Masquerading Behind a Facade of National Security

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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. In that case, the Court upheld President Roosevelt’s 1942 executive order 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).
disloyalty. 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. 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. 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).

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 “\textit{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

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6. See, e.g., David Cole & William N. Eskridge, Jr., \textit{From Hand-Holding to Sodomy: First Amendment Protections of Homosexual (Expressive) Conduct}, 29 \textit{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 \textit{Korematsu}, 323 U.S. at 246 (Jackson, J., dissenting))).


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


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.”\footnote{13}

Korematsu thus remains startlingly significant—especially after the Court’s recent ruling in Trump v. Hawaii,\footnote{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\footnote{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”\footnote{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.

\footnote{13.} Id. at 246.
\footnote{14.} 138 S. Ct. 2392 (2018).
\footnote{15.} See YAMAMOTO, supra note 4, at 51.
\footnote{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—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, 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.”

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, 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. 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.

19. Id. at 307 (citations omitted).
Justice Black, a former Ku Klux Klan member, wrote for the six-member majority. He first disclaimed overt prejudice, 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.” 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. 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.” 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,” declaring “we cannot reject as unfounded the judgment of the military authorities and of Congress” about “pressing public necessity.”

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. The writ of coram nobis is a rarely employed common law vehicle for reopening a “manifestly unjust” criminal conviction—usually on grounds of egregious

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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.


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.


30. Id. at 216.

governmental misconduct—where petitioners have served their sentences, and they and their community suffer continuing prejudice from the conviction. The Korematsu, Hirabayashi, and Yasui coram nobis reopenings revealed a “scandal without precedent in the history of American law.” 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. 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.

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). 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. Indeed, FBI Director J.

32. Government misconduct that amounts to “knowingly us[ing] perjured testimony or witholding 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.”).


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, 384 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 36–32 and accompanying text.

36. See KENNETH RINGLE, RINGLE REPORT ON JAPANESE INTERNMENT (1941); Memorandum from FCC Comm’r James L. Fly to Atty 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 Atty 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. But all this crucial exculpatory evidence was deliberately covered up.

The Korematsu and Hirabayashi coram nobis litigation also revealed that World War II executive branch leaders—including an Assistant Attorney General, 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.

Justice Department lawyers drafting the government’s Hirabayashi and Korematsu briefs vehemently protested as a matter of conscience, excoriating their
superiors for the apparent “suppression of evidence”\textsuperscript{41} and the presentation to the courts of “willful historical inaccuracies and intentional falsehoods.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{44} Nevertheless, the Justice Department ultimately decided not to alert the Court to the DeWitt report’s deliberate misstatements about ostensibly Japanese American espionage.\textsuperscript{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.\textsuperscript{46} The Justice Department simply asked the Court to take judicial notice of the facts recited in this outside-the-record report\textsuperscript{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

\textsuperscript{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 investigatory report recommending against mass racial treatment).

\textsuperscript{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).

\textsuperscript{43} IRONS, supra note 33, at 285 (quoting the Burling memo).

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

\textsuperscript{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).

\textsuperscript{46} See Transcript of Oral Argument at 8–9, Korematsu v. United States, 323 U.S. 214 (1944) (No. 44–22).

\textsuperscript{47} See id. at 6–7.
choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination . . . .

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. 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.” 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.” 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.

Despite purporting to undertake the “most rigid scrutiny,” 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.” The Third

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).
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)).
57. See id. at 1420.
58. Id. at 1416-17 (quoting PERSONAL JUSTICE DENIED, supra note 25, at 18).
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. After the 2015 Paris terror attacks, a city mayor in Virginia cited Japanese American incarceration to justify not accepting Syrian refugees into the city. And as a presidential candidate, Donald Trump highlighted Japanese American exclusion as a foundation for barring present-day Muslim entry into the country. Influential jurists, too, have continued to embrace the opinion’s judicial passivity (even while refraining from expressly citing the case). Others, by contrast, have characterized Hirabayashi and Korematsu as stark cautionary tales—loaded weapons poised to inflict lasting damage on innocent people.

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


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.


Security to protect the American people and institutions from both domestic and foreign terrorism. Soon thereafter, the Department initiated an immigrant registration and tracking program. 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.

But the breadth and intrusiveness of many security measures appeared to reflect racial and religious scapegoating. 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. Another aimed to build popular support for an invasion of Iraq and control of its oil resources—motives rooted in politics and economics. The Center for Public Integrity identified false Bush administration statements about Iraq’s supposed weapons of mass destruction and the threats posed by al Qaeda.

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.


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

Kirsanow invoked Korematsu as precedent. He warned that, if such an attack occurred, Arab Americans could “forget civil rights in this country.” 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. 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. For Clark, a former Democratic presidential candidate, religious extremism posed a serious security threat. 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. 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

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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.


79. Id.

Writs Act\textsuperscript{81} instead of making a purely constitutional ruling,\textsuperscript{82} Judge Mukasey gave Padilla’s counsel no authority to conduct discovery, cross-examine witnesses, or effectively rebut officials’ claims.\textsuperscript{83} In addition to limiting Padilla’s counsel’s participation, Judge Mukasey adopted the attenuated “some evidence” standard advocated by the Bush administration.\textsuperscript{84} Padilla eventually refiled his case in a different district, where he prevailed; but the Fourth Circuit reversed.\textsuperscript{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.\textsuperscript{86}

In the same timeframe, American citizen Yaser Hamdi challenged his military detention as an enemy combatant.\textsuperscript{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.”\textsuperscript{88} On appeal, the government argued that “courts may not second-guess the military’s determination”;\textsuperscript{89} the government had suggested, in the court’s phrasing, that “[the military’s] determinations on this score are the first and final word.”

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\item \textsuperscript{81} 28 U.S.C. § 1651 (2018).
\item \textsuperscript{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”).
\item \textsuperscript{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.”).
\item \textsuperscript{85} Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).
\item \textsuperscript{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).
\item \textsuperscript{88} Id. at 535.
\item \textsuperscript{89} Brief for Respondents-Appellants at 28, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567.
\item \textsuperscript{90}  Hamdi, 296 F.3d at 283.
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The Fourth Circuit agreed and discharged the lower court’s habeas writ.\textsuperscript{91} The court denied a rehearing en banc\textsuperscript{92} but Judge Motz dissented, writing that the judiciary “must not forget the lesson of Korematsu.”\textsuperscript{93} Here, “as in Korematsu, the Executive has failed to proffer any real evidence to justify” Hamdi’s prolonged detention.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{97} Justice Souter, joined by Justice Ginsburg, cited Korematsu as a cautionary illustration.\textsuperscript{98}

Later in the war on terror, in \textit{Holder v. Humanitarian Law Project},\textsuperscript{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.”\textsuperscript{100} Chief Justice Roberts, for the majority, first declared that the possible infringement of First Amendment rights called for heightened scrutiny.\textsuperscript{101} But like the majority in Korematsu, the Court deferred. It accepted without careful review the conclusory, hearsay-

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\textsuperscript{91} \textit{Hamdi}, 316 F.3d 450.

\textsuperscript{92} Hamdi v. Rumsfeld, 337 F.3d 335, 341 (4th Cir. 2003) (denying “petition for rehearing and suggestion for rehearing en banc”).

\textsuperscript{93} \textit{Id.} at 375 (Motz, J., dissenting).

\textsuperscript{94} \textit{Id.} at 375-76.


\textsuperscript{96} \textit{Hamdi}, 542 U.S. at 536.

\textsuperscript{97} \textit{Id.} at 535-36.

\textsuperscript{98} \textit{See id. at 542-44}.

\textsuperscript{99} 561 U.S. 1 (2010).


\textsuperscript{101} \textit{See Humanitarian Law Project}, 561 U.S. at 28.
\end{flushleft}
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 support[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. 08-1498), 2009 WL 3877534).


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).


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

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111. See Clapper, 568 U.S. at 411.
115. See Weiss, supra note 7.
Bernardino, and Orlando—coalesced in President Trump’s anti-Muslim statements\textsuperscript{17} and three ensuing executive orders.\textsuperscript{18}

Terror attacks warrant security officials’ swift and rational responses in catching and prosecuting perpetrators and in taking grounded, proactive steps to prevent future violence.\textsuperscript{19} And after 9/11, the government established a multilevel system to track security threats, prosecute perpetrators, and restructure the immigration vetting system.\textsuperscript{20} But a majority of Republican voters still endorsed then-candidate Trump’s prescribed “complete and total shutdown” of Muslim entry into the United States.\textsuperscript{21} And with his reference to the Japanese American incarceration as precedent,\textsuperscript{22} nearly half of Republican voters thought


\textsuperscript{18} 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).

\textsuperscript{19} See Yamamoto et al., supra note 10, at 34-46.


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).


126. Id.

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

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. Most importantly, the Court had not jettisoned the case’s “principle of unconditional judicial deference to the executive on national security matters.” Moreover, Chief Justice Rehnquist and prominent Seventh Circuit Judge Posner had earlier endorsed key aspects of Korematsu.

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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. 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. The former Chief Justice observed that *Korematsu* was correctly decided as to first generation Japanese immigrants in America. Without acknowledging the revelations of the coram nobis litigation or the findings of Congress’s Commission on the Wartime Relocation and Internment of Civilians, 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.” 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.”

After the initiation of the Gulf War, Judge Posner maintained that “*Korematsu* was correctly decided,” highlighting the importance of judicial reticence...
rather than independence. *Korematsu* appropriately enabled courts during hostilities to say, “we’re going to defer.”

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

**B. “Animus, Invective, and Obvious Pretext”**

In response to challenges to the President’s exclusion orders, the Justice Department asserted that the orders were “unreviewable.” 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.”

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,” 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.” The Fourth Circuit, too, sitting en banc, refused “to ignore evidence, circumscribe [its] review, and blindly defer” 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

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


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.”).


history, . . . and is incompatible with our duty to evaluate the evidence before us.”

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.

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.” 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. In essence, Solicitor General Francisco implored the Court, just trust us.

But the undisclosed report was apparently a mere seventeen pages—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)).
152. Id. at 27 (emphasis added).
153. See id. at 26.
security benefit from the kind of exclusionary measures embodied in the executive orders.\textsuperscript{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.\textsuperscript{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?”\textsuperscript{157}

D. “Blindly Accepting the Government’s Misguided Invitation to Sanction a Discriminatory Policy”

The Supreme Court’s five-member majority in \textit{Trump v. Hawaii},\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{163} Highlighting the damage to


\textsuperscript{158} 138 S. Ct. 2392 (2018).

\textsuperscript{159} Id. at 2410.

\textsuperscript{160} Id. at 2418.

\textsuperscript{161} Id. at 2421.

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

\textsuperscript{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.”

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. 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. The government was unwilling to reveal its own intelligence agencies’ views of the security concerns. 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. 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 redeployes the same dangerous logic underlying Korematsu.”

Justice Sotomayor also underscored Trump’s “harm to our constitutional fabric” in redeploying Korematsu’s logic—individuals “left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.” 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.” 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.

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.
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.”

Justice Sotomayor agreed that “this formal repudiation of a shameful precedent is laudable and long overdue.” 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.” 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.”

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. Contrary to Chief Justice Roberts’s phrasing, the Korematsu majority did not address government action taken “explicitly on the basis of race.” Second, the forced removal, like Trump’s exclusion orders, targeted foreign nationals, too. Korematsu was not only about abuse of “U.S. citizens.” Third, the Korematsu majority did not limit its ruling to confinement in “concentration camps.” 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.
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.
MASQUERADING BEHIND A FACADE OF NATIONAL SECURITY

blanket restriction and exclusion.\textsuperscript{183} Finally, as in \textit{Trump}, \textit{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.”\textsuperscript{184}

Only by distorting what the \textit{Korematsu} Court said and did was Chief Justice Roberts able to declare “wholly inapt”\textsuperscript{185} the likening of key aspects of \textit{Korematsu} to \textit{Trump}, and to thereby reject \textit{Korematsu} while upholding the entry ban on those from Muslim-majority countries.

Most significantly, the \textit{Trump} majority did not extend its repudiation to the most dangerous aspect of \textit{Korematsu}—its unconditional deference to the executive branch. Instead, \textit{Trump} reinscribed this “logic”\textsuperscript{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.”\textsuperscript{187} As Anil Kalhan observed, the majority “engaged in a cheap parlor trick: purporting to ‘overrule’ a narrow, distorted version of \textit{Korematsu} while simultaneously embracing and replicating that decision’s actual logic.”\textsuperscript{188} Justice Sotomayor thus characterized the limited “overruling” as the Court “merely replac[ing] one ‘gravely wrong’ decision with another.”\textsuperscript{189}

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

\textsuperscript{183} See id. at 217-18.
\textsuperscript{184} \textit{Trump}, 138 S. Ct. at 2423; see \textit{Korematsu}, 323 U.S. at 219, 220, 223-24.
\textsuperscript{185} \textit{Trump}, 138 S. Ct. at 2423.
\textsuperscript{186} Id. at 2448 (Sotomayor, J., dissenting).
\textsuperscript{187} Id. at 2447.
\textsuperscript{189} \textit{Trump}, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (quoting id. at 2423 (majority opinion)).
\textsuperscript{190} See \textit{YAMAMOTO}, supra note 4, at 67-71 (describing courts’ “implied recognition” of \textit{Korematsu}).
\textsuperscript{192} See id. at 27-28.
\textsuperscript{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.”

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.” 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?

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). This proposed resolution and its 2001 predecessor authorize the President to undertake wars related to the 9/11 terrorist attacks. One aspect of

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\textsuperscript{199} and a lower court broadly interpreted the AUMF as providing implicit authorization.\textsuperscript{200}

The National Defense Authorization Act for Fiscal Year 2012 (NDAA),\textsuperscript{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.\textsuperscript{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,\textsuperscript{203} the lower court cited Korematsu as a cautionary warning\textsuperscript{204} and undertook “exacting scrutiny” to determine if the security restraint on liberty was “actually necessary,”\textsuperscript{205} finding a key section of the Act to be unconstitutional. The Second Circuit, however, reversed on standing grounds without ruling on the merits.\textsuperscript{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.\textsuperscript{207}


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


\textsuperscript{204}. See id. at 431, 459.

\textsuperscript{205}. Id. at 465.

\textsuperscript{206}. Hedges, 724 F.3d 170.

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 Hamdi208 and Boumediene209 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 States213—heightened judicial scrutiny might still be...

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 MOTO-MURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE
available as an essential aspect of the rule of law.\textsuperscript{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.\textsuperscript{215} This scrutiny is especially needed in fear-filled national security settings, as \textit{Korematsu} demonstrated, and is jurisprudentially compelling in a democracy marked by checks and balances and a separation of powers.\textsuperscript{216} Moreover, even where immigration is involved, a foundation for \textit{Trump}'s extreme judicial deference—the plenary power doctrine—may continue to erode.\textsuperscript{217} Without saying so explicitly, the Court in \textit{Trump} invoked effectively

\textsuperscript{214} Courts have undertaken careful scrutiny in this setting. See, e.g., \textit{Hamdi} v. \textit{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.”); \textit{N.Y. Times Co.} v. \textit{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.”); \textit{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”); \textit{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); \textit{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”); \textit{Doc 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 \textit{Korematsu} v. \textit{United States}, 323 U.S. 214 (1944)); cf. \textit{Yamamoto}, \textit{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”).


\textsuperscript{216} \textit{See infra} notes 229-243 and accompanying text; \textit{see also} \textit{Owen Fiss}, \textit{A War Like No Other: The Constitution in a Time of Terror} 134-35, 137 (2015); \textit{Yamamoto}, \textit{supra} note 4, at 77.

unbridled congressional (and by delegation, presidential) plenary power over immigration by citing three older cases embracing that doctrine.\textsuperscript{218} One of those cases, \textit{Harisiades v. Shaughnessy},\textsuperscript{219} relied on \textit{Korematsu} to deferentially uphold the national security-justified deportation of a class of legal resident aliens for past political associations.\textsuperscript{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.\textsuperscript{221}

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


\textsuperscript{219} 342 U.S. 580.

\textsuperscript{220} Id. at 589 n.16, 591 n.17.

\textsuperscript{221} Id. at 599-600 (Douglas, J., dissenting).


\textsuperscript{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.”).

\textsuperscript{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.”

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.” 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—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.

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.

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).
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.”).
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. 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, locking people up indefinitely as “individuals associated with” designated terror groups, torturing to obtain information, harassing journalists, excluding transgender people from military service, or gathering broad swaths of citizens’ data without authorization.

In these situations, judicial engagement in the form of heightened scrutiny stands as an integral pillar in the edifice of a functioning constitutional democracy. 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.” 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.”

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), Obergefell (invalidating bans on same-sex marriage), Hamdi (securing judicial review and due process protections for detained citizens labeled “enemy

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231. See Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).
237. See YAMAMOTO, supra note 4, at 109-20.
238. POSNER, supra note 141, at 4.
239. Id. at 4-5.
masquerading behind a facade of national security"), 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.

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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 coward, 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”).