THE YALE LAW JOURNAL FORUM
JANUARY 30, 2019

Masquerading Behind a Facade of National Security

Eric K. Yamamoto & Rachel Oyama

ABSTRACT. In 1944, the Supreme Court in *Korematsu v. United States* upheld President Roosevelt's executive order initiating the mass removal and incarceration of 120,000 Japanese Americans on falsified claims of group disloyalty. In the ensuing decades, some courts and scholars have cited *Korematsu* as precedent for extreme judicial deference when reviewing sweeping restrictions of civil liberties defended as national security measures. In sharp contrast, others have highlighted the World War II-era decision as a cautionary tale about the harm to vulnerable minorities and the damage to American democracy that can occur when the judiciary abandons its role as a guardian of fundamental liberties. To these commentators, *Korematsu*'s principle of exceeding judicial passivity is a "loaded weapon," ready for the hands of future overzealous or unscrupulous government leaders.

Seventy-five years later, *Korematsu* remains startlingly significant, especially after the Supreme Court's 2018 ruling in *Trump v. Hawaii* that repudiated a key part of *Korematsu* (mass racial incarceration) while replicating another key part (extreme judicial deference). This significance is highlighted by a pressing question for a constitutional democracy both concerned about national security and committed to the rule of law: what will happen when those detained, harassed, or discriminated against in the name of national security turn to the courts for legal protection? This Essay refracts this question through the lens of *Korematsu* and its 1984 coram nobis reopening, examining how courts will—and should—respond to the dual needs to promote national security and protect fundamental democratic liberties.

INTRODUCTION

2019 marks the seventy-fifth anniversary of the Supreme Court's decision in *Korematsu v. United States*.[1] In that case, the Court upheld President Roosevelt's 1942 executive order[2] initiating the mass removal and incarceration—often called the "internment"—of 120,000 Japanese Americans on falsified claims of group

1. 323 U.S. 214 (1944).

2. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

disloyalty.[3] In the ensuing decades, some courts and policy makers have relied on *Korematsu*, either explicitly or implicitly, as precedent for extreme judicial deference when reviewing sweeping restrictions of civil liberties justified in the name of national security.[4] In sharp contrast, others have highlighted the World War II-era decision as a cautionary tale about the harm to vulnerable minorities and the damage to American democracy that results when the judiciary abandons its role as a guardian of fundamental liberties.[5] These commentators have characterized *Korematsu*'s principle of exceeding judicial passivity as a

3. *Korematsu*, 323 U.S. 214; *see also* Hirabayashi v. United States, 828 F.2d 591, 598 (9th Cir. 1987) (observing the Court's reliance on the existence of an altered military report to justify the internment); Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (determining that the government had deliberately misled the Court and finding "manifest injustice").

4. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 345 n.30 (1993) (Stevens, J., dissenting) (observing that "the Court's holding in *Korematsu* obviously supports the majority's analysis, for the Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security"); Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952) (citing *Korematsu* as precedent for deferentially upholding the national security-justified deportation of legal permanent resident aliens for dangerous political associations); *see also* ERIC K. YAMAMOTO, IN THE SHADOW OF *KOREMATSU*: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 61 (2018) (describing how courts and policy makers have cited *Korematsu* and its principle of extreme judicial deference in national security settings); David A. Harris, *On the Contemporary Meaning of* Korematsu*: "Liberty Lies in the Hearts of Men and Women*, 79 MO. L. REV. 1, 20 (2011) ("The post-9/11 climate has transformed the significance of *Korematsu* from a decision that might, in the past, have seemed a mere academic exercise into a standing precedent with potentially profound consequences."); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 1001 (2004) (observing the "return of the *Korematsu* mindset"); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1404-06 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)) (noting that Chief Justice Rehnquist "does not seem especially troubled" by the infringement of civil liberties during wartime); Eric K. Yamamoto et al., *"Loaded Weapon" Revisited: The Trump Era Import of Justice Jackson's Warning in* Korematsu, 24 ASIAN AM. L.J. 5 (2017) (revisiting the implications of *Korematsu* in the Trump era).

5. *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (characterizing the World War II cases as a civil liberties "disaster"); *see also* Erwin Chemerinsky, Korematsu v. United States*: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 166 (2011) (placing *Korematsu* in the "Hall of Shame" and proclaiming that "there is no doubt that *Korematsu* belongs on the list of the worst Supreme Court rulings"); Diana Cho, *The NDAA, AUMF, and Citizens Detained away from the Theater of War: Sounding a Clarion Call for a Clear Statement Rule*, 48 LOY. L.A. L. REV. 927, 955 (2015) ("The *Korematsu* decision . . . serves as a compelling reminder of when too much judicial deference to executive authority in times of war yields regrettable results that are not easily reversed."); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386-90 (2011) (ranking *Korematsu* as the fourth most-cited case for its "anticanonical" or "antiprecedential" value).

dangerous precedent, ready for deployment by overzealous or unscrupulous government leaders.[6]

In 2014, Justice Scalia reflected this latter view when responding to a prescient question about the continued relevance of *Korematsu*. Justice Scalia stated that "*Korematsu* was wrong . . . . But you are kidding yourself if you think the same thing will not happen again . . . ."[7] By that time, *Korematsu* had been sorely discredited by judges and scholars,[8] but the Court had never formally overruled any part of it. When Justice Scalia was then asked how the Court would likely rule in a similar case today, he answered by reciting the Latin phrase "*Inter arma enim silent leges*[.] In times of war, the laws fall silent."[9]

As Justice Scalia suggested, judges tend to sacrifice constitutionally protected liberties in the face of fears about the nation's security. Not only do courts allow the executive branch to enforce reasonable national security measures; some judges turn a blind eye to unfounded or even fabricated security claims, as the *Korematsu* Court did in 1944.[10] The laws fall silent, and the vulnerable go unprotected. As Justice Scalia emphasized, it could "happen again."

Justice Scalia's response hearkened back to Justice Jackson's warning in his scathing *Korematsu* dissent. Justice Jackson warned that the Court's decision in *Korematsu* — which upheld the executive order despite the lack of bona fide proof of "[p]ressing public necessity"[11] — served as a dangerous precedent for future violations of civil liberties.[12] *Korematsu* stood as a "loaded weapon," ready for the

6. *See, e.g.*, David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protections of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 343 (1994) ("The danger posed by the deference argument is vividly demonstrated by the Supreme Court's decision in *Korematsu*."); Harris, *supra* note 4, at 3 (claiming that "*Korematsu* remains a 'loaded weapon,' just as Justice Jackson predicted in his dissent" (quoting *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting))).

7. Debra Cassens Weiss, *Scalia:* Korematsu *Was Wrong, but "You Are Kidding Yourself" if You Think It Won't Happen Again*, ABA J. (Feb. 4, 2014, 1:05 PM), http://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won/ [https://perma.cc/B2N8-CSFW].

8. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042-43 (2004); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002).

9. Ilya Somin, *Justice Scalia on* Kelo *and* Korematsu, WASH. POST: VOLOKH CONSPIRACY (Feb. 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-kelo-and-korematsu [https://perma.cc/H9G4-BLDQ].

10. *See* Yamamoto et al., *supra* note 4, at 31 (2017).

11. *Korematsu*, 323 U.S. at 216.

12. *See id.* at 242-48 (Jackson, J., dissenting).

hands of any government authority who could "bring forward a plausible," even if unfounded, "claim of an urgent need."[13]

Korematsu thus remains startlingly significant—especially after the Court's recent ruling in *Trump v. Hawaii*,[14] upholding President Trump's 2017 "travel ban." In its ruling, the Court appeared to repudiate *Korematsu*'s validation of mass racial incarceration while replicating its "logic" of unconditional deference to the President. As a constitutional democracy both concerned about national security and committed to the rule of law, *Korematsu*'s continuing significance is highlighted by a pressing question for the United States: what will happen when those detained, harassed, or discriminated against in the name of national security—not because of their actions but largely because of race, religion, associations, or expressed views—turn to the courts for legal protection?

This Essay addresses that question through the lens of *Korematsu* and its 1984 coram nobis reopening to examine how courts will—and should—respond to the dual needs to promote the nation's security and protect fundamental democratic liberties. Part I describes how, in *Korematsu*, the Court turned a blind eye to the executive's falsified claims of military necessity. Part II addresses the post-9/11 era and its "chameleonic deployment" of *Korematsu*[15] to either justify or reject sweeping ethnicity- and religion-tinged executive actions. Part III charts the civil liberties challenges to President Trump's 2017 executive orders. It assesses the Court's distortion of *Korematsu* in declaring "wholly inapt"[16] the likening of key aspects of *Korematsu* to *Trump* while upholding the entry ban on those from Muslim-majority countries.

Part IV asks whether, in reviewing restrictions of civil liberties, courts must always defer to the executive's assertions of national security—even if seemingly unfounded—or whether, in some situations, they can closely scrutinize those assertions. The themes of the first four Parts coalesce in our conclusion. This closing Part charts a doctrinal and realpolitik opening for further shaping *Korematsu*'s legacy: uplifting judicial independence by affirming heightened scrutiny as an integral pillar in the edifice of a functioning constitutional democracy.

---

13. *Id.* at 246.

14. 138 S. Ct. 2392 (2018).

15. *See* YAMAMOTO, *supra* note 4, at 51.

16. *Trump*, 138 S. Ct. at 2423 (2018).

I. *KOREMATSU* AND JUDICIAL DEFERENCE

The Court in *Korematsu* validated the removal and, indirectly, the prolonged mass imprisonment of mostly American citizens[17]—without charges, trials, or evidence of individual disloyalty—despite the Constitution's commands of due process and equal protection. As the U.S. Court of Appeals for the Third Circuit observed in 2015 in a Muslim-American community's suit against the New York police for illegal harassment and surveillance,[18] when incarcerated Japanese Americans during World War II "pleaded with the courts to uphold their constitutional rights, [the Supreme Court] passively accepted the Government's representations that the use of [racial] classifications was necessary to the national interest. In doing so, we failed to recognize that the discriminatory treatment of approximately 120,000 persons of Japanese ancestry was fueled not by military necessity but unfounded fears."[19]

A. Korematsu v. United States

In 1942, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui separately challenged Executive Order 9066—which was race-neutral on its face—along with its implementing military orders that imposed a racial curfew, removal, and mass incarceration. The Supreme Court upheld the temporary curfew order in *Hirabayashi* and *Yasui* in 1943,[20] deferring to the President and Congress in their exercise of war powers, while delaying a ruling on the far more serious removal and confinement orders.[21] Nearing the war's end in December 1944—and with almost 90,000 still imprisoned—the Court in *Korematsu* validated the forced removal of all West Coast persons of Japanese ancestry.[22]

17. *See generally* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2001) (providing a background history and analysis of the Roosevelt administration's internment policy).

18. Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

19. *Id.* at 307 (citations omitted).

20. Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943).

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

22. Korematsu v. United States, 323 U.S. 214, 223-24 (1944); *cf. Ex parte* Endo, 323 U.S. 283 (1944) (finding that the War Relocation Authority lacked statutory authorization to continue confining innocent Japanese Americans).

Justice Black, a former Ku Klux Klan member,[23] wrote for the six-member majority. He first disclaimed overt prejudice,[24] ignoring the blatant racial animus conveyed by General John DeWitt in issuing the military orders—including General DeWitt's public explanation that even for American citizens, the "racial strains are undiluted" and "a Jap is a Jap."[25] In disclaiming racial prejudice, Justice Black also ignored the fact that the exclusion orders applied only to persons of Japanese ancestry—mostly American citizens—and that the orders applied indefinitely to every member of the racial group on the West Coast.[26] He observed that the United States "feared an invasion of our West Coast" by Japan and that the military had perceived an urgent need to take "precautionary measures."[27] But instead of carefully parsing the factual record for threats posed by Japanese Americans, Justice Black deferentially accepted the government's claim that the racial group posed the "gravest imminent danger to the public safety,"[28] declaring "we cannot reject as unfounded the judgment of the military authorities and of Congress"[29] about "pressing public necessity."[30]

B. The Coram Nobis Reopenings

In 1983, based mainly on the discovery of World War II-era documents, Korematsu, Hirabayashi, and Yasui separately filed coram nobis petitions seeking to reopen their cases and set aside their convictions for refusing to abide by General DeWitt's curfew and exclusion orders. All three succeeded.[31] The writ of coram nobis is a rarely employed common law vehicle for reopening a "manifestly unjust" criminal conviction—usually on grounds of egregious

---

23. *See* Kat Eschner, *This Supreme Court Justice Was a KKK Member*, SMITHSONIAN (Feb. 27, 2017), https://www.smithsonianmag.com/smart-news/supreme-court-justice-was-kkk-member-180962254/ [https://perma.cc/YG5J-VUL7].

24. *See Korematsu*, 323 U.S. at 216.

25. J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 34 (1943); *see also* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 66 (1982) [hereinafter PERSONAL JUSTICE DENIED] (quoting Transcript of Conference between DeWitt and newspapermen (Apr. 14, 1943)).

26. *Korematsu*, 323 U.S. at 223-24. Persons of Italian and German ancestry were not similarly removed and incarcerated as a group. *See id.* at 241 (Murphy, J., dissenting).

27. *Id*. at 223 (majority opinion).

28. *Id.* at 218; *see infra* notes 36-52 and accompanying text.

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

30. *Id.* at 216.

31. *See* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Yasui v. United States, No. 83-151-BE (D. Or. Jan 26, 1984), *reprinted in* Peggy Nagae, Yasui v. United States*: From 1941 to Today—Making the Case for the Constitution*, OR. STATE BAR (2016).

governmental misconduct—where petitioners have served their sentences, and they and their community suffer continuing prejudice from the conviction.[32]

The *Korematsu*, *Hirabayashi*, and *Yasui* coram nobis reopenings revealed a "scandal without precedent in the history of American law."[33] The litigation showed that, during World War II, the government had deliberately misled the courts and the American public about the ostensible threat posed by Japanese Americans, effectively deploying them as scapegoats.[34] The War and Justice Departments first wrongly intimated that Japanese Americans had committed espionage in support of Japan's Navy, then falsely asserted that there had been insufficient time to identify and detain the disloyal—and thus that the entire racial group had to be locked up.[35]

Officials from the War and Justice Departments made this dissembling stick by concealing crucial evidence that directly refuted the government's claim of military necessity. The officials intentionally buried the assessments of major intelligence services, including the Federal Bureau of Investigation (FBI), the Federal Communications Commission (FCC), and the Office of Naval Intelligence (ONI).[36] Collectively, after thorough investigations, these intelligence services had found Japanese Americans to be loyal as a group, cleared them of espionage, and recommended against group-based treatment.[37] Indeed, FBI Director J.

---

32. Government misconduct that amounts to "knowingly us[ing] perjured testimony or withh[olding] materially favorable evidence" can be grounds for issuing a writ of coram nobis. United States v. Taylor, 648 F.2d 565, 571 (9th Cir. 1981); *see* YAMAMOTO, *supra* note 4, at 165 n.3 ("The writ aims to eliminate the continuing stigma of a 'manifestly unjust' conviction arising out of egregious governmental (usually prosecutorial) misconduct with continuing adverse consequences.").

33. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES, at viii (1983).

34. In the *Korematsu* coram nobis case, Judge Patel found that there would be "manifest injustice" to deny relief, determining that the government had deliberately misled the Court. *Korematsu*, 584 F. Supp. at 1417. For similar reasons, after a full trial, the Ninth Circuit vacated Hirabayashi's dual convictions for the curfew and exclusion violations. *See* Hirabayashi, 828 F.2d at 608. The lower court vacated Yasui's curfew conviction without a hearing on the merits. Yasui v. United States, No. 83-151-BE, at *2 (D. Or. Jan. 26, 1984), *reprinted in* Peggy Nagae, Yasui v. United States*: From 1941 to Today—Making the Case for the Constitution*, OR. STATE BAR 5-41 to 5-42 (2016); *see* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989).

35. *See infra* notes 36-52 and accompanying text.

36. *See* KENNETH RINGLE, RINGLE REPORT ON JAPANESE INTERNMENT (1941); Memorandum from FCC Comm'r James L. Fly to Att'y Gen. Francis Biddle (Apr. 4, 1944), *reprinted in* IRONS, *supra* note 34, at 159 [hereinafter Memorandum from Fly to Biddle]; Memorandum from FBI Dir. J. Edgar Hoover to Att'y Gen. Francis Biddle (Feb. 2, 1942), *reprinted in* PERSONAL JUSTICE DENIED, *supra* note 25, at 73 [hereinafter Memorandum from Hoover to Biddle].

37. *See* IRONS, *supra* note 33, at viii-x; RINGLE, *supra* note 36 (determining that Japanese Americans were loyal in general, and recommending handling disloyalty questions on an individual

Edgar Hoover wrote to the U.S. Attorney General that the frantic push for mass confinement appeared to be based on *politics*, not facts.[38] But all this crucial exculpatory evidence was deliberately covered up.[39]

The *Korematsu* and *Hirabayashi* coram nobis litigation also revealed that World War II executive branch leaders—including an Assistant Attorney General, a War Department official, the U.S. Solicitor General, and General DeWitt—had helped distort and fabricate pivotal facts. Prior to *Hirabayashi*, DeWitt's completed and printed final report was recalled and altered to conceal its explicitly racist rationale for the mass incarceration and to recite key facts about temporal exigency that DeWitt and other officials knew to be false.[40]

Justice Department lawyers drafting the government's *Hirabayashi* and *Korematsu* briefs vehemently protested as a matter of conscience, excoriating their

basis); Memorandum from Fly to Biddle, *supra* note 36 (directly refuting the DeWitt report's findings of illicit shore-to-ship radio signaling, declaring that "[t]here were no radio signals reported to the Commission which could not be identified, or which were unlawful. Like the Department of Justice, the Commission knows of no evidence of any elicit radio signaling in this area during the period in question"); Memorandum from Hoover to Biddle, *supra* note 36 (contradicting the DeWitt report's espionage findings, stating that "[t]he necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data").

38. *See* Memorandum from Hoover to Biddle, *supra* note 36, at 73.

39. *See* IRONS, *supra* note 33, at 205-12 (detailing the "behind-the-scenes" maneuverings to suppress critical evidence disproving Japanese American disloyalty or espionage); *see also infra* notes 40-52 and accompanying text.

40. The original completed, printed, and partially distributed DeWitt report recited the actual rationale for the mass racial classification. It reported that "it was not that there was insufficient time in which to make such a determination [of disloyalty]; it was simply that . . . a positive determination could not have been made; that an exact separation of the 'sheep from the goats' was unfeasible." *Hirabayashi*, 828 F.2d at 598 (quoting Hirabayashi v. United States, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986)). The original report revealed that the racial incarceration turned not upon temporal exigency but upon the military's perception that race itself predetermined disloyalty. Realizing that the finished report would fully undercut the government's defense of insufficient time to sort out the disloyal individually, the War Department compelled DeWitt to recall the report and, against his objections, to alter it to state the opposite of what he originally wrote. The altered version recited that "[n]o ready means existed for determining the loyal from the disloyal," *id.*,—falsely justifying the mass incarceration as a temporal exigency and concealing its racist underpinnings. *See* IRONS, *supra* note 33, at 210. After the alteration, the "War Department tried to destroy all copies of the original report" by burning "the galley proofs, galley pages, drafts and memorandum of the original report." *Hirabayashi*, 828 F.2d at 598. The altered DeWitt report was relied on by the Supreme Court in *Korematsu*. *See Korematsu*, 323 U.S. at 236-37 (Murphy, J., dissenting) (indicating the Court's reliance on the DeWitt report). And Justice Black's opinion echoed the altered report's key temporal assessment, finding that the "military authorities considered that the need for action was great, and time was short." *Id*. at 223-24.

superiors for the apparent "suppression of evidence"[41] and the presentation to the courts of "willful historical inaccuracies and intentional falsehoods."[42] The principal drafter of the government's *Korematsu* brief wrote to the Assistant Attorney General that "General DeWitt's report makes flat statements concerning radio transmitters and ship-to-shore signaling which are categorically denied by the FBI and the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods."[43] The government's lawyer concluded that "[t]here is in fact a contrariety of information and we ought to say so" to the Court.[44] Nevertheless, the Justice Department ultimately decided not to alert the Court to the DeWitt report's deliberate misstatements about ostensible Japanese American espionage.[45]

The government never formally submitted into evidence DeWitt's report that set forth the facts supposedly showing Japanese Americans' imminent danger to public safety.[46] The Justice Department simply asked the Court to take judicial notice of the facts recited in this outside-the-record report[47]—with no cross-examination or opportunity to introduce rebuttal evidence. As Justice Jackson observed in his dissent,

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no

41. Memorandum from Edward J. Ennis, Dir., Alien Enemy Control Unit, Dep't of Justice, to Charles H. Fahy, Solicitor Gen. (Apr. 30, 1943), https://research.archives.gov/id/296058 [https://perma.cc/4FK7-LCJ8] (urging the Solicitor General to disclose to the Supreme Court the ONI's investigative report recommending against mass racial treatment).

42. Korematsu v. United States, 584 F. Supp. 1406, 1410, 1418 (N.D. Cal. 1984) (citing Justice Department Director of Alien Enemy Control Edward J. Ennis's memorandum to Assistant Attorney General Herbert Wechsler—as well as a memorandum by Justice Department attorney J.L. Burling to Wechsler—to show that officials expressed concern and were aware of the knowingly falsified facts about espionage in DeWitt's report and urged disclosure to the Supreme Court); *see also Hirabayashi*, 828 F.2d at 599-604 (describing the deliberate factual misstatements in the DeWitt report and the Justice Department's awareness of and misgivings about them).

43. IRONS, *supra* note 33, at 285 (quoting the Burling memo).

44. Memorandum from J.L. Burling to Assistant Attorney General Herbert Wechsler (Sept. 11, 1944), *reprinted in* Petition, *Korematsu*, 584 F. Supp. at 1424.

45. *See* IRONS, *supra* note 33, at 285, 288-92 (noting that the Justice Department rejected the footnote Burling inserted into the government's *Korematsu* brief to alert the Court to the contradicting intelligence).

46. *See* Transcript of Oral Argument at 8-9, Korematsu v. United States, 323 U.S. 214 (1944) (No. 44-22).

47. *See id.* at 6-7.

> choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination . . . .[48]

The "sharp controversy" Justice Jackson referred to was sparked by a *Harper's Magazine* article in which the naval intelligence officer who authored the suppressed ONI report, Lieutenant Kenneth Ringle, writing under pseudonym, publicly exposed the extensive intelligence undercutting the executive order and ensuing military orders.[49] In that report, the ONI determined that Japanese Americans were loyal as a group, that "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people," and that Japanese Americans "should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis."[50] When the Justices questioned Solicitor General Charles Fahy about DeWitt's report and any contradicting assessments, Fahy replied that the report's facts justified the mass exclusion and incarceration and that "no person in any responsible position has ever taken a contrary position."[51] This was a direct misrepresentation to the Court—ignoring the unanimous, and then still hidden, ONI, FBI, and FCC assessments and the internal Justice Department lawyers' protests. In 2011, through a rare "Confession of Error," Acting Solicitor General Neal Katyal acknowledged that the Solicitor General in *Korematsu* and *Hirabayashi* had knowingly misled the Court.[52]

Despite purporting to undertake the "most rigid scrutiny,"[53] the *Korematsu* majority did the opposite. It deferred fully and thereby countenanced the government's deception. Employing a triple negative, Justice Black wrote that "we *cannot* reject as *unfounded*" the government's claim that "disloyal members of that population . . . could *not* be precisely and quickly ascertained."[54] The Third

---

48. *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

49. *See generally* IRONS, *supra* note 33, at 202-03 (discussing the *Harper's Magazine* article); sources cited *supra* note 36.

50. IRONS, *supra* note 33, at 203; *see* Memorandum from Hoover to Biddle, *supra* note 36, at 73 (Hoover advising Biddle that "[t]he necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data" of Japanese American espionage or acts of disloyalty).

51. Transcript of Oral Argument, *supra* note 46, at 6-7.

52. *See* Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUST. BLOG (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/K5N3-TXNT]; *see also* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641 (2019).

53. *Korematsu*, 323 U.S. at 216.

54. *Id.* at 218 (emphasis added).

Circuit in 2015 aptly characterized the *Korematsu* Court's logic—its extreme passivity—as "unconditional deference" to the government.[55]

In 1984, after finding "manifest injustice," U.S. District Judge Patel granted Korematsu's coram nobis petition.[56] In an effort to cleanse a judicial record infected by egregious unethical misconduct, Judge Patel vacated Korematsu's forty-year-old conviction for resisting the military orders, effectively clearing the names of all those excluded and incarcerated.[57] Judge Patel affirmed a congressional investigative commission's finding that "race prejudice, war hysteria and a failure of political leadership"[58] were the underlying causes of this manifest injustice. And she concluded that although *Korematsu* formally remained on the law books, it now served as a sharp lesson for judicial vigilance.[59]

Judge Patel's ruling may be viewed narrowly as a belated effort to correct a badly tainted judicial record. It also may be seen more broadly as characterizing *Korematsu*, *Hirabayashi*, and *Yasui* as cautionary tales of grave injustice arising out of popular fears, opportunistic politicians, dissembling officials, and deferential courts. Indeed, Judge Patel cautioned against deploying national security justifications as a bar to heightened scrutiny of potentially abusive security actions. As "historical precedent," she wrote, *Korematsu* "stands as a constant caution . . . that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."[60]

II. THE POST-9/11 ERA

Despite Judge Patel's cautionary warning, the post-9/11 era has raised anew the specter of *Korematsu*'s principle of unconditional judicial deference.

---

55. Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (quoting Patrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43, 53-54 (2d Cir. 2002)).

56. Korematsu v. United States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

57. *See id.* at 1420.

58. *Id.* at 1416-17 (quoting PERSONAL JUSTICE DENIED, *supra* note 25, at 18).

59. *See id.* at 1420; *see also* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 4211 (2018)) (authorizing a government apology and reparations). In separate proceedings, the Ninth Circuit affirmed the granting of Hirabayashi's coram nobis petition and vacated both his curfew and exclusion convictions. Hirabayashi v. United States, 828 F.2d 591, 597, 608 (9th Cir. 1987). The U.S. District Court for the District of Oregon vacated Yasui's conviction. Yasui v. United States, No. 83-151-BE (D. Or. Jan. 26, 1984), *reprinted in* Peggy Nagae, Yasui v. United States*: From 1941 to Today—Making the Case for the Constitution*, OR. ST. BAR (2016).

60. *Korematsu*, 584 F. Supp. at 1420.

Since 9/11, politicians have relied on the 1944 Supreme Court decision to justify sweeping ethnicity- and religion-tinged government actions, both against citizens and noncitizens. For instance, shortly after 9/11, a commissioner of the U.S. Civil Rights Commission cited the case as precedent for a possible mass internment of Arabs or Muslims in the United States.[61] After the 2015 Paris terror attacks, a city mayor in Virginia cited Japanese American incarceration to justify not accepting Syrian refugees into the city.[62] And as a presidential candidate, Donald Trump highlighted Japanese American exclusion as a foundation for barring present-day Muslim entry into the country.[63] Influential jurists, too, have continued to embrace the opinion's judicial passivity (even while refraining from expressly citing the case).[64] Others, by contrast, have characterized *Korematsu* and *Hirabayashi* as stark cautionary tales—loaded weapons poised to inflict lasting damage on innocent people.[65]

Immediately after the September 11, 2001 attacks on the World Trade Center and the Pentagon, the Bush administration initiated a "war against terrorism."[66] Congress quickly passed the USA Patriot Act, significantly expanding executive national security powers.[67] Congress created the Department of Homeland

---

61. *See* Lynette Clemetson, *Traces of Terror: Arab-Americans; Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES (July 23, 2002), https://www.nytimes.com/2002/07/23/us/traces-terror-arab-americans-civil-rights-commissioner-under-fire-for-comments.html [https://perma.cc/SU6H-TCVW].

62. *See* Matt Chittum, *Roanoke Mayor David Bowers Broadly Condemned for Statements on Syrian Refugees*, ROANOKE TIMES (Nov. 18, 2015), https://www.roanoke.com/news/local/roanoke/roanoke-mayor-david-bowers-broadly-condemned-for-statements-on-syrian/article_e1e4234e-006f-558f-bc94-dd566796c261.html [https://perma.cc/T8KB-NVYX].

63. *See* Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015, 1:01 PM), https://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128 [https://perma.cc/HF4A-ND4G].

64. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 33-34 (2010) (relying on a State Department affidavit and ultimately deferring to the executive branch's position on a matter of asserted national security); *see also* YAMAMOTO, *supra* note 4, at 51-74 (describing *Korematsu*'s "chameleonic deployment").

65. *See* YAMAMOTO, *supra* note 4, at 71-74.

66. *See The Text of President Bush's Address Tuesday Night, After Terrorist Attacks on New York and Washington*, CNN (Sept. 11, 2001, 11:14 PM), http://edition.cnn.com/2001/US/09/11/bush.speech.text/ [https://perma.cc/4ER5-W6XN] ("America and our friends and allies join with all those who want peace and security in the world and we stand together to win the war against terrorism.").

67. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat 272 (codified as amended in scattered sections of U.S. Code); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2742; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1405(e)(1), 119 Stat. 3136 (codified as amended in 28 U.S.C.

Security to protect the American people and institutions from both domestic and foreign terrorism.[68] Soon thereafter, the Department initiated an immigrant registration and tracking program.[69] The government's security arms also advanced a range of other measures, including enhanced airport and public transportation security, expanded electronic surveillance, and intensified investigation of terror networks.[70]

But the breadth and intrusiveness of many security measures appeared to reflect racial and religious scapegoating.[71] Civil liberties advocates warned of hidden agendas behind far-reaching antiterrorism policies. One potential agenda involved bolstering the administration's political power by pandering to public fears in vilifying vulnerable communities.[72] Another aimed to build popular support for an invasion of Iraq and control of its oil resources—motives rooted in politics and economics.[73] The Center for Public Integrity identified 532 false Bush administration statements about Iraq's supposed weapons of mass destruction and the threats posed by al Qaeda.[74]

The clash of security concerns and constitutional liberties also enmeshed policy makers. After 9/11, Peter Kirsanow, a controversial Bush appointee to the U.S. Civil Rights Commission, suggested that Arab Americans would be interned en masse if the United States suffered another major terror attack.

§ 2241 (2018)); Military Commissions Act of 2006, Pub. L. No. § 109-366, § 7, 120 Stat. 2600 (codified as amended in 28 U.S.C. § 2241 (2018)).

68. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

69. National Security Entry-Exit Registration System. Registration and Monitoring of Certain Nonimmigrants, 8 C.F.R. §§ 214, 264 (2018) (authorizing a system for registering certain noncitizens within the United States as part of the war on terror—including port of entry registration and domestic registration).

70. *Id. See generally* Natsu Taylor Saito, *For "Our" Security: Who Is an "American" and What Is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 40 (2003).

71. See Saito, *supra* note 70 (critiquing post-9/11 administration antiterrorism policies, including racial and religious investigative targeting); *A Year of Loss: Reexamining Civil Liberties Since September 11*, LAWYERS COMM. FOR HUMAN RIGHTS (2002), https://www.humanrightsfirst.org/wp-content/uploads/pdf/loss_report.pdf [https://perma.cc/TSB6-J5EY].

72. *See* NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES (2002); Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers,* 23 HAMLINE J. PUB. L. & POL'Y 455, 456 (2002).

73. *See* sources cited *supra* note 72; *see also* YAMAMOTO, *supra* note 4, at 53.

74. *See* Charles Lewis & Mark Reading-Smith, *False Pretenses,* CTR. FOR PUB. INTEGRITY (Jan. 23, 2008, 12:00 AM), https://www.publicintegrity.org/2008/01/23/5641/false-pretenses [https://perma.cc/LV45-7CQJ].

Kirsanow invoked *Korematsu* as precedent.[75] He warned that, if such an attack occurred, Arab Americans could "forget civil rights in this country."[76] The head of the U.S. House Subcommittee on Crime, Terrorism, and Homeland Security, Howard Coble, similarly faced public condemnation for implying that he supported mass ethnic internment, citing the World War II-era incarceration.[77] And in 2015, retired U.S. Army General and former Commander of the NATO Allied Forces Wesley Clark called for segregating American Muslims who possessed "radicalized" antigovernment views.[78] For Clark, a former Democratic presidential candidate, religious extremism posed a serious security threat.[79] Clark's call for segregation bore two hallmarks: first, it signaled that citizens and noncitizens in America could be incarcerated without charges or hearings based on likely radical beliefs rather than wrongful actions; and second, it tacitly resurrected *Korematsu* by implying that courts would countenance government suppression of individual rights on broadly asserted grounds of national security.

The courts, too, entered the fray—at times fully deferring to the executive branch and its largely unsubstantiated claims of national security, and at other times citing *Korematsu* as a reason for more closely reviewing the government's factual claims. Early in the War on Terror, in *Padilla ex rel. Newman v. Bush*, U.S. District Judge Mukasey called for "deference . . . [to] the President's determination" that an American citizen arrested on U.S. soil was an enemy combatant and, therefore, could be detained indefinitely.[80] José Padilla sued to challenge the President's detention authority and the factual basis for his terrorist designation. Judge Mukasey allowed Padilla to challenge his designation, but sharply restricted Padilla's ability to effectively advocate on his behalf. Guided by the All

---

75. *See* Harris, *supra* note 4, at 22 ("Kirsanow's comments reveal a genuinely frightening and dark fact. In the aftermath of another serious attack by extremists . . . some will argue that the internment of Arabs and Muslims is a necessary measure that national security demands.").

76. Clemetson, *supra* note 61. Responding to public condemnation of this statement, Kirsanow later claimed that "his comments were meant to acknowledge, not condone, possible sentiment after another terrorist attack" and that "[t]he whole premise [of his comments] was to make clear that these attitudes must be roundly condemned." *Id.*

77. *See* Carl Ingram, *Assembly Demands Head of House Panel Quit*, L.A. TIMES (May 20, 2003), http://articles.latimes.com/2003/may/20/local/me-internment20 [https://perma.cc/WL35-S4Y6] (reporting on Coble's remarks and the backlash to them).

78. *See* Murtaza Hussain, *Wesley Clark Calls for Internment Camps for "Radicalized" Americans*, INTERCEPT (July 20, 2015), https://theintercept.com/2015/07/20/chattanooga-wesley-clark-calls-internment-camps-disloyal-americans/ [https://perma.cc/3QVB-Z8K7] (reporting on Clark's comments).

79. *Id.*

80. 233 F. Supp. 2d 564, 605-08 (S.D.N.Y. 2002), *opinion adhered to on reconsideration sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y.), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

Writs Act[81] instead of making a purely constitutional ruling,[82] Judge Mukasey gave Padilla's counsel no authority to conduct discovery, cross-examine witnesses, or effectively rebut officials' claims.[83] In addition to limiting Padilla's counsel's participation, Judge Mukasey adopted the attenuated "some evidence" standard advocated by the Bush administration.[84] Padilla eventually refiled his case in a different district, where he prevailed; but the Fourth Circuit reversed.[85] After multiple appeals, the government foreclosed a judicial determination on the merits of Padilla's challenge to indefinite military detention by prosecuting him in the U.S. criminal system.[86]

In the same timeframe, American citizen Yaser Hamdi challenged his military detention as an enemy combatant.[87] The lower court characterized the Justice Department's evidence (a declaration by Michael Mobbs, Special Adviser to the Under Secretary of Defense for Policy) as "little more than the government's 'say so' regarding the validity of Hamdi's classification" and observed that "if the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi . . . this Court would be acting as little more than a rubber-stamp."[88] On appeal, the government argued that "courts may not second-guess the military's determination";[89] the government had suggested, in the court's phrasing, that "[the military's] determinations on this score are the first and final word."[90]

---

81. 28 U.S.C. § 1651 (2018).

82. *Padilla*, 233 F. Supp. 2d at 599-601; *see* Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused*," 2 SEATTLE J. FOR SOC. JUST. 129, 146 (2003).

83. *Padilla*, 233 F. Supp. 2d at 603 ("[A]ccess to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so."); *see* Cruz, *supra* note 82, at 146 (explaining that Padilla's limited access to counsel effectively "excluded Padilla from using counsel to conduct discovery, cross-examine witnesses, and meaningfully rebut the executive's testimony").

84. *Padilla*, 233 F. Supp. 2d at 608; *see* Cruz, *supra* note 82, at 147-48 ("Padilla's access to counsel for presenting facts in the habeas proceeding was essentially a façade . . . . Most important, the district court predetermined that the executive would prevail through the invocation of a practically nonexistent standard.").

85. Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

86. Padilla v. Hanft, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring) (denying petition for a writ of certiorari on grounds that the claim had been mooted by events, as Padilla was "charged with crimes and released from military custody" to be prosecuted in federal court).

87. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

88. *Id.* at 535.

89. Brief for Respondents-Appellants at 28, Hamdi v. Rumsfeld, 296 F.2d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567.

90. *Hamdi*, 296 F.3d at 283.

The Fourth Circuit agreed and discharged the lower court's habeas writ.[91] The court denied a rehearing en banc[92] but Judge Motz dissented, writing that the judiciary "must not forget the lesson of *Korematsu*."[93] Here, "as in *Korematsu*, the Executive has failed to proffer any real evidence to justify" Hamdi's prolonged detention.[94] Judge Motz quoted Justice Murphy's *Korematsu* dissent, which stated that "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."[95]

On further appeal to the Supreme Court, Justice O'Connor observed that during hostilities, judicial deference "serves only to condense power into a single branch of government."[96] She declared that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," and she too quoted Justice Murphy's dissent for the proposition that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving" civil liberties claims.[97] Justice Souter, joined by Justice Ginsburg, cited *Korematsu* as a cautionary illustration.[98]

Later in the war on terror, in *Holder v. Humanitarian Law Project*,[99] citizens and domestic humanitarian organizations challenged as constitutionally overbroad a statute making it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[100] Chief Justice Roberts, for the majority, first declared that the possible infringement of First Amendment rights called for heightened scrutiny.[101] But like the majority in *Korematsu*, the Court deferred. It accepted without careful review the conclusory, hearsay-

---

91. *Hamdi*, 316 F.3d 450.

92. Hamdi v. Rumsfeld, 337 F.3d 335, 341 (4th Cir. 2003) (denying "petition for rehearing and suggestion for rehearing en banc").

93. *Id.* at 375 (Motz, J., dissenting).

94. *Id*. at 375-76.

95. *Id*. at 376 (quoting Korematsu v. United States, 323 U.S. 214, 234 (1994) (Murphy, J., dissenting)). The Supreme Court ruled that Hamdi was entitled to full adjudicatory review of his challenge to his enemy combatant status. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). But the government, rather than prosecuting Hamdi, released him outside the United States. *See* Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 316 (2005).

96. *Hamdi*, 542 U.S. at 536.

97. *Id*. at 535-36.

98. *See id*. at 542-44.

99. 561 U.S. 1 (2010).

100. 18 U.S.C. § 2339B (2006), *amended by* USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 704, 129 Stat. 268, 300.

101. *See Humanitarian Law Project*, 561 U.S. at 28.

laden affidavit of a State Department official.[102] When the executive claims that its actions are necessary to protect national security, Chief Justice Roberts wrote, the executive "is *not required to conclusively link all the pieces in the puzzle* before we grant weight to its empirical conclusions."[103] As Ganesh Sitaraman and Ingrid Wuerth later noted, the majority accepted the Obama administration's claim of necessity "without any scrutiny."[104]

In dissent, Justice Breyer—joined by Justices Ginsburg and Sotomayor—acknowledged the government's compelling interest in combating terrorism.[105] But he also highlighted the majority's failure to insist upon "specific evidence, rather than general assertion[s]."[106] Courts must examine the facts on national security—"whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction."[107] The government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals."[108]

Three years later, the Court in *Clapper v. Amnesty International*[109] rejected a constitutional challenge to a section of the Foreign Intelligence Surveillance Act (FISA).[110] Journalists, lawyers, and advocates who worked with foreigners outside the United States had claimed that the government improperly employed FISA—which authorizes foreign intelligence surveillance—to spy on American citizens in the United States. The Court ruled that the plaintiffs lacked threshold standing to challenge surveillance under the Act because, based on the government's representations, foreigners were targeted, and the American claimants

---

102. The Court relied on the State Department's conclusory statement that the "'experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]' Congress's finding that all contributions to foreign terrorist organizations further terrorism." *Id.* at 33 (alteration in original) (citing Declaration of Kenneth R. McKune at 133, *Humanitarian Law Project*, 561 U.S. 1 (No. 98-1498), 2009 WL 3877534).

103. *Humanitarian Law Project*, 561 U.S. at 35 (emphasis added).

104. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1967-68 (2015).

105. *Humanitarian Law Project*, 561 U.S. at 46 (Breyer, J., dissenting).

106. *Id.* at 62.

107. *Id.* at 54; *see also id.* at 34 (majority opinion) (insisting that courts do not abdicate the judicial role even in the national security arena); *id.* at 45, 61-62 (Breyer, J., dissenting) (same).

108. *Id.* at 61 (Breyer, J., dissenting).

109. 568 U.S. 398 (2013).

110. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub L. No. 110-261, § 702, 122 Stat. 2436, 2438.

could not show a reasonable likelihood that their own communications were targeted.[111]

Edward Snowden's subsequent leak of classified documents revealed that far more Americans than acknowledged in *Clapper* had been swept up in the government's information gathering.[112] Senators accused the Justice Department of key factual misstatements in legally justifying the far-reaching government surveillance.[113] As First Circuit Judge Sandra Lynch noted,

> One could question whether the Supreme Court's role in providing a check to executive power had been undermined in *Clapper* . . . . A judiciary, without the facts or an independent means of acquiring them, stands in danger of being manipulated by the very political branches it was designed to control. That happened in *Korematsu.*[114]

All of this illuminates Justice Scalia's 2014 prophecy that a sweeping curtailment of civil liberties could "happen again."[115] Indeed, this prediction played out in American politicians' calls for the barring of Muslims from entering the United States.[116] These calls—fueled by fears following the attacks in Paris, San

---

111. *See Clapper,* 568 U.S. at 411.

112. *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html [https://perma.cc/M336-BU9E]; Charlie Savage, *Justice Dept. Criticized on Spying Statements*, N.Y. TIMES (May 13, 2014), https://www.nytimes.com/2014/05/14/us/justice-dept-criticized-on-spying-statements.html [https://perma.cc/7YRX-2Z5L].

113. *See, e.g.*, Sandra L. Lynch, *Constitutional Integrity: Lessons from the Shadows*, 92 N.Y.U. L. REV. 623, 627 (2017) (describing how, "[c]oncerned, several U.S. Senators wrote a letter to the DOJ accusing it of having been less than forthright with the *Clapper* Court"); Kate Tummarello, *Senators Ask DOJ to Come Clean on Supreme Court Surveillance Case*, HILL (Nov. 21, 2013, 1:44 PM), https://thehill.com/policy/technology/191088-senators-ask-doj-to-come-clean-on-supreme-court-surveillance-case [https://perma.cc/6UZ8-VNL3] (describing how several senators asked the Department of Justice to clarify misleading statements).

114. Lynch, *supra* note 113, at 628.

115. *See* Weiss, *supra* note 7.

116. *See* Aaron Blake, *Whip Count: Here's Where Republicans Stand on Trump's Controversial Travel Ban*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/heres-where-republicans-stand-on-president-trumps-controversial-travel-ban [https://perma.cc/TQ7K-7DYL]; Chittum, *supra* note 62; Tomo Hirai, *Politicians Link Wartime Incarceration of Japanese Americans in Syrian Refugee Crisis*, NICHI BEI WEEKLY (Dec. 3, 2015), https://www.nichibei.org/2015/12/politicians-link-wartime-incarceration-of-japanese-americans-in-syrian-refugee-crisis/ [https://perma.cc/WK6E-KQZM]; Daniel Victor, *Roanoke Mayor Apologizes for Japanese Internment Remarks*, N.Y. TIMES (Nov. 20, 2015), https://www.nytimes.com/2015/11/21/us/roanoke-mayor-apologizes-for-japanese-internment-remarks.html [https://perma.cc/8G5J-RKJM]; *see also* YAMAMOTO, supra note 4, at 15-16 (describing politicians' calls for mass religion-based treatment).

Bernardino, and Orlando—coalesced in President Trump's anti-Muslim statements[117] and three ensuing executive orders.[118]

Terror attacks warrant security officials' swift and rational responses in catching and prosecuting perpetrators and in taking grounded, proactive steps to prevent future violence.[119] And after 9/11, the government established a multilevel system to track security threats, prosecute perpetrators, and restructure the immigration vetting system.[120] But a majority of Republican voters still endorsed then-candidate Trump's prescribed "complete and total shutdown" of Muslim entry into the United States.[121] And with his reference to the Japanese American incarceration as precedent,[122] nearly half of Republican voters thought

117. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2438-40 (2018) (Sotomayor, J., dissenting).

118. *See id.* at 3403-04 (majority opinion). The third executive order—the proclamation at issue in *Trump v. Hawaii*—restricts entry of all immigrants and certain categories of nonimmigrants from specified countries—primarily Muslim-majority—for inadequate vetting procedures and government information sharing. The proclamation also excludes some foreign nationals with substantial ties to the United States and creates a limited waiver program. *See* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017). Restrictions placed on these countries echo the original exclusion orders' policy "to protect [United States] citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes." Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, § 2 (Jan. 27, 2017).

119. *See* Yamamoto et al., *supra* note 10, at 34-46.

120. *See* THE 9/11 COMMISSION REPORT, NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 383-98 (2004), https://www.9-11commission.gov/report/911Report.pdf [https://perma.cc/T39Q-M45J]; *see also* David Bier, *Very Few Immigration Vetting Failures of Terrorists Since 9/11*, CATO INST. (Aug. 31, 2017, 10:39 AM), https://www.cato.org/blog/very-few-immigration-vetting-failures-terrorists-911 [https://perma.cc/36MV-SEAD] (questioning whether the post-9/11 changes were necessary).

121. *See* Tom Jensen, *Trump Edges Cruz in Iowa; His Supporters Think Japanese Internment Was Good; Clinton Still Well Ahead of Sanders in State*, PUB. POL'Y POLLING (Dec. 15, 2015), https://www.publicpolicypolling.com/polls/trump-edges-cruz-in-iowa-his-supporters-think-japanese-internment-was-good-clinton-still-well-ahead-of-sanders-in-state/ [https://perma.cc/DSX6-D6MV].

122. *See* Rebecca Kaplan, *Trump Defends Muslim Plan by Comparing Himself to FDR*, CBS NEWS (Dec. 8, 2015), https://www.cbsnews.com/news/donald-trump-defends-muslim-plan-by-comparing-himself-to-fdr [https://perma.cc/5FEM-5M7P]. *See generally* DOUGLAS LITTLE, US VERSUS THEM: THE UNITED STATES, RADICAL ISLAM, AND THE RISE OF THE GREEN THREAT 223-31 (2016) (analyzing how us-vs-them attitudes and narratives in the United States contributed to Muslim scapegoating).

that the mass racial imprisonment was a "good idea," and more than half supported "Trump's call to ban[] Muslims from entering the United States."[123]

III. TRUMP V. HAWAII

Challenges to President Trump's 2017 executive orders—colloquially described as a "travel ban" or "Muslim ban"[124]—raised again the threshold issue in *Korematsu*: will the judiciary defer to the executive branch and passively accept its national security justifications? Or will courts carefully scrutinize the government's claims of pressing public necessity?

A. The 2017 Executive Orders

Shortly after the 2016 election, a Trump campaign surrogate cited Japanese American incarceration as precedent for sweeping Muslim exclusionary measures, including the creation of a Muslim registry. "[I]t is legal. [The President's transition advisors] say it will hold constitutional muster,"[125] he said. "We've done it based on race, we've done it based on religion," and "[w]e did it during World War II with Japanese."[126] And, he added, the Supreme Court "upheld things as horrific as Japanese internment camps"[127]—directly implicating *Korematsu*.

---

123. Jensen, *supra* note 121 (reporting a December 2015 Iowa poll finding that forty-eight percent of presidential candidate Trump's supporters considered the Japanese American incarceration during World War II a good idea).

124. *See, e.g.*, Rowaida Abdelaziz, *Trump's Muslim Ban Is Forcing Some Americans to Move to War-torn Countries to Reunite with Their Families*, HUFFPOST (Aug. 4, 2018), https://www.huffingtonpost.com/entry/muslim-ban-separating-americans-from-family_us_5b636791e4bode86f49f4f96 [https://perma.cc/8BD2-PAWP] (referring to the third executive order as a "Muslim ban"); Farah Amjad, *Is the Democratic Party Progressive Enough for Muslims?*, NEW REPUBLIC (Oct. 26, 2018), https://newrepublic.com/article/151907/democratic-party-progressive-enough-muslims [https://perma.cc/2V39-FSXJ] (referring to the executive orders collectively as a "Muslim ban"); David Remnick, *Kelela Reinvents R. & B., and Sally Yates Gets Fired*, NEW YORKER (Oct. 19, 2018), https://www.newyorker.com/podcast/the-new-yorker-radio-hour/kelela-reinvents-r-and-b-and-sally-yates-gets-fired [https://perma.cc/J6XP-AZQ5] (describing the first executive order as a "Muslim travel ban").

125. *On Fox, Trump Supporter Carl Higbie Cites Japanese Internment Camps as "Precedent" for Muslim Registry*, MEDIA MATTERS (Nov. 16, 2016), https://www.mediamatters.org/video/2016/11/16/fox-trump-supporter-carl-higbie-cites-japanese-internment-camps-precedent-muslim-registry/214509 [https://perma.cc/KA4L-E94T] (reporting Higbie's statements).

126. *Id.*

127. Jonah Engel Bromwich, *Trump Camp's Talk of Registry and Japanese Internment Raises Muslims' Fears*, N.Y. TIMES (Nov. 17, 2016), https://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html [https://perma.cc/JV42-AH6F].

The week after his inauguration, the President issued the first of three exclusion orders. Some supported the restrictive measure.[128] But others condemned it. Business and religious leaders, politicians, scholars, and civil liberties groups, along with Muslim communities, called the orders discriminatory.[129] Massachusetts Attorney General Maura Healey characterized the order as "akin to "tak[ing] a wrecking ball to the Statue of Liberty."[130] Individuals and states launched legal challenges. Judges issued nationwide restraining orders.[131]

Still, the President's 2017 exclusion orders and politicians' citations to the World War II-era incarceration rested on one tremulous legal leg. Although deeply discredited, *Korematsu*'s validation of the forced racial removal had never been overruled by the Supreme Court.[132] Most importantly, the Court had not jettisoned the case's "principle of unconditional judicial deference to the executive on national security matters."[133] Moreover, Chief Justice Rehnquist and prominent Seventh Circuit Judge Posner had earlier endorsed key aspects of *Korematsu*.[134]

---

128. *See* Chris Kahn, *More Americans Support Donald Trump's Travel Ban than Oppose It, Poll Shows*, INDEPENDENT (Jan. 31, 2017, 10:51 PM), https://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-travel-immigration-refugees-iran-iraq-syria-a7556186.html [https://perma.cc/W5GC-PY7X].

129. *See, e.g.*, Vanessa Fuhrmans, *A Watershed Moment in CEO Activism*, WALL ST. J. (Apr. 4, 2017, 9:00 AM ET), https://www.wsj.com/articles/a-watershed-moment-in-ceo-activism-1491310803 [https://perma.cc/JY5P-DAJG]; Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html [https://perma.cc/ET3L-N3FM].

130. Maura Healey (@maura_healey), TWITTER (Jan. 28, 2017, 5:40 PM), https://twitter.com/maura_healey/status/825473640707813380 [https://perma.cc/HX36-U4Q8]; *see also* Heidi Chang, *Ahead of Supreme Court Fight, Trump Travel Ban Opponents Reflect on Past Anti-Asian Policies*, NBC NEWS (Apr. 24, 2018), https://www.nbcnews.com/news/asian-america/ahead-supreme-court-fight-trump-travel-ban-opponents-reflect-past-n867496 [https://perma.cc/6MHC-927E]; Richard Pérez-Peña, *Trump's Immigration Ban Draws Deep Anger and Muted Praise*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/trumps-immigration-ban-disapproval-applause.html [https://perma.cc/4E9A-4U46].

131. *See* Hawai'i v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017) (granting a motion for a temporary restraining order against President Trump's third executive order); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017) (granting in part and denying in part a motion for a temporary restraining order against President Trump's second executive order); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting a motion for a temporary restraining order against President Trump's first executive order).

132. *See* Greene, *supra* note 5, at 386-90; Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J.F. 629 (2019).

133. YAMAMOTO, *supra* note 4, at 9.

134. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205-11 (1998) (asserting that, while the Court decided *Korematsu* incorrectly as it relates to U.S.

In his book *All the Laws but One*, Chief Justice Rehnquist intimated that, in light of the government's broad war and national security powers and control over immigration, the courts should enforce all laws, with one exception.[135] They need not, and should not during hostilities, closely enforce the Constitution's protection of civilian liberties. The political branches essentially hold a blank check on these matters at least until hostilities end.[136] The former Chief Justice observed that *Korematsu* was correctly decided as to first generation Japanese immigrants in America.[137] Without acknowledging the revelations of the coram nobis litigation or the findings of Congress's Commission on the Wartime Relocation and Internment of Civilians,[138] however, the Chief Justice's broader pronouncements extended beyond the first generation to encompass all persons of Japanese ancestry, including American citizens. Tracking Justice Black's broad language in *Korematsu* that encompassed both immigrants and citizens, Chief Justice Rehnquist wrote approvingly that "[t]he Court's answer . . . seems satisfactory—those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war."[139] Most importantly, his book's language—including the book's title—appeared to endorse the extremely deferential judicial approach that legally validated the entire "internment."[140]

After the initiation of the Gulf War, Judge Posner maintained that "*Korematsu* was correctly decided,"[141] highlighting the importance of judicial reticence

citizens of Japanese ancestry, the government's treatment of non-U.S. citizen Japanese immigrants was permissible, despite the admitted racial prejudice); Pamela S. Karlan & Richard A. Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER'S MAG. (May 2001), https://archive.harpers.org/2001/05/pdf/HarpersMagazine-2001-05-0072056.pdf [https://perma.cc/CQ9Q-T2HK] (quoting Judge Posner as saying that "*Korematsu* was correctly decided").

135. *See* REHNQUIST, *supra* note 134, at 202, 224-25.

136. *See id*. at 224-25.

137. *See id*. at 201, 203, 209.

138. *See* PERSONAL JUSTICE DENIED, supra note 25; *see also* Harris, *supra* note 4, at 17 (describing Chief Justice Rehnquist's historical myopia as "mind-boggling," citing the former Chief Justice's failure to engage with overwhelming evidence and judicial findings of serious government deception in initiating the World War II incarceration and in altering and fabricating key parts of the factual record on military necessity in legally justifying it).

139. *See* REHNQUIST, *supra* note 134, at 206.

140. *See id*. at 207. Consistent with *Korematsu*'s deference principle, the Chief Justice concluded that courts should allow the executive branch "to respond to a condition without [the courts] making a careful inquiry into how that condition came about." *Id.*; *see* Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1398 (1999) (characterizing Chief Justice Rehnquist's view as having deferential judges "accede by avoiding or narrowing their readings of the Bill of Rights until the crisis is over").

141. Karlan & Posner, *supra* note 134, at 39 (quoting Posner's statement from a public exchange shortly before 9/11 that *Korematsu* was correctly decided); *see* Kermit Roosevelt, *Richard A.*

rather than independence. *Korematsu* appropriately enabled courts during hostilities to say, "we're going to defer."[142]

According to observers, the events of the post-9/11 era resurrected these contested aspects of *Korematsu* "with potentially profound consequences."[143]

B. "Animus, Invective, and Obvious Pretext"

In response to challenges to the President's exclusion orders,[144] the Justice Department asserted that the orders were "unreviewable."[145] But two district court judges and two courts of appeals disagreed. They closely scrutinized the facts and determined that the President's noncitizen exclusion orders were not supported by genuine security concerns but rather, in the words of one judge, wholly reflected "religious animus, invective, and obvious pretext."[146]

Another judge cited the assessment of forty-nine bipartisan former national security, foreign policy, and intelligence officials who had jointly declared that "'concrete evidence' has shown that 'country-based bans are ineffective,'"[147] and that the President's orders "fail[] to advance the national security or foreign policy interests of the United States but would cause serious and multiple harms to those interests."[148] The Fourth Circuit, too, sitting en banc, refused "to ignore evidence, circumscribe [its] review, and blindly defer"[149] to the President. It cited *Korematsu* as a cautionary warning, stating that "'unconditional deference to a government agent's invocation of "emergency" . . . has a lamentable place in our

---

Posner's "Divergent Paths: The Academy and the Judiciary," N.Y. TIMES (Jan. 29, 2016), https://www.nytimes.com/2016/01/31/books/review/richard-a-posners-divergent-paths-the-academy-and-the-judiciary.html [https://perma.cc/YUK7-S9Z3]; *see also* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (expressing the view that judges must read the Constitution flexibly in times of national emergency).

142. Karlan & Posner, *supra* note 134, at 39.

143. Harris, *supra* note 4, at 20.

144. *See* Hawai'i v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

145. *See Hawai'i*, 265 F. Supp. 3d at 1154 ("[T]he Government again invokes the doctrine of consular nonreviewability in an effort to circumvent judicial review of seemingly any Executive action denying entry to an alien abroad.").

146. Hawai'i v. Trump, 245 F. Supp. 3d 1227, 1236 (D. Haw. 2017).

147. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 593 (D. Md. 2017).

148. *See* Brief of Amici Curiae Former National Security Officials in Support of Respondents at 15, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1733146.

149. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 601 (4th Cir. 2017).

history,' . . . and is incompatible with our duty to evaluate the evidence before us."[150]

C. *"How Is this Different than* Korematsu*?"*

At the Supreme Court oral argument in *Trump v. Hawaii*, U.S. Solicitor General Francisco enlivened Justice Jackson's warning in *Korematsu* that the case's principle of extreme judicial deference would lie about like a "loaded weapon." In urging the Court to uphold the "travel ban," he declined to argue that factual realities showed that certain noncitizens posed an impending security danger or that there was a compelling need for sweeping action targeting the members of a specific religion. Rather, he effectively urged the Court to ignore the evidence, asserting that the President had brought to the courts a plausible claim of urgent need based on an "extensive worldwide" interagency review and that this should be enough for a deferential Court.[151]

The Solicitor General mustered that argument for judicial passivity as a strategic move to end-run disclosure of the truth—whether the government possessed a bona fide security justification set forth in its undisclosed 2017 Homeland Security report. Because of the elected branches' immigration, foreign policy, and national security powers, Francisco asserted, "there is a very strong presumption that what is being set out there [in the proclamation] is the *truth*."[152] According to Francisco, the Court should almost always accept the President's word, even without substantial evidence of impending security threats.

When Justice Sotomayor probed, Francisco acknowledged that the government had kept the Homeland Security report under wraps. The government refused to disclose its justifying report to either litigants or the courts.[153] In essence, Solicitor General Francisco implored the Court, just trust us.

But the undisclosed report was apparently a mere seventeen pages[154]—hardly reflective of extensive worldwide security analysis. In the companion case *IRAP v. Trump*, Judge Chuang of the District of Maryland had voiced strong skepticism about the report. It had been prepared after-the-fact to justify the policy prescriptions. And an earlier Homeland Security report found little

---

150. *Id.* at 603 (citations omitted) (quotation marks omitted) (quoting Patrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43 (2d Cir. 2002)).

151. *See* Transcript of Oral Argument at 14-15, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 2446100.

152. *Id.* at 27 (emphasis added).

153. *See id.* at 26.

154. *Trump*, 138 S. Ct. at 2443 (Sotomayor, J., dissenting).

security benefit from the kind of exclusionary measures embodied in the executive orders.[155] Moreover, the plaintiffs maintained that the report's contents had been contested within the Department and had contradicted statements in the proclamation—hence the government's unwillingness to open the report to scrutiny.[156] The government's attorney called for the court to deferentially accept the unproven facts recited in the presidential order and the undisclosed report. Judge Chuang declined, instead challenging the attorney: "How is this different than *Korematsu*?"[157]

D. "Blindly Accepting the Government's Misguided Invitation to Sanction a Discriminatory Policy"

The Supreme Court's five-member majority in *Trump v. Hawaii*,[158] led by Chief Justice Roberts, effectively upheld the President's third order, dissolving a nationwide preliminary injunction. The majority first determined that the order did not exceed "any textual [statutory] limit on the President's authority."[159] The Court then concluded that the order did not violate the Constitution's Establishment Clause barring religious discrimination. The exclusion order was facially neutral.[160] And even if the Court examined the President's intent, the order would survive because it was "expressly premised on legitimate [national security] purposes."[161] The Court would not "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.'"[162]

Justice Sotomayor's vociferous dissent called out the majority's choice to "ignor[e] the facts, misconstru[e] our legal precedent, and turn[] a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens."[163] Highlighting the damage to

---

155. *See* OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SECURITY, MOST FOREIGN-BORN, US-BASED VIOLENT EXTREMISTS RADICALIZED AFTER ENTERING HOMELAND; OPPORTUNITIES FOR TAILORED CVE PROGRAMS EXIST 2 (2017).

156. *See* Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d. 539, 561-64 (D. Md. 2017), *aff'd in part and vacated in part*, 857 F.3d 554 (4th Cir. 2017).

157. Josh Gerstein, *Federal Judge Hears Challenge to the Third Version of Trump's Travel Ban*, POLITICO (Oct. 16, 2017), https://www.politico.com/story/2017/10/16/trump-travel-ban-judge-maryland-243840 [https://perma.cc/A2GW-CPLY] (quoting Judge Chuang).

158. 138 S. Ct. 2392 (2018).

159. *Id.* at 2410.

160. *Id.* at 2418.

161. *Id.* at 2421.

162. *Id.* (quoting Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

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

Muslim communities, she detailed numerous examples of the Administration's anti-Muslim animus, characterizing the executive orders as religious animosity "masquerad[ing] behind a facade of national-security concerns."[164]

Given the paucity of evidence supporting the "superficial claim of national security," Justice Sotomayor characterized the *Trump* majority's "rational basis" review as blindly deferential, paralleling the *Korematsu* majority's closed-eyed approach.[165] She echoed Judge Chuang's earlier assessment that in both *Korematsu* and *Trump*, the government went to great lengths to shield its key security report from view.[166] The government was unwilling to reveal its own intelligence agencies' views of the security concerns.[167] In ignoring the President's repeated anti-Muslim statements, Justice Sotomayor continued, the majority empowered the President to hide behind an internal review process that the government refused to disclose to the public.[168] By "blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu*."[169]

Justice Sotomayor also underscored *Trump*'s "harm to our constitutional fabric" in redeploying *Korematsu*'s logic[170]—individuals "left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."[171] She concluded by highlighting the imperative of judicial independence for a checks-and-balances democracy through careful judicial scrutiny: "Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments."[172] The constitutional scheme commands courts to act as guardians of precious liberties when fears and prejudices of the moment overrun Congress and the President—what the judiciary failed to do in *Korematsu*.[173]

Reacting to Justice Sotomayor's linkage of *Trump* to *Korematsu*, Chief Justice Roberts closed the majority opinion with a passage that, although significant,

---

164. *Id*.

165. *Id.* at 2448.

166. *Id*. at 2447-48.

167. *Id*.

168. *Id*. at 2442-44.

169. *Id*. at 2448.

170. *Id*. at 2447-48.

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

172. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

173. *See infra* notes 213 and 243.

reads like an afterthought. While stopping short of explicitly overruling *Korematsu*, Chief Justice Roberts observed:

> The dissent's reference to *Korematsu* . . . affords this Court the opportunity to make express what is already obvious: *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."[174]

Justice Sotomayor agreed that "this formal repudiation of a shameful precedent is laudable and long overdue."[175] The Court's belated rejection of the forced racial removal was important for formerly incarcerated Japanese Americans.

But the Court's renunciation of *Korematsu* was crucially—and misleadingly—limited. It only reached what Chief Justice Roberts described as *Korematsu*'s validation of the "forcible relocation of U.S. citizens to concentration camps solely and explicitly on the basis of race."[176] Of course, that was not what was at play in *Trump*—hence the majority opinion's statement that "*Korematsu* has nothing to do with" *Trump*, finding it "wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission."[177]

In distinguishing *Trump* from *Korematsu*, however, Chief Justice Roberts's description badly mischaracterized the 1944 decision. First, similar to *Trump*'s religion-neutral executive order, the exclusion order in *Korematsu* was race-neutral.[178] Contrary to Chief Justice Roberts's phrasing, the *Korematsu* majority did not address government action taken "explicitly on the basis of race."[179] Second, the forced removal, like Trump's exclusion orders, targeted foreign nationals, too.[180] *Korematsu* was not only about abuse of "U.S. citizens."[181] Third, the *Korematsu* majority did not limit its ruling to confinement in "concentration camps."[182] It more broadly validated the mass racial exclusion from designated areas—incorporating the earlier *Hirabayashi* and *Yasui* decisions approving the less intrusive, though still restrictive, racial curfew—thus, like *Trump*, addressing

---

174. *Trump*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

175. *Id.* at 2448 (Sotomayor, J., dissenting).

176. *Id.* at 2423 (majority opinion).

177. *Id.*

178. *Korematsu*, 323 U.S. at 217-20.

179. *Trump,* 138 S. Ct. at 2423; *see Korematsu*, 323 U.S. at 217-20. Justice Murphy's dissent, by contrast, characterized the decision as a descent "into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

180. *See Korematsu*, 323 U.S. at 216-17 (majority opinion).

181. *See id.*

182. *See id.* at 223.

blanket restriction and exclusion.[183] Finally, as in *Trump*, *Korematsu* expressly justified the exclusionary executive order not on impermissible racial or religious grounds but on a claim of national security—albeit unsubstantiated. Contrary to Chief Justice Roberts's description, it did not purport to approve government action undertaken "solely . . . on the basis of race."[184]

Only by distorting what the *Korematsu* Court said and did was Chief Justice Roberts able to declare "wholly inapt"[185] the likening of key aspects of *Korematsu* to *Trump*, and to thereby reject *Korematsu* while upholding the entry ban on those from Muslim-majority countries.

Most significantly, the *Trump* majority did not extend its repudiation to the most dangerous aspect of *Korematsu*—its unconditional deference to the executive branch. Instead, *Trump* reinscribed this "logic"[186] by expressly embracing extreme judicial passivity in the foreign policy and immigration settings and validating the President's proclamation "on a barren invocation of national security."[187] As Anil Kalhan observed, the majority "engaged in a cheap parlor trick: purporting to 'overrule' a narrow, distorted version of *Korematsu* while simultaneously embracing and replicating that decision's actual logic."[188] Justice Sotomayor thus characterized the limited "overruling" as the Court "merely replac[ing] one 'gravely wrong' decision with another."[189]

Before *Trump*, *Korematsu* had been discredited and judges felt uncomfortable citing it while at times nevertheless employing its minimalist judicial approach.[190] *Humanitarian Law Project* is illustrative.[191] There, the majority—led by Chief Justice Roberts—first acknowledged that heightened scrutiny was appropriate given the citizens groups' First Amendment claims.[192] Yet it fully deferred to the executive branch and its empty factual proffering on national security[193] without citing *Korematsu*, despite its resonance.

---

183. *See id.* at 217-18.

184. *Trump*, 138 S. Ct. at 2423; *see Korematsu*, 323 U.S. at 219, 220, 223-24.

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

186. *Id.* at 2448 (Sotomayor, J., dissenting).

187. *Id.* at 2447.

188. Anil Kalhan, Trump v. Hawaii *and Chief Justice Roberts's "*Korematsu *Overruled" Parlor Trick*, AM. CONST. SOC'Y (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick [https://perma.cc/BY3M-M7P3].

189. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (quoting *id.* at 2423 (majority opinion)).

190. *See* YAMAMOTO, *supra* note 4, at 67-71 (describing courts' "implied recognition" of *Korematsu*).

191. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2015).

192. *See id.* at 27-28.

193. *See id.* at 48, 55, 61 (Breyer, J., dissenting).

In national security cases after June 2018, judges now possess a citation to bolster an exceedingly deferential posture without having to draw, at least directly, upon *Korematsu*. What could not be comfortably cited earlier can be openly cited now — as *Trump v. Hawaii*. And this transition makes it far easier for courts in future cases to blindly defer to the President and accept largely unsubstantiated or even manufactured claims of national security as justification for curtailing fundamental liberties.

For this reason, immigration law scholar Hiroshi Motomura trenchantly observed that narrowly "[o]verruling Korematsu the way the court did in this case reduces the overruling to symbolism that is so bare that it is deeply troubling . . . . If the majority really wanted to bury Korematsu, they would have struck down the travel ban."[194]

Justice Jackson's warning rings ever loudly. A crucial part of *Korematsu* survives in *Trump* — "blindly accepting the Government's . . . superficial claim of national security."[195] And it stands as a *reloaded* weapon ready for the hands of an authority with a plausible, even if unfounded, claim of urgent need.

IV. BACK TO THE FUTURE

What does this mean moving forward, beyond validation of President Trump's travel ban? Must courts always defer to the executive branch when reviewing national security-justified restrictions of civil liberties? Or, at least in some situations, should they closely scrutinize the executive branch's claims of pressing public necessity?[196]

A. The AUMF and 2012 NDAA

Consider the potential impact of *Korematsu* and *Trump* in light of the pending 2018 congressional resolution on the Authorization for Use of Military Force (AUMF).[197] This proposed resolution and its 2001 predecessor[198] authorize the President to undertake wars related to the 9/11 terrorist attacks. One aspect of

194. Charlie Savage, Korematsu, *Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html [https://perma.cc/59J3-XA7N] (quoting Motomura).

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

196. Korematsu v. United States, 323 U.S. 214, 216 (1944) (declaring that "pressing public necessity" could justify discriminatory security measures).

197. Authorization for Use of Military Force of 2018, S.J. Res. 59, 115th Cong.

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

this power is the authority to designate persons who could be placed in indefinite military detention, particularly American citizens on U.S. soil. The 2001 AUMF was silent on this matter, although the Bush and Obama administrations[199] and a lower court broadly interpreted the AUMF as providing implicit authorization.[200]

The National Defense Authorization Act for Fiscal Year 2012 (NDAA),[201] referencing the AUMF, made this presidential authority—to detain indefinitely—explicit as to citizens and noncitizens who "substantially supported al-Qaeda, the Taliban, or associated forces . . . engaged in hostilities against the United States," including persons committing a "belligerent act" in aid of such an enemy.[202] Because the NDAA did not define its key terms, American journalists and human rights organizations challenged the Act's potentially overbroad reach and chilling impact on legitimate First Amendment activities. In *Hedges v. Obama*,[203] the lower court cited *Korematsu* as a cautionary warning[204] and undertook "exacting scrutiny" to determine if the security restraint on liberty was "actually necessary,"[205] finding a key section of the Act to be unconstitutional. The Second Circuit, however, reversed on standing grounds without ruling on the merits.[206] The NDAA still stands.

The proposed 2018 AUMF would expand the President's capacity under the 2012 NDAA to name new "associated forces," thereby broadening the potential pool of Americans subject to prolonged detention without charges or trial.[207]

---

199. *See* Jon Schwarz, *New Bipartisan Bill Could Give Any President the Power to Imprison U.S. Citizens in Military Detention Forever*, INTERCEPT (May 1, 2018, 3:29 PM), https://theintercept.com/2018/05/01/ndaa-2018-aumf-detention/ [https://perma.cc/32JJ-HPWU]; *see also* Bruce Ackerman, *Will Congress Cede Its War-Making Authority to Trump?*, ATLANTIC (June 20, 2017), https://www.theatlantic.com/politics/archive/2017/06/will-congress-cede-its-war-making-authority-to-trump/530910/ [https://perma.cc/83PM-RF37].

200. *See* Padilla v. Hanft, 423 F.3d 386, 391-92, 397 (4th Cir. 2005).

201. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011). The Act in part addresses the Non-Detention Act of 1971's requirement of congressional approval to indefinitely detain citizens without charges or trial. *See* 18 U.S.C. § 4001(a) (2018).

202. National Defense Authorization Act for Fiscal Year 2012 § 1021(b).

203. 890 F. Supp. 2d 424 (S.D.N.Y. 2012), *vacated*, 724 F.3d 170 (2d Cir. 2013).

204. *See id.* at 431, 459.

205. *Id*. at 465.

206. *Hedges*, 724 F.3d 170.

207. *See* Marjorie Cohn, *Will Congress Authorize Indefinite Detention of Americans?*, TRUTHOUT (May 10, 2018), https://truthout.org/articles/will-congress-authorize-indefinite-detention-of-americans [https://perma.cc/55VK-8JSZ]; Derek Royden, *Sword of Damocles: Reviewing the 2018 AUMF*, NATION OF CHANGE (May 4, 2018), https://www.nationofchange.org/2018/05/04/sword-of-damocles-reviewing-the-2018-aumf/ [https://perma.cc/L728-K3NZ].

Even if the new AUMF is not adopted, the prospect of indefinite military detention of citizens on American soil remains under its predecessor and the NDAA.

Buried in the debates about the scope and operation of the AUMF and NDAA lies a threshold legal process question: if a President designates and indefinitely detains a citizen as a "substantial supporter of associated forces" or an enemy belligerent—a fact-intensive determination—is a reviewing court required to fully defer to the President and his or her fact-based assessment? Or should the court carefully scrutinize that crucial assessment? After the Supreme Court's post-9/11 *Hamdi*[208] and *Boumediene*[209] rulings, a detainee is entitled to challenge the appropriateness of the designation. But following *Trump,* it appears at first glance that any ensuing review could amount to little more than a deferential rubber stamp.

B. A Flickering Light?

Yet there remains a flickering aspirational light. The limiting language in Chief Justice Roberts's *Trump* opinion leaves a potential legal and political opening. As Justice Kennedy's quixotic concurrence emphasized, the "Court does acknowledge that in some instances, governmental action may be subject to judicial review."[210] The majority opinion's call for overriding deference is grounded in the elected branches' combined powers over immigration, foreign affairs (sovereign-to-sovereign dealings),[211] and national security.[212] The confluence of those powers in a given situation counsels a measure of judicial reticence.

But where immigration and foreign affairs are not directly involved and where the government apparently curtails fundamental liberties on national security grounds—particularly the liberties of citizens or of noncitizens with connections to the United States[213]—heightened judicial scrutiny might still be

---

208. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

209. Boumediene v. Bush, 553 U.S. 723 (2008).

210. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (Kennedy, J., concurring).

211. *Id.* at 2419 (majority opinion) ("'[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))).

212. *Id.* at 2420 ("[O]ur inquiry into matters of [immigration] entry and national security is highly constrained.").

213. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 273 (1990) (finding that the Fourth Amendment did not apply to the search and seizure of property "owned by a nonresident alien and located in a foreign country," when the individual "had no voluntary connection with this country that might place him among 'the people' of the United States"); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE

available as an essential aspect of the rule of law.[214] As Justice Sotomayor intimated and as ordinary constitutional doctrine prescribes, in that situation, careful scrutiny is designed to protect members of disfavored groups otherwise vulnerable to the political will of intemperate majorities.[215] This scrutiny is especially needed in fear-filled national security settings, as *Korematsu* demonstrated, and is jurisprudentially compelling in a democracy marked by checks and balances and a separation of powers.[216]

Moreover, even where immigration is involved, a foundation for *Trump*'s extreme judicial deference—the plenary power doctrine—may continue to erode.[217] Without saying so explicitly, the Court in *Trump* invoked effectively

---

UNITED STATES 35-36 (2006). Under the plenary power doctrine, "noncitizens outside the United States cannot raise constitutional challenges to exclusion grounds or procedures." MOTOMURA, *supra*, at 35. But Motomura contends— as *Verdugo-Urquidez* implies—that "[i]mmigration as affiliation . . . [plays] a central role in the constitutional aspects of immigration law" in which "noncitizens with ties in the United States" should be afforded First Amendment protections. *Id*. at 100, 106.

214. Courts have undertaken careful scrutiny in this setting. *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); N.Y. Times Co. v. United States, 403 U.S. 713, 725, 727 (1971) (per curiam) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture . . . . In no event may mere conclusions [about national security] be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary."); United States v. Robel, 389 U.S. 258, 263 (1967) (undertaking careful scrutiny and observing that the "Government argues that this Court has given broad deference to the exercise of [Congress's war power] . . . . However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit"); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126-27 (1866) (requiring government proof of an "actual and present" public danger to justify depriving a citizen of a constitutional right to a civil jury trial through a military trial while the civil courts are open and operating); Hassan v. City of New York, 804 F.3d 277, 301 (3d Cir. 2015) (emphasizing that even in national security settings "intentional discrimination based on religious affiliation must survive heightened equal-protection review"); Doe v. Gonzales, 500 F. Supp. 379, 414-15 (S.D.N.Y. 2007) (describing the "tragic ill-effects" of the government's expansive powers "unchecked by judicial rulings" in cases like *Korematsu v. United States*, 323 U.S. 214 (1944)); *cf.* YAMAMOTO, *supra* note 4, at 77 (noting that some courts "demonstrated judicial independence in protecting fundamental civilian liberties during times of distress, while still others professed a scrutinizing judicial role before sliding into passivity").

215. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980); YAMAMOTO, *supra* note 4, at 86.

216. *See infra* notes 229-243 and accompanying text; *see also* OWEN FISS, A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR 134-35, 137 (2015); YAMAMOTO, *supra* note 4, at 77.

217. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990) (recognizing modern

unbridled congressional (and by delegation, presidential) plenary power over immigration by citing three older cases embracing that doctrine.[218] One of those cases, *Harisiades v. Shaughnessy*,[219] relied on *Korematsu* to deferentially uphold the national security-justified deportation of a class of legal resident aliens for past political associations.[220] In dissent, Justice Douglas castigated the majority for redeploying an outdated and dangerous doctrine as the basis for unfettered deference. He noted:

> This doctrine of [plenary] powers inherent in sovereignty is one both indefinite and dangerous . . . . Our [powers] are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism . . . . [The Constitution's] framers were familiar with history, and wisely . . . they gave to this government no general power to banish.[221]

Indeed, the plenary power doctrine was rooted in nineteenth-century notions of absolute national sovereignty, untethered to contemporary human rights commitments.[222] Equally significant, the doctrine emerged from racist and nativist precepts of America's need to exclude hordes of threatening foreigners.[223] In *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*, Justice Field replicated the California constitutional convention's narrative about an "Oriental invasion."[224] By characterizing the racial group as a "menace

cases' erosion of the plenary power doctrine); *see also* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (indicating that courts should not "'look behind' the Government's" order without an "affirmative showing of bad faith"); Zadvydas v. Davis, 533 U.S. 678, 695 (2001) ("The Government . . . looks for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area . . . . But that power is subject to important constitutional limitations.").

218. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418-19 (2018) (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 81 (1976); and Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)).

219. 342 U.S. 580.

220. *Id.* at 589 n.16, 591 n.17.

221. *Id.* at 599-600 (Douglas, J., dissenting).

222. *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10-11 (1990); Natsu Taylor Saito, *The Enduring Effect of the* Chinese Exclusion Cases*: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14-16 (2003).

223. *See* Saito, *supra* note 222, at 35 ("The plenary power doctrine was first articulated in the Chinese exclusion cases to allow the government to exclude a disfavored minority . . . by virtue of their race, ethnicity, national origin or culture, and to deny them otherwise applicable protections of law.").

224. 130 U.S. 581, 595 (1889).

to our civilization," he uplifted unreviewable government power to meet the "great danger that at no distant day . . . our country would be overrun by them unless prompt action was taken to restrict their immigration."[225]

Over time, judges and scholars have leveled sharp criticism of the plenary power doctrine. They have identified the doctrine's roots in "official racial discrimination," calling it a "relic from a different era."[226] Moreover, Congress has prohibited immigration-visa discrimination on the basis of race, religion, and national origin. Changing legislative, judicial, and public views of human rights and racism have undercut the doctrine's reach and standing[227]—a likely reason the *Trump* majority invoked its tenets without explicitly naming it.

Cast in this light, a realpolitik opening still exists for limiting the impact of *Trump* and *Korematsu*.[228]

CONCLUDING THOUGHTS

Congress and the President need wide latitude in protecting the nation's institutions and people—in securing airports, train stations, public arenas, and nuclear power plants; in deploying security forces where needed; in properly gathering intelligence; in vetting newcomers; and in prosecuting violent perpetrators. Courts generally should defer in these matters. But not in all situations.[229]

Where the government sweepingly curtails the constitutional liberties of those in or with substantial connections to the United States, judicial passivity must end. When courts act reflexively as a rubber stamp for executive security

---

225. *Id.* (emphasizing congressional power).

226. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (quoting Reid v. Covert, 354 U.S. 1, 12 (1957)).

227. *See* Kerry v. Din, 135 S. Ct. 2128, 2140-41, 2145 (2015) (carefully assessing an official's visa denial for a "bona fide factual basis" and for possible "bad faith" motivation); *see also* Saito, *supra* note 222, at 32 ("To argue that the U.S. government must have plenary power to protect itself from threats posed by [outsiders] is to turn reality on its head. Simply because these groups are all perceived as 'outsiders' does not mean that they are a threat to . . . national security.").

228. *See* Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 287 (2005) (charting a broad realpolitik blueprint for "building the political coalitions and cultural momentum needed to impel close judicial scrutiny of executive national security claims" of pressing public necessity).

229. *See* YAMAMOTO, *supra* note 4, at 95-99 (offering a methodology for determining when heightened judicial scrutiny is practically needed and jurisprudentially warranted).

actions, they generate a "shadow side" of American law.[230] They enable an executive, with impunity, to scapegoat or intimidate vulnerable groups for political advantage. This damages communities, the rule of law, and America's moral stature—whether discriminating on the basis of race or religion,[231] locking people up indefinitely as "individuals associated with" designated terror groups,[232] torturing to obtain information,[233] harassing journalists,[234] excluding transgender people from military service,[235] or gathering broad swaths of citizens' data without authorization.[236]

In these situations, judicial engagement in the form of heightened scrutiny stands as an integral pillar in the edifice of a functioning constitutional democracy.[237] The "core meaning of 'civil liberties' is freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real or, sometimes, imagined internal and external enemies."[238] Judicial protection of these liberties aims to deter or halt "actions [that] may get out of hand, creating a climate of fear, oppressing the innocent, stifling independent thought, and endangering democracy."[239]

For these reasons, *Korematsu* continues to serve as a cautionary tale about enduring tears in the fabric of America's democracy when courts abdicate their role as a guardian of fundamental liberties. And its coram nobis reopening spotlights the importance of jurists taking cognizance of powerful political currents in halting government excesses and thereby profoundly shaping American justice—for instance, in *Brown* (rejecting government racial segregation),[240] *Obergefell* (invalidating bans on same-sex marriage),[241] *Hamdi* (securing judicial review and due process protections for detained citizens labeled "enemy

230. *See* Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 49 (2002).

231. *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

232. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004) (quoting Declaration of Michael H. Mobbs, Joint App. Vol. 1, at 148, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1120871).

233. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

234. *See* Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012), *vacated*, 724 F.3d 170 (2d Cir. 2013).

235. *See* Doe v. Trump, 288 F. Supp. 3d 1045 (W.D. Wash. 2017), *reconsideration denied*, 284 F. Supp. 3d 1182 (W.D. Wash. 2018), *stay pending appeal denied*, 284 F. Supp. 3d 1172 (W.D. Wash. 2018), *appeal filed*, 2018 WL 1774089 (9th Cir. 2018).

236. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

237. *See* YAMAMOTO, *supra* note 4, at 109-20.

238. POSNER, *supra* note 141, at 4.

239. *Id.* at 4-5.

240. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

241. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

combatants"),[242] and *Doe v. Gonzales* (rejecting FBI national security letters in place of subpoenas for sweeping information gathering from private third parties).[243] These cases and others collectively advance an imperative methodology for courts, especially in national security and civil liberties controversies that do not directly implicate a mix of immigration and foreign affairs: the express repudiation of *Korematsu*'s "logic" of unconditional deference.[244]

There remains a legal opening to meet this imperative. It will entail political organizing and education that accentuates lawmaker and judicial accountability in a functioning democracy, along with sustained critical legal advocacy that uplifts heightened scrutiny as a bedrock for unmasking pretextual government abuses. A realpolitik coalescence is essential. Courts acting as guardians of precious liberties "in practice often results not from legal pronouncements alone but rather from a ragged combination of law *and* politics."[245] This combination likely contributed to the lower courts' preliminary injunctions against the travel ban.[246] With clear-eyed judges buttressed by vigorous advocacy and organizing,[247] America's constitutional democracy may yet rise to prevent religious and racial animosity from again masquerading behind a facade of national security.

Eric Yamamoto is the Fred T. Korematsu Professor of Law and Social Justice, University of Hawai`i at Manoa, William S. Richardson School of Law. Rachel Oyama is a member of the University of Hawai`i at Manoa, William S. Richardson School of Law, class of 2019.

242. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

243. Doe v. Gonzales, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *aff'd in part*, *rev'd in part*, *and remanded sub nom.* John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008); *see also* Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 688 (2016) ("Whether it was *Marbury*, or *Youngstown*, or *Brown*, or *Nixon*, some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law.").

244. *See* YAMAMOTO, *supra* note 4, at 105-07. Future courts also can simultaneously repudiate *Hirabayashi* and *Yasui*.

245. *Id.* at 110 (emphasis added).

246. *See* sources cited *supra* note 131.

247. *See* YAMAMOTO, *supra* note 4, at 111 (emphasizing the need for "'something more' to implement an embraced methodology for better accommodating security and liberty: critical legal advocacy and public pressure").