Rather, it seems the Court would be hard-pressed to find the doctrinal foothold to overturn these cases. Although overruling the cases would be an adequate step toward stopping the executive's power from expanding, it may create ostensibly arbitrary distinctions and other critiques concerning Supreme Court precedence generally. In conclusion, overruling judicial precedent is not an exceedingly viable remedy.

B. Legislative Enactments

A second method of limiting presidential authority would be through a legislative enactment. For example, the *Korematsu* case turned on the fact that Congress had expressly authorized the President to enact executive orders for

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have no place in reviewing, much less overturning, executive foreign policy actions." (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936))).

254. *See* Jama v. Immigration & Customs Enf't, 543 U.S. 335, 348 (2005) (describing the "customary policy of deference to the President in matters of foreign affairs").

255. *See supra* Section II.C.

256. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

257. *Id.* Despite Justice O'Connor's thoughtful transcription of the stare decisis test, the Supreme Court does not often run through this test, nor does it often require adherence to precedent, especially in constitutional disputes. *See* 2A BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE, LAWYER'S EDITION § 3:788 (2018) (describing the doctrine of stare decisis and acknowledging that the Supreme Court is not always bound by its own precedent).

258. This must be viewed in the *assessment* of the facts of a particular case. The rules created in *Trump v. Hawaii* are not unworkable, they simply produce undesired effects.

the sake of protection during wartime.[259] An act of Congress would also push any presidential action into either *Youngstown* Category One or Category Three, depending on whether Congress granted the President authority (Category One) or denied the President the ability to act a certain way (Category Three).[260] Therefore, an act of Congress restricting the President's ability to enter into hostilities through an informal declaration would make it unconstitutional for the President to do so. A concern, however, is that the President needs to be able to act in a time of war to protect Americans, and a legislative enactment would prevent the President's ability to do so.

Although legislative enactment would restrict the President's ability to detain citizens, this does not resolve the concern surrounding the Thirteenth Amendment. The President's ability to detain U.S. citizens, however, is not limited to wartimes. Criminalizing otherwise lawful activity based on arbitrary characteristics would still permit detention of citizens discussed in Section III.A. Therefore, although this type of law would hamper the President's ability to detain citizens, the Thirteenth Amendment still permits detention as conviction of a crime.[261] Therefore, although another step in the right direction, a legislative enactment would not satisfactorily prohibit the wrongful behavior present in the Scenario while hampering the ability of the President to do his or her job properly.

Another way a legislative enactment may not be the most successful way of eliminating unwarranted executive overreach is that Congress has already done this in passing the War Powers Resolution.[262] Nixon had initially vetoed the Resolution; however, Congress was able to override the presidential veto.[263] Since then, it has not been widely respected by the Executive Branch, and not taken seriously.[264] Therefore, not only would a legislative enactment fail to preclude the executive overreach, it may not even be taken seriously if it had addressed the executive overreach.

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259. Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also id.* at 237–39 (Murphy, J., dissenting) (finding the five rationales for the enactment to be (1) the racial group identified is very close-knit; (2) pro-Japanese groups exhibited American disloyalty; (3) the group was located at a strategic location to attack the United States; (4) there were allegedly many violent incidents; and (5) that several bombings on the Pacific coast could be attributed to individuals of the racial group identified).

260. *See supra* notes 159–62 and accompanying text.

261. *See supra* notes 194–96 and accompanying text.

262. *See supra* notes 174–81 and accompanying text.

263. Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RES. J. INT'L L. 173, 179–80 (2012).

264. Broughton, *supra* note 178, at 689–90; Brian Hughes, *Interactive: Presidents Historically Have Ignored War Powers Resolution*, WASH. EXAMINER (Sept. 6, 2013, 12:00 AM), https://www.washingtonexaminer.com/interactive-presidents-historically-have-ignored-war-powers-resolution.

C. *CONSTITUTIONAL AMENDMENT IS THE SUREST WAY TO PREVENT WRONGFUL CITIZEN DETENTION*

Lastly, the most effective method of limiting the President's detention authority would be through a constitutional amendment. An amendment would successfully prevent the Scenario from being carried out. Politically, many groups could support an amendment limiting the power of the Executive branch. For example, it would appease Debsian ideologues[265] and appease across the spectrum to libertarianism beliefs by limiting the power of the government generally.[266]

The Amendment could not upset the current criminal justice system; instead, it would have to prohibit a governmental actor from detaining citizens for arbitrary reasons while maintaining the current penal system for criminals. The Amendment would need to specify that Congress has the *exclusive* authority to declare war and enter into hostilities. It also would need to specifically limit detention to approved circumstances and introduce procedural safeguards. Additionally, the Amendment would have to specifically limit the extent of the detention in both kind and duration. Finally, it would have to limit over-inclusive preemptive classifications and detentions. The Amendment could read:

1. The President or any executive officer is prohibited from detaining any citizen or group of citizens in any forced labor or political quarantine detention center focused on retributive elements, without compelling federal interest, narrowly tailored means, and pre-deprivation individualized due process of law, regardless of whether there exists a formal or informal declaration of war, or entrance of the United States military into hostilities, of which the power to declare or proclaim is exclusively held by Congress.
2. The Congress shall have the power to enforce this provision as necessary.

The first section of the Amendment focuses on the specific limitations of the President and other executive officers. In *Korematsu*, the Commanding General had issued an executive order, limiting the ability for individuals of Japanese ancestry to access certain areas of the military installation.[267] The Amendment proposes that authority be limited, preventing a similar holding from recurring. Limiting the ability for executive detention is not a novel idea;

265. DEBS, *supra* note 57, at 187 (wanting to "abolish the prison" as it is "such a hideous thing").

266. Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 240–43 (2014).

267. Korematsu v. United States, 323 U.S. 214, 215–16 (1944).

in fact, it was the premise upon which habeas petitions were formed.[268] The Amendment seeks to limit executive detention, regardless of the actor. Since courts must interpret the phrase "any executive officer" broadly,[269] this would surely apply to a wide range of actors. For example, immigration officers, who are charged with detaining illegal aliens, would be covered by the Amendment's requirements.[270] Although the Amendment reviews the actions of a wide range of executive actors, it does not prevent a wide range of action.

The Amendment further specifies that in order for there to be a violation, an executive officer violates the provisions of the Amendment by detaining "any citizen or group of citizens . . . focused on retributive elements."[271] In criminal law, there are four main "objectives of punishment[:] deterrence, rehabilitation, retribution and isolation."[272] The Amendment covers one of these elements—retribution. This principle of retribution, or *lex talionis*, refers to "[t]he law of retaliation"[273] or "[s]omething justly deserved."[274] The courts would be tasked with assessing when detention constitutes "retributive elements."[275]

However, the second section grants Congress the express authority to enforce the Amendment by passing legislation, allowing the legislature to have some say in what qualifies as retributive.[276] Additionally, Congress can utilize the Necessary and Proper Clause to exercise more control over the scope of the Amendment.[277] Therefore, even absent any congressional action pursuant to Section 2 of the Amendment, Congress still possesses the authority to pass legislation that is necessary to carry on the objectives of the Executive and Judicial Branches of government. Congress' ability to pass legislation for the purpose of defining and securing the scope of retributive elements takes the decision-making power from the hands of the Executive and provides for the government to speak with one voice.[278]

Notwithstanding any future congressional action pursuant to Section 2 or the Necessary and Proper Clause, the Amendment currently leaves open

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268. I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001).

269. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 493–95 (2010).

270. *See* 8 C.F.R. §§ 241.2–.4 (2018).

271. *See supra* Section IV.C.

272. People v. Suitte, 455 N.Y.S.2d 675, 678 (App. Div. 1982) (citing People v. Notey, 423 N.Y.S.2d 947, 950 (App. Div. 1980)).

273. *Lex Talionis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

274. *Retribution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

275. *See supra* Section IV.C.

276. *See supra* Section IV.C.

277. *See* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 107 (1998) ("The Necessary and Proper Clause gives Congress the power 'To make all Laws which shall be necessary and proper for carrying into Execution' Congress's other powers *and the powers of the other branches of the federal government*." (emphasis added) (quoting U.S. CONST. art. I, § 8, cl. 18)).

278. *See supra* note 203 and accompanying text.

the possibility for detention based on some retributive motives as long as those motives are not the primary focus of the detention. For instance, a court would be hard-pressed to find that a detention is "focused on retributive elements"[279] if such detention is equally justified by the four criminal-punishment objectives (i.e., 25% on retribution and 75% on non-retributive elements).[280] This is not to say that there is an easy way to assess the motives; it would require a fact-intensive, case-specific analysis. This element of the Amendment would require the most work of the judiciary, unless Congress were to help enforce the Amendment through the legislative process. Absent congressional influence, however, assessing the intent of an executive decision-maker is not beyond the judiciary's competence.[281]

Further, the Amendment specifically prohibits forced labor institutions and political quarantine, which were the hallmarks of both the Gulags[282] and the Scenario.[283] The explicit prohibition of forced labor institutions directly combats the effects of the "except" clause in the Thirteenth Amendment.[284] The courts could interpret the forced labor and political quarantine provision in multiple ways. First, courts may look at the type of *institution* by asking such questions as to determine whether a detention center was being used for forced labor. Second, courts may look at the type of *detention action*. In other words, the court could ask "Regardless of the type of detention center, is the government compelling labor from an individual?" Both of these interpretations would affect similar individuals, but the first would seem to permit the type of low-paying prison labor currently seen in the United States.[285] The second would look not at the prison within which the workers are detained but rather at the fact that the work is performed for meager pay. In this way, courts may be able to strike down prison labor under the Amendment. This would depend entirely on how the courts interpreted the forced labor institution provision. Overall, penal institutions will be relatively unaffected. Any forced labor institution would be abolished, and the government would be thwarted from compelling labor from prisoners, but their detention alone would not be problematic. When an individual qualifies for protection under the first part of the Amendment discussed above, the Amendment protects that individual by requiring the government to pass

279. *See supra* Section IV.C.

280. *See supra* notes 271–72 and accompanying text.

281. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 593 (1973); Atuar v. United States, 156 F. App'x 555, 565 (4th Cir. 2005); United States v. Uni Oil, Inc., 710 F.2d 1078, 1086 (5th Cir. 1983).

282. *See supra* note 14 and accompanying text.

283. *See supra* Section II.C.

284. *See supra* notes 193–96 and accompanying text.

285. *See supra* notes 198–201 and accompanying text.

strict scrutiny.[286] Although this may be inferred from the constitutional nature of the Amendment,[287] the Amendment also adds the requirement of pre-deprivation due process. The Amendment therefore takes strict scrutiny and makes it more exacting, ensuring the courts do not misinterpret the level of due process necessary for detentions that are prohibited under this Amendment.

Lastly, the Amendment reaffirms the exclusive power of Congress to declare war.[288] This language seeks to limit the ability of the President to unilaterally enter into hostilities for the purposes of exercising wartime prerogatives. This does not interfere with the President's ability to exercise the other executive powers granted under Article II of the Constitution. For example, the President would still retain the ability to negotiate and ratify international treaties,[289] but the President would be restricted from unilaterally exercising wartime prerogatives. Further, the President would still retain the power to recognize foreign nations and act pursuant to those declarations,[290] yet the President would have to yield to Congress when declaring war against them. The unilateral wartime prerogatives impacted, then, would be those President Bush proclaimed against the ephemeral entity of terrorism.[291]

Ultimately, the Amendment covers many executive actors and their actions. It also seeks to limit the President's ability to proclaim war unilaterally, thereby supporting separation of powers and adding more checks and balances to the system. In doing so, like with a proposed legislative enactment in Section IV.B, the President may be unable to act as quickly as before, unless Congress declares a formal war. This is the solution that would

286. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (introducing "more exacting judicial scrutiny").

287. *See* Romer v. Evans, 517 U.S. 620, 650 n.3 (1996) (Scalia, J., dissenting) (holding a fundamental right gets strict scrutiny); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (holding that constitutional rights are fundamental rights).

288. *Cf.* U.S. CONST. art. I, § 8, cl. 11 (granting to Congress the power to declare war).

289. *See* Medellin v. Texas, 552 U.S. 491, 519 (2008) ("[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.").

290. *See* Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142, 1145 (9th Cir. 1999) ("[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive Branch alone the authority to recognize, and to withdraw recognition from, foreign regimes.").

291. *See supra* notes 183, 237 and accompanying text.

satisfactorily squash the dangerous precedents,[292] with fewer unintended effects than the other proposed solutions.[293]

V. CONCLUSION

Although hypothetical, the Scenario highlights the dangers in the development of executive power jurisprudence. It illustrates how the President has the ability to detain individuals based on arbitrary classifications. The President can circumvent the congressional authority to declare war by acting in the alleged interest of national security. This will provide the President the authority to exercise wartime prerogatives in the short-term without any congressional declaration of war. Once war is declared, the President has more expansive executive powers, including the authority to decide and determine who constitutes an enemy for purposes of detention.

This Note treats the Scenario as a hypothetical tasked with demonstrating ostensibly impossible executive overreach. The Scenario has been carried out, however, in the Soviet Union through the first half of the twentieth century. The holes that exist in presidential authority mirror the authority abused by Joseph Stalin in the Gulag-era Soviet Union. The circumstances that promoted the Gulag development in the Soviet Union are ever-present today. Immediate action is needed to mitigate the risk of replicating one of the most devastating periods in human history. This starts with overturning erroneous Supreme Court decisions that not only agitate our basic understandings of fairness and equality but also exacerbate presidential power doctrines. It cannot end there, however. Since a legislative enactment would not sufficiently address these concerns, a constitutional amendment is necessary, which formally distinguishes the overlapping boundary between Congress' power to declare war and limits the President's ability to enter into hostilities during times of necessity, limits unconstitutional detentions like those in the

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292. First, the type of detention in *Hirabayashi* would be impermissible. Hirabayashi v. United States, 320 U.S. 81, 86 (1943). The detention in *Korematsu* yields the same result. Korematsu v. United States, 323 U.S. 214, 219 (1944). The facts of *Trump v. Hawaii* would limit detention and closed access to immigrants. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2404–06 (2018). Detention for un-American activities would be restricted to detentions based on non-retributive motives, thereby protecting against political quarantine as well. *See* Debs v. United States, 249 U.S. 211, 212 (1919); *supra* Section III.A.3 (discussing whether Communists would receive strict scrutiny or rational basis). Lastly, it would resolve the debate of the War Powers Resolution, see *supra* notes 175–80, by declaring that Congress must enter into hostilities. In this way, executive wartime prerogatives in the interest of national security will finally be checked by Congress and the Courts—the President cannot act until the other branches act.

293. The Amendment specifies the types of detention centers included in the prohibition. This specificity makes it unlikely to impact the current prison system drastically, if at all. The majority of prisons do not fall into this type of prohibition. Furthermore, the Amendment does not prohibit prisons, but rather prohibits specific detentions. In this way, all prisons can remain, but not every citizen can be detained without the government satisfying the exacting requirements under the Amendment.

Scenario, and requires strict scrutiny for any law imposing similarly retributive punishments. Without this, the American promise of freedom is in jeopardy.