

Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived *Korematsu*

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ABSTRACT. Neal Katyal, who argued *Trump v. Hawaii* at each level of the federal court system, compares the Supreme Court’s decision to uphold President Trump’s travel ban to the Court’s decision nearly seventy-five years ago to affirm the internment of Japanese Americans in *Korematsu*. He concludes that while *Hawaii* overturned *Korematsu*, it essentially recreated the doctrine under another name. The phoenix of excessive deference to the executive unfortunately persists as an entrenched part of our jurisprudence.

INTRODUCTION

In 1944, Justice Jackson delivered an ominous warning to his colleagues on the bench and to the nation. By sanctioning the internment of Japanese Americans and upholding an exclusion order based on a “mere declaration”¹ of “reasonable military necessity,”² the Supreme Court’s decision in *Korematsu v. United States* would “lie[] about like a loaded weapon ready for the hand of any authority that c[ould] bring forward a plausible claim of an urgent need.”³ For decades, Justice Jackson’s warning has been characterized as a fear of the past or an alternate history that never came to be.⁴ Indeed, the Court’s decision in *Korematsu*

1. *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

2. *Id.* at 248.

3. *Id.* at 246.

4. See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2575 (2003); Adam Liptak, *A Discredited Supreme Court Ruling that Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), <https://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html> [https://perma.cc/ZP5B-TTXJ].

has joined the ranks of this country's most notorious antiprecedents—textbook cases of judicial decision-making gone wrong that jurists of all stripes vow never to repeat.⁵ But on the eve of *Korematsu*'s seventy-fifth anniversary, a majority of the Court brought to fruition what Justice Jackson predicted so long ago. Despite overturning *Korematsu*, the Court's decision in *Trump v. Hawaii*⁶ perpetuates the very-near-blind deference to the executive branch that led the *Korematsu* Court astray.

In her dissent, Justice Sotomayor explicitly spelled out the glaring similarities between the two cases⁷—a move that garnered sharp criticism from some of her colleagues on the Court as well as commentators.⁸ According to her critics, Justice Sotomayor's *Korematsu* reference was not just inapposite but a rhetorical cheap shot.⁹ Yet a closer examination of the language and arguments in the two cases shows that Justice Sotomayor was on to something. The parallels between these two opinions are striking, both on the surface and in the underlying substance. And if the “court of history” tells us anything,¹⁰ these cases will share a

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5. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011); see also *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (“I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“*Korematsu* demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification.” (quoting *Korematsu*, 323 U.S. at 223)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.” (citing *Korematsu*, 323 U.S. at 235-40 (Murphy, J., dissenting))).
 6. 138 S. Ct. 2392 (2018).
 7. See *id.* at 2447-48 (Sotomayor, J., dissenting).
 8. See, e.g., *id.* at 2423 (majority opinion) (“[T]he dissent invokes *Korematsu* . . . Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case.”); Marina Medvin, *Korematsu Has Nothing to Do with Trump’s Travel Ban*, TOWNHALL (June 28, 2018, 12:01 AM), <https://townhall.com/columnists/marinamedvin/2018/06/28/korematsu-has-nothing-to-do-with-trumps-travel-ban-n2495295> [<https://perma.cc/HTD5-VF8Y>] (arguing that, by comparing President Trump’s travel ban to *Korematsu*, Justice Sotomayor “disgraced the abuse that the American-Japanese suffered during World War II”); Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018, 8:18 AM), <https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext> [<https://perma.cc/6LLM-3L6J>] (“The discussion of the Japanese internment case by both the majority and dissenting opinions was degrading to the court as an institution and should embarrass both Sotomayor and Roberts. Citing *Korematsu* is one of the cheapest shots available to a litigant, much less a justice.”).
 9. See sources cited *supra* note 8.
 10. *Hawaii*, 138 S. Ct. at 2423.

similar legacy too. *Hawaii* will join *Korematsu* on the list of antiprecedents having “no place in law under the Constitution.”¹¹

In the ensuing pages, I lay out these parallels. The parallels were not ones that Justice Sotomayor discovered at the conclusion of the litigation. Rather, at every step of the *Hawaii* case, I was aware of them; indeed, I had a unique perspective on how bad *Korematsu* was for our nation. Six years before Donald Trump was elected President, I confessed error on behalf of the Solicitor General’s Office for its conduct in litigating *Korematsu*. I knew firsthand the dangers of untrammelled executive power. Our amici and supporters knew this as well, so much so that my last physical contact before standing up to give the oral argument in *Hawaii* was the warm embraces in the Supreme Court chamber given to me by Senator Mazie Hirono and Karen Korematsu, the daughter of Fred Korematsu.

In the months since the Supreme Court’s five-four decision and in the wake of the criticism of Justice Sotomayor, I’ve wondered whether those of us who litigated the case were unduly sensitive to the commonalities between *Hawaii* and *Korematsu*. In the end, the answer is no.

This Essay explains why. In Part I, I explain many of the surface-level similarities between the cases, such as the way in which the history and purpose of both governmental actions were laundered. Readers of the *Hawaii* majority opinion would have little idea about the terrible history of Trump’s travel ban, including many of the anti-Muslim statements he had made over the years. As in *Korematsu*, it took the dissent to detail these buried facts at length. In Part II, the Essay details how the surface-level similarities are eclipsed by a much more fundamental commonality between the two decisions: they are, at their root, decisions that place their unbounded trust in the President when he asserts military necessity. One way of putting the point is this: it was not hard for Chief Justice Roberts in *Hawaii* to overrule *Korematsu* in name, since he merely recreated its reasoning under a different appellation. The Court still has the same tool in its toolkit – it’s just that the case now begins with a *T*.

I. SURFACE-LEVEL SIMILARITIES FROM A SIDE-BY-SIDE COMPARISON

Of course, *Korematsu* and *Hawaii* are not the same case. They involve orders of substantially different dimensions and scope. To put it briefly, in *Korematsu*, the Military Commander of the Western Defense Command, General John DeWitt, under the authority of the President, ordered the relocation of Japanese

11. *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

Americans—including United States citizens—to internment camps according to explicit race-based classifications.¹² In *Hawaii*, the President of the United States, Donald Trump, ordered a ban on foreign nationals' entry to the country using a facially neutral policy that predominantly impacts Muslim-majority nations.¹³ These cases are products of distinct time periods, and their facts are undisputedly different. But it's the legal reasoning and the remarkable commonalities in the language and arguments—not the facts—that are telling.

Begin with the statements of the officials responsible for the respective orders—statements that were available to both the *Korematsu* and *Hawaii* Courts and provide the contextual backdrop against which these cases were decided.¹⁴ As Justice Murphy noted in his *Korematsu* dissent, General DeWitt described people of Japanese ancestry as “subversive,” part of “an “enemy race,” and members of “a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom, and religion.”¹⁵ Similarly, President Trump called for a “total and complete shutdown of Muslims entering the United States.”¹⁶ He also announced that “Islam hates us,”¹⁷ retweeted “three anti-Muslim propaganda videos” just two months after issuing the third travel ban,¹⁸ and stated that “it was ‘very hard’ for Muslims to assimilate into Western culture.”¹⁹ If the symmetries were not obvious, President Trump connected the

12. See *Korematsu*, 323 U.S. at 226-29 (Roberts, J., dissenting).

13. See *Hawaii*, 138 S. Ct. at 2404-07; see also *id.* at 2416-17.

14. Part II of this Essay discusses other evidence that emerged after oral argument. This Part discusses only statements that were articulated in the opinions themselves, not statements that came out after the decision or oral argument. See Joshua A. Geltzer, *The White House Refuses to Disavow Trump's Muslim-Ban Promise*, SLATE (Apr. 26, 2018, 6:15 PM), <https://slate.com/news-and-politics/2018/04/did-noel-francisco-mislead-the-supreme-court-about-trumps-current-muslim-ban-position.html> [https://perma.cc/2PPG-LGUR] (discussing information that the Solicitor General mischaracterized during oral argument in *Hawaii*). See generally Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3034-36 (2013) (discussing critical evidence in *Korematsu* that the Solicitor General did not bring to the attention of the Court). These statements—and their implications—are discussed below. See *infra* Part II.

15. *Korematsu*, 323 U.S. at 236-37 (Murphy, J., dissenting) (quoting J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942 (1943)).

16. See Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [https://perma.cc/3ZKH-UQU6].

17. *Hawaii*, 138 S. Ct. at 2417 (quoting Joint Appendix at 120, 159).

18. *Id.*

19. *Id.* at 2437 (Sotomayor, J., dissenting) (quoting Joint Appendix at 131-32) (paraphrasing the President's words in an interview with *Fox News*); see also Chris Cillizza, *Donald Trump's Explanation of His Wiretapping Tweets Will Shock and Amaze You*, WASH. POST (Mar. 16, 2017),

dots himself. He likened his proposed ban during the campaign to the internment at issue in *Korematsu*, “noting that President Franklin D. Roosevelt ‘did the same thing’ with respect to the internment of Japanese Americans during World War II.”²⁰ And while his lawyers sometimes tried to suggest otherwise, President Trump never once disavowed those remarks or said he was not trying to impose a Muslim ban.²¹

While less blatant, the majority opinions in both cases share common arguments and rhetorical devices, too. In *Korematsu*, Justice Black purported to draw a hard constitutional line when protecting individual liberties, citing only the most extreme threats to national security as justifying deviation from core constitutional protections. In his words, only “circumstances of direst emergency and peril” present an exception to the general rule that “[c]ompulsory exclusion of large groups of citizens from their homes . . . is inconsistent with our basic governmental institutions.”²² In *Hawaii*, Chief Justice Roberts purported to establish a similar exception, noting that while “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,”²³ and “[w]hile we of course ‘do not defer to the Government’s reading of the First Amendment,’ the Executive’s evaluation of the underlying facts is entitled to appropriate weight,” especially in the context of national security.²⁴

But in both cases, the majorities tempered these implicit promises of (albeit marginal) judicial oversight by hiding behind the shield of the executive branch’s institutional competence. Take, for instance, the *Korematsu* Court’s emphasis on its lack of military expertise, declaring that it could not “reject as unfounded the judgment of the military authorities” or “say that the war-making branches of the Government did not have ground for believing” that the actions they took were necessary.²⁵ For its part, the *Hawaii* Court explained that whether or not

<https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson> [<https://perma.cc/E3VN-CCDY>].

20. *Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting) (quoting Joint Appendix at 120). These remarks were made while Trump was a presidential candidate in 2015. See Jenna Johnson, *Donald Trump Says He Is Not Bothered by Comparisons to Hitler*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/08/donald-trump-says-he-is-not-bothered-by-comparisons-to-hitler> [<https://perma.cc/K6YF-9UU8>].

21. See Geltzer, *supra* note 14.

22. *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

23. *Hawaii*, 138 S. Ct. at 2417 (majority opinion) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

24. *Id.* at 2422 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010)).

25. *Korematsu*, 323 U.S. at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

President Trump's policy is "overbroad" or "does little to serve national security interests," the Court "cannot substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'"²⁶

The most glaring similarity is the fervor with which the two majority opinions dismissively rejected the dissents' respective characterizations of the facts. Consider Justice Black's retort to his three dissenting colleagues:

Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.²⁷

Chief Justice Roberts's remarks in *Hawaii* read like a sequel:

Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President²⁸

There's a bit of protesting too much in both of these passages. Despite the insistence that *Korematsu* is utterly distinct from *Hawaii*, the language, style, and arguments of the two majority opinions suggest otherwise.

A similar picture emerges in the dissents. In a single line, Justice Roberts's dissent in *Korematsu* captures a principal frustration of the dissenters in both cases. "Why," he asked, "should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?"²⁹ For Justice Roberts, the *Korematsu* majority's central failure was treating the exclusion order as

26. *Hawaii*, 138 S. Ct. at 2421 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

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

28. *Hawaii*, 138 S. Ct. at 242 (citation omitted).

29. *Korematsu*, 323 U.S. at 232 (Roberts, J., dissenting).

a “hypothetical” extension of a curfew, when a thorough review of the facts (specifically, those known to the Court but not fully detailed in the majority opinion) revealed an “over-all plan for forceable detention.”³⁰ This is essentially the same line of argument that Justice Breyer employed in his *Hawaii* dissent. To Justice Breyer, the case boiled down to the actual implementation of the ban and its waiver and exemption system.³¹ Just as Justice Roberts had chided the *Korematsu* majority for deciding a hypothetical version of the case,³² Justice Breyer framed the issue in *Hawaii* as involving two potential alternatives. In the first, the government properly applied the Proclamation’s waiver and exemption provisions – an assumption the majority took for granted. In the other, Justice Breyer described a world where waivers and exemptions were merely a form of “window dressing.”³³ As was the case when Justice Roberts laid out a more complete picture of the facts in *Korematsu*, Justice Breyer’s survey of the evidence available in *Hawaii* shattered the facade that the majority had erected, calling into question a number of the majority’s central premises.³⁴

And what goes for Justice Breyer goes for Justice Sotomayor’s dissent in spades. Just four sentences into her opinion, Justice Sotomayor charged the Court with “leav[ing] undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerades behind a façade of national-security concerns.”³⁵ She went on to label the waiver program a “sham”³⁶ and to criticize the majority for providing a “highly abridged account” of the facts instead of the “full record” that “paints a far more harrowing picture.”³⁷

Justice Sotomayor’s opinion is eerily reminiscent of the remaining two *Korematsu* dissents, authored by Justices Murphy and Jackson, respectively. Not only did Justice Sotomayor directly quote from these dissents,³⁸ but she also reiterated their rejection of national security exceptionalism and mirrored their concerns about doctrinal manipulation. To start, in *Korematsu*, Justice Murphy insisted on placing “definite limits [on] military discretion,” arguing that “like

30. *Id.*

31. See *Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting).

32. See *Korematsu*, 323 U.S. at 232 (Roberts, J., dissenting).

33. *Hawaii*, 138 S. Ct. at 2432–33 (quoting Declaration of Christopher Richardson at 3–4, *Alharbi v. Miller*, No. 1:18-cv-2435 (E.D.N.Y. June 1, 2018)).

34. See *id.* at 2430–33.

35. *Id.* at 2433 (Sotomayor, J., dissenting).

36. *Id.* at 2445.

37. *Id.* at 2435.

38. See *id.* at 2448.

other claims conflicting with the asserted constitutional rights of [an] individual, [a] military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.”³⁹ Justice Sotomayor urged the same, noting that “[a]lthough national security is unquestionably an issue of paramount public importance, it is not ‘a talisman’ that the Government can use ‘to ward off inconvenient claims—a label used to cover a multitude of sins.’”⁴⁰

The parallels don’t end there. Both Justice Jackson and Justice Sotomayor accused the majorities of a bait-and-switch, calling into question what the Court had said just months earlier. In *Hirabayashi v. United States*,⁴¹ a case decided just six months before *Korematsu*, the Court had expressly limited its holding to the curfew requirements at issue, declining to pass judgment on other military orders.⁴² But according to Justice Jackson, by relying on *Hirabayashi* and claiming that it dictated the outcome in *Korematsu*, the majority was “now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding.”⁴³ Along similar lines, Justice Sotomayor condemned the Court’s refusal to follow the very principles it laid out “just weeks [before]”⁴⁴ in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁴⁵ “Unlike in *Masterpiece*, where the majority considered the state commissioner’s statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President’s charged statements about Muslims as irrelevant.”⁴⁶ Looking beyond recent precedent, both Justices took the Court to task for manipulating the broader constitutional inquiry. For instance, Justice Jackson noted that, “whether consciously or not,” the majority is “distort[ing] the Constitution to approve all that the military may deem expedient.”⁴⁷ By the same token, Justice Sotomayor criticized the Court for “incorrectly appl[ying] a watered down legal standard” that vitiates Establishment Clause jurisprudence.⁴⁸

Taken together, the opinions in *Hawaii* read like a modern-day adaptation of *Korematsu*. Normally, this would not be surprising—after all, the same

39. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).

40. *Hawaii*, 138 S. Ct. at 2446 (Sotomayor, J., dissenting) (internal quotation marks omitted) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)).

41. 320 U.S. 81 (1943).

42. *Id.* at 102, 105.

43. *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

44. *Hawaii*, 138 S. Ct. at 2446 (Sotomayor, J., dissenting).

45. 138 S. Ct. 1719.

46. *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (citation omitted).

47. *Korematsu*, 323 U.S. at 244-45 (Jackson, J., dissenting).

48. *Hawaii*, 138 S. Ct. at 2440 & n.5 (Sotomayor, J., dissenting).

institutional body decided both cases, and later decisions necessarily draw from the language and arguments of their earlier counterparts. But *Korematsu* is not just any case. It is one of the most widely rejected and disfavored decisions in the Court's history. And it is altogether surprising that a decision that purported to overrule *Korematsu* in effect recreated its reasoning.

II. BLIND DEFERENCE TO PARTIAL TRUTH: THE FAILURE TO LEARN FROM *KOREMATSU*

It is not simply the standard of review (strong deference) that creates the parallels in these cases, but also the way in which the majorities applied the standard to the facts at hand. In each case, the dissents condemn the Court's unquestioning acceptance of the government's "half-truths"⁴⁹ and "self-serving" statements,⁵⁰ "all in the name of a superficial claim of national security."⁵¹ This shared criticism is much more than a surface-level similarity—it explains how, despite overturning *Korematsu*, the Court "merely replace[d] one 'gravely wrong' decision with another."⁵² Both Courts adopted a posture of broad deference to the executive—even when individual constitutional rights are infringed—when the executive asserts that a policy is necessary to ensure the nation's security.

Consider how the *Korematsu* majority reached its decision. It accepted at face value the government's attestations of military necessity, never questioning whether this conclusion was justified by anything more than General DeWitt's own declarations.⁵³ It never considered whether the military's pronouncements of urgency actually made sense—not as a matter of policy, but for the purpose of credibility given that a significant period of time had passed since Pearl Harbor.⁵⁴ Nor did the majority mention the "unverified" and vague nature of multiple findings in General DeWitt's report.⁵⁵ In fact, the majority failed to even consider General DeWitt's patently racist comments about people of Japanese

49. *Korematsu*, 323 U.S. at 239 (Murphy, J., dissenting).

50. *Id.* at 245 (Jackson, J., dissenting).

51. *Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

52. *Id.* (quoting *id.* at 2423 (majority opinion)).

53. See *Korematsu*, 323 U.S. at 218-19.

54. See *id.* at 241 (Murphy, J., dissenting) (noting that "nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed," suggesting that "[l]eisure and deliberation seem to have been more of the essence than speed").

55. *Id.* at 238.

ancestry “belonging to ‘an enemy race’ whose ‘racial strains are undiluted’” – statements that could not be based on any purported military expertise.⁵⁶ And it surely did not recognize the “sharp controversy as to the credibility of the DeWitt report” itself.⁵⁷

Rather, the majority cited General DeWitt’s report just once – without even naming the General in the main text⁵⁸ – and supplemented the report by citing two congressional hearings, even though those hearings actually provide considerable reason to doubt the justifiability of the military’s assertions.⁵⁹ The Court explicitly refused to look at “the true nature of the assembly and relocation centers,”⁶⁰ opting instead to consider the exclusion order in a vacuum, wholly separate from the context in which it was executed. By the end of its opinion, the majority appeared to have accepted the government’s position as not just sufficiently reasonable but also right. The Court simply declared that “Korematsu was not excluded from the Military Area because of hostility to him or his race,”⁶¹ without providing any analysis to support such a definitive conclusion. Really the decision amounts to this: constitutional protections can be put on hold if the government asserts a remotely plausible claim of military necessity, and the ugly real motivations for a government policy can be swept under the rug.⁶²

56. *Id.* at 236.

57. *Id.* at 245 (Jackson, J., dissenting).

58. See *id.* at 219 n.2 (majority opinion). The Court provided a more thorough summary of General DeWitt’s report in *Hirabayashi*. See *Hirabayashi v. United States*, 320 U.S. 81, 102-04 (1943). But even there, the Court failed to mention the report’s troubling aspects, including each of the damaging facts noted above. See *Hirabayashi*, 320 U.S. at 102-04. In any event, the Court’s scant mention of the report in *Korematsu* cannot be excused by its prior analysis in *Hirabayashi*, as the two cases involve orders of entirely different magnitudes. As Justice Roberts explained in his dissent, curfew orders are simply not the same as forcible relocation, and the Court’s acceptance of the former cannot singlehandedly provide the basis for upholding the latter. See *Korematsu*, 323 U.S. at 231-32 (Roberts, J., dissenting).

59. See *Korematsu*, 323 U.S. at 219 n.2 (first citing *National War Agencies Appropriation Bill for 1945: Hearings Before the Subcomm of the H. Comm. on Appropriations*, 78th Cong. 608-76 (1944) (noting that many people who had been interned were “pro-American” and likely “not dangerous” but rather feared they would not properly adjust to the United States); and then citing *Expatriation of Certain Nationals of the United States: Hearings on H.R. 2701, H.R. 3012, H.R. 3489, H.R. 3446, and H.R. 4103 Before the H. Comm. on Immigration and Naturalization*, 78th Cong. 37-45, 49-58 (1944) (noting that (a) over 10,000 previously-interned Japanese-Americans had voluntarily moved to the Midwest and the intermountain region, after which there had been no reports of “any trouble” among this group that reached the military’s attention, and (b) that it may be possible to identify and segregate disloyal individuals of Japanese ancestry from loyal ones)).

60. *Id.* at 223.

61. *Id.*

62. Cf. Leah Litman, *Unchecked Power Is Still Dangerous No Matter What the Court Says*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/travel-ban-hawaii>

Yet the majority's blind deference and its abdication of judicial responsibility are not the only reasons why *Korematsu's* legacy is so spoiled. The Solicitor General withheld critical information from the Court – information that, even under the Court's extremely deferential approach, could not have sustained the majority's holding.⁶³ In the government's brief for *Hirabayashi*, the case on which the *Korematsu* majority so heavily relied, the Solicitor General omitted any mention of the Office of Naval Intelligence's report that concluded "the entire 'Japanese Problem' ha[d] been magnified out of its true proportion, largely because of the physical characteristics of the people."⁶⁴ By the time *Korematsu* reached the Court, the Federal Bureau of Investigation, the Federal Communications Commission, and two members of the Alien Enemy Control Unit had also concluded that General DeWitt's report was not credible and that the internment orders were not justified.⁶⁵ But the Solicitor General still stood by General DeWitt's report, going so far as to tell the Court during oral argument that "no person in any responsible position has ever taken a contrary position" to the one the government "has always maintained since the *Hirabayashi* case."⁶⁶

At the time *Korematsu* was decided, little of this information was known to the Court. But it was certainly known by the time of *Hawaii*, as the true story had emerged in the 1980s.⁶⁷ Indeed, when I served as Acting Solicitor General of the United States, in 2011, I officially confessed error on behalf of the Justice Department in both *Hirabayashi* and *Korematsu*.⁶⁸

Against this backdrop of the judiciary's blind deference and the executive's wanton dishonesty, *Korematsu* has taken its place in history as a warning message for judges, jurists, and government officials alike. Even apart from the Solicitor General's suppression of valuable information, *Korematsu's* legacy is inextricably linked to the majority's failure to look past the government's blanket assertions

-supreme-court.html [https://perma.cc/4TPS-TJNG] (noting that "immigration has become a 'Constitution-lite zone'").

63. See Katyal, *supra* note 14, at 3037 (quoting *Hirabayashi v. United States*, 828 F.2d 591, 602 (9th Cir. 1987)).

64. *Id.* at 3033 (quoting KENNETH RINGLE, RINGLE REPORT ON JAPANESE INTERNMENT § I.h (1941)).

65. See *id.* at 3034-35.

66. *Id.* at 3036 (quoting *Hirabayashi*, 828 F.2d at 603 n.13).

67. See *id.* at 3036-37.

68. See Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T JUST. (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/M7FA-W7S4].

and evaluate the exclusion order for what it really was.⁶⁹ In light of this infamous legacy, it is all the more surprising to see the current Court “redeploy[] the same dangerous logic”⁷⁰ seventy-four years after the initial decision, and just seven years after the confession of error.

Arguing the *Hawaii* case, I was constantly aware of the ways in which military necessity claims had been abused by the White House in the past. I am not someone who generally believes courts should be in the business of second-guessing national security decisions. But when those decisions are the product of animus, and when they are not fully vetted by the interagency process and the national security professionals trained to make such decisions,⁷¹ some judicial scrutiny is not only appropriate – it is necessary.

Unfortunately, just like the majority in *Korematsu*, the *Hawaii* Court refused to thoroughly examine the evidence. In fact, in setting the standard of review, the majority expressed reluctance to even “look beyond the face of the Proclamation” and ask “whether the entry policy [was] plausibly related to the Government’s stated objective[s].”⁷² Were it not for “the Government[’s] . . . suggest[ion] that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” a “conventional” look at the facial legitimacy of the policy would have “put an end” to the matter.⁷³

Even grossly discriminatory actions can be written in facially neutral terms. Such a legal test does nothing but reward clever lawyering. The *Hawaii* majority tried to grapple with the extrinsic evidence, but did not engage with everything Trump said – it merely recited a select few examples.⁷⁴ For instance, when then-candidate Trump reformulated his proposed Muslim ban to focus on immigration and terrorism, he explained that the new proposed policy was in fact an “expansion” of the Muslim ban, and that “he used different terminology because ‘[p]eople were so upset when [he] used the word Muslim.’”⁷⁵ Despite this statement’s clear connection to the Proclamation at issue – which emphasized facially neutral concepts like immigration and terrorism after previously promising a Muslim ban – the majority did not even cite it. Nor did the Court mention President Trump’s statement about how, under the first version of the travel ban, “Christians would be given priority for entry as refugees to the United States”

69. See Greene, *supra* note 5, at 423-25.

70. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

71. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006).

72. *Hawaii*, 138 S. Ct. at 2420 (majority opinion).

73. *Id.*

74. See *id.* at 2417-18.

75. See *id.* at 2436 (Sotomayor, J., dissenting) (quoting Joint Appendix at 123).

because it was “very unfair” that Muslims had historically enjoyed such privileges.⁷⁶ Likewise, the majority failed to consider President Trump’s infatuation with General Pershing’s supposed massacre of Muslim terrorists in the 1900s, a topic he repeatedly discussed.⁷⁷

According to the majority, President Trump’s statements were unnecessary to evaluate because the Proclamation contained sufficiently legitimate justifications to satisfy rational basis review.⁷⁸ And so the *Hawaii* majority ultimately concluded that the Proclamation is “a facially neutral policy denying certain foreign nationals the privilege of admission.”⁷⁹ But in focusing on the four corners of the Proclamation, the Court ignored the tainted influence of the President’s comments on the Proclamation itself. Though the majority recognized that President Trump had instructed his lawyers to craft a “legal[]” version of a Muslim ban,⁸⁰ it assessed the Proclamation as if it had randomly dropped out of the sky.

Just like the majority in *Korematsu*, which ignored General Dewitt’s racism and pretended the government’s actions were not what they really were, the *Hawaii* Court refused to consider the broader context of the travel ban. It did not even question whether the waiver and exemption programs were actually applied in practice – and declined to engage with *any* of the data on the programs presented by amici⁸¹ – despite relying on the existence of such programs to support its holding.⁸² The Court did not ask whether the policy, if truly designed to

76. *Id.* (quoting Joint Appendix at 125).

77. *See id.* at 2436, 2438.

78. *See id.* at 2420-21 (majority opinion).

79. *Id.* at 2423.

80. *Id.* at 2417.

81. *E.g.*, Brief for Amici Curiae Scholars of Immigration Law in Support of Respondents on the History of the Immigration and Nationality Act at 23-24, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1586764; Brief of Amici Curiae Former National Security Officials in Support of Respondents at 23, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1733146; Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors in Support of Respondents at 34, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1585891; Brief of Amici Curiae Muslim Justice League et al. in Support of Plaintiffs-Appellees and Affirmance at 16-17, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2017 WL 5640359; Brief of Amici Curiae Pars Equality Center et al. in Support of Respondents at 11-12, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2017 WL 4176191; Brief of Amici Curiae The Association of Art Museum Directors et al. in Support of Respondents at 14, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1605671; Brief of the States of New York et al. as Amici Curiae in Support of Respondents at 9 n.22, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1586440.

82. *See Hawaii*, 138 S. Ct. at 2422-23; *see also id.* at 2430 (Breyer, J., dissenting).

meet its stated objectives, made plausible sense.⁸³ Notwithstanding President Trump’s comments about Christians and Muslims in connection to the first travel ban, the majority countered Hawaii’s arguments about religious animosity by simply pointing to the Proclamation and noting that “the text says nothing about religion.”⁸⁴ And just as the majority in *Korematsu* accepted General DeWitt’s findings at face value,⁸⁵ the majority in *Hawaii* did the same with the Trump administration’s interagency review. That report ostensibly contains findings in support of the travel ban, but the Court never saw a copy of the document.⁸⁶

Indeed, the Administration went to great lengths to suppress the worldwide review – the asserted basis for the ban – from being released to the public, both in the *Hawaii* litigation and elsewhere (such as FOIA litigation).⁸⁷ The extent to which the Administration insisted that the report stay secret, and that not even portions of it be disclosed with redactions, is somewhat suspicious. Meanwhile, other documents that were released present greater cause for concern. In February 2017 – following the President’s issuance of his first Executive Order – a draft report authored by the Department of Homeland Security was leaked, finding that “citizenship [is] likely an unreliable indicator of terrorist threat to the United States.”⁸⁸ In other words, a mere six months before the Department helped produce the review that purportedly justified the third travel ban, it had drafted a report calling into question the entire rationale for the policy.

And here is where the connections between *Korematsu* and *Hawaii* become even eerier. Not only did the government resist providing the Court with any

83. See *id.* at 2421 (majority opinion) (noting – just as the majority did in *Korematsu* – that the Court cannot “substitute” its own policy judgments for those of the executive branch); see also *id.* at 2443–45 (Sotomayor, J., dissenting).

84. *Id.* at 2421 (majority opinion).

85. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (“Here . . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”).

86. See *Hawaii*, 138 S. Ct. at 2443 (Sotomayor, J., dissenting).

87. See *id.* (noting that the government “refuse[d] to disclose [the review] to the public”); Notice of *In Camera Ex Parte* Lodging of Report Containing Classified Information and Objection to Review or Consideration of Report at 4, *Hawaii v. Trump*, No. 17-cv-00050-DKW-KSC (D. Haw. Oct. 13, 2017) (resisting a request to provide the report to the U.S. District Court for the District of Hawaii for *in camera* inspection and urging the court not to “consider [its] contents” if it did review the report); see also State Letter Resisting FOIA Request, Brennan Ctr. for Justice v. U.S. Dep’t of State, 300 F. Supp. 3d 540 (S.D.N.Y. 2018) (No. 17 Civ. 7520 (PGG)) (resisting the release of the report to the public in FOIA litigation).

88. *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, U.S. DEP’T HOMELAND SEC. (2017), <https://fas.org/irp/eprint/dhs-7countries.pdf> [<https://perma.cc/P7AB-32AJ>].

substantive evidence against which it could measure—or at least consider—the government’s claim of necessity; it even allowed for improper information to go uncorrected. At oral argument, Solicitor General Francisco assured the Court that President Trump had “‘made crystal-clear on September 25 that he had no intention of imposing the Muslim ban’ and ‘has praised Islam as one of the great countries [sic] of the world.’”⁸⁹ Yet the President never made any statement along those lines on September 25 (the day after the third travel ban was announced), and the Solicitor General later informed the Court that the actual date of the President’s statement was *January* 2017, not September.⁹⁰ That statement concerned the first ban, not the one before the Court. And whatever the statement meant, the fact remained that President Trump never formally renounced the Muslim ban, and neither had any spokesperson for the White House—not former press secretary Sean Spicer, not deputy press secretary Raj Shah, and not current press secretary Sarah Huckabee Sanders.⁹¹ The government’s claim was, well, a “half-truth.”⁹²

CONCLUSION

For decades, *Korematsu* has been viewed as a cautionary tale. But until *Hawaii*, it had never been overturned—a fact that set it apart from its fellow anti-precedents.⁹³ As a renounced decision still on the books, it served as a stark reminder of failed legal reasoning and the dangers of blindly adhering to the government’s assertions.⁹⁴ Given this legacy, it seemed only natural that in overturning *Korematsu*, the Court would strictly adhere to these lessons. After all, as Richard Primus articulately put it, “the court is the chief narrator of American constitutional history, so an ugly chapter from the past can never be fully closed until the court itself writes the better ending.”⁹⁵

89. *Hawaii*, 138 S. Ct. at 2439 n.4 (Sotomayor, J., dissenting) (quoting Transcript of Oral Argument at 81).

90. *See id.*

91. *See* Geltzer, *supra* note 14.

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

93. *See* Richard Primus, *How Trump Gave the Supreme Court a Second Chance on Japanese Internment*, POLITICO (May 30, 2017), <https://www.politico.com/magazine/story/2017/05/30/donald-trump-korematsu-japanese-internment-supreme-court-215208> [<https://perma.cc/9GJE-UT8W>].

94. *See* Noah Feldman, Opinion, *Why Korematsu Is Not a Precedent*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html> [<https://perma.cc/5TS8-7WT9>].

95. Primus, *supra* note 93.

Hawaii could have been that “better ending.” With hundreds of pages in the Joint Appendix, the Court had more than sufficient evidence to affirm the injunction on religious animus grounds.⁹⁶ Unlike the hidden intelligence report in *Korematsu*, President Trump’s anti-Muslim comments were littered across various media outlets, “plastered on the candidate’s website,” and “staring everyone in the face.”⁹⁷ And yet when given the chance to memorialize *Korematsu*’s lessons, the Court instead made almost every mistake in *Korematsu*’s playbook—it accepted the government’s arguments at face value, deferred to the executive branch without ensuring that deference was warranted, and confined itself to a narrow review of the Proclamation, examining a “figmentary and artificial”⁹⁸ case instead of the one actually before it. For these reasons, it will come as no surprise when, one day in the future, *Trump v. Hawaii* is eventually overturned. But let us hope that when that happens, the Court ends this line of cases for good, rather than resurrect it by another name.

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96. See Joint Appendix at 158-241, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

97. Ian Samuel & Leah Litman, *No Peeking? Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017), <https://takecareblog.com/blog/no-peeking-korematsu-and-judicial-credulity> [<https://perma.cc/LTW7-5F47>].

98. *Korematsu v. United States*, 323 U.S. 214, 232 (1944) (Roberts, J., dissenting).