The Loaded Weapon

Eric K. Yamamoto and Susan Kiyomi Serrano

[T]he Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Justice Jackson, dissenting
Korematsu v. U.S., 323 U.S. 214 (1944)

Ahmed’s Secret Incarceration

What do you make of Nasser Ahmed’s secret incarceration? An imagined Kafkaesque trial of the absurd? Could it be real, here in the United States?

Nasser Ahmed spends over three years in prison as a national security threat. “Secret evidence” in a “secret” government proceeding marks him a bona fide threat to the nation’s security. An Egyptian father of four U.S. citizen children, Ahmed is never charged with a crime. Even so, the Immigration and Naturalization Service imprisons and then seeks to deport him based on evidence hidden from Ahmed and his attorney. For an entire year, the government refuses to even furnish Ahmed’s lawyer with a summary of the evidence. Finally, the government provides a one-line summary, asserting only that it has evidence “concerning respondent’s association with a known terrorist organization.” The government refuses to identify the organization.¹ Unable to defend himself against nonexistent charges on the basis of undisclosed evidence in a secret proceeding, Ahmed languishes in solitary confinement.

After years of incarceration the actual “secret” evidence is revealed, and it shows that Ahmed has not engaged in any kind of

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terrorist activity. Nor has he supported any terrorist organizations. The government imprisoned and sought to deport Ahmed on national security grounds because of his “associations.” And what were the government’s allegations of those associations? Ahmed once was appointed by a U.S. court to serve as a paralegal and translator for the defense team of Sheik Abdel Rahman, who was being tried in a U.S. court for seditious conspiracy. Three years of secret incarceration for doing what the court asked and indeed authorized him to do.

Ahmed’s civil liberties nightmare sounds like tortured Kafka-esque imaginings. It is, however, reality. United States reality. One such story among many. And it happened during time of comparative peace, well before the public outcry for revenge abroad and heightened national security protections at home following the September 11 attacks on the World Trade Center and Pentagon. A board of immigration appeals court eventually reviewing Ahmed’s case said that Ahmed’s blind imprisonment for groundless national security reasons was an injustice. But that was before. Before the “War on Terrorism.”

Today, in response to the horrific killing of thousands of Americans and people from countries around the world, the President, Congress and federal agencies, like the Immigration and Naturalization Service, are creating a new regime of national security measures. Some of these measures are needed and only reasonably burdensome—like added checks at airports and increased security at nuclear power plants and government buildings. But others, like secret detentions, are immensely troubling. When the government abuses its national security powers, particularly by targeting members of vulnerable groups, and is challenged, how are the U.S. courts likely to rule?

This is the key question for all concerned about both the nation’s security and civil liberties, for all concerned about justice here as well as abroad. Will the judiciary, as popularly believed, stand strong under the Constitution as the bulwark against ill-conceived, harshly discriminatory government action during times of national stress? Will it assure due process and equal protection for those denigrated in the public mind, the very democratic values that make the nation’s security worth protecting? Or, taking an implicit cue from the U.S. Supreme Court, might frontline and appeals courts react with more fear than balance and replay in post-modern form the injustice of the Japanese American World War II internment? Recall the potentially prescient dissent of Su-
The Supreme Court Justice Jackson in the 1944 Korematsu case, which upheld the legality of the internment: “The Court has for all time validated the principle of racial discrimination in criminal procedure and of transplanting citizens. The principle stands as a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need.”

The “Law” after September 11

Two months after the deadly plane-bombings in New York and Washington D.C., the U.S. continues to detain over a thousand “suspected” terrorists. Officials have not revealed the names or citizenship of hundreds of those arrested or their places of detention. None has been charged with terrorist crimes. Civil rights groups called for the release of information about these individuals, arguing that the secrecy surrounding these detentions “prevents any democratic oversight of the government’s response to the attacks.” In the face of charges that the government has been indefinitely jailing innocent people without charges, proper food or access to attorneys, U.S. Attorney General Ashcroft issued a Nixonian non-denial denial: the government has engaged in no “wholesale abuse” of those detained.2

In the wake of September 11, the government responded with a spate of laws designed both to address broad threats to the nation’s physical security and to salve the nation’s damaged psyche. It did so by expanding executive and military powers to pursue what it described as a “war against terrorists”—increased wire-tapping and surveillance, communications intercepts, secret property searches, racial investigative profiling, prolonged detentions and accelerated deportations. The government did this in part by curtailing rights of speech, press and association, as well rights to freedom from racial discrimination and incarceration without charges or trial. In signing the far-reaching anti-terrorism “Patriot” bill into law, President Bush vowed that the government would “enforce [it] with all the urgency of a nation at war.” 3

Many among the American public responded with deep concern both for those killed and for the proper balance of national security and civil liberties. Others reacted by looking for scapegoats. Those remotely resembling persons of Arab ancestry were targeted. In Arizona, a man angry about the bombings shot and killed a Sikh storeowner. Men in a car shouting epithets ran over and killed a Native American woman. Airline pilots, reacting to passenger sentiments, banned Arab, Pakistani and Asian Indi-
ans from flights for no other reason than their apparent ancestry. High school students in Dearborn, Michigan taunted a Muslim girl wearing a traditional headscarf, kicked her and slammed her into a locker. In Los Angeles, two men mistook a Latino man for an Arab, followed him home and kicked in his front door. In San Francisco, fake blood was smeared across the entrance to an Islamic community center. Businesses, homes and mosques were firebombed and vandalized. Housing evictions, job firings, verbal harassment as well as assaults were reported in alarming numbers.

President Bush cautioned that the U.S. was targeting “terrorists,” not Muslims or all persons of Arab ancestry. At the same time the government’s actions potentially raised the ugly specter of guilt-by-association (“if you’re not with us, you’re against us”). This principle, for some, was a coded reference to ancestry, casting suspicion on all persons of Arab descent. Indeed the FBI and INS reportedly commenced racial profiling investigations and detentions; the Justice Department appeared to resurrect support for the formerly discredited secret trials based on secret evidence for the deportation of “dangerous” immigrants—like Nasser Ahmed. Attorney General Ashcroft announced a “wartime reorganization” of the Justice Department to aggressively investigate and prosecute terrorists. The government also launched a “terrorist tracking task force” to root out suspected terrorists who overstay their visas. Attorney General Ashcroft vowed to prosecute those suspected of associations with designated terrorist groups: “If you overstay your visas even by one day, we will arrest you. . . . If you violate a local law, we will hope that you will, and work to make sure that you are put in jail and be kept in custody as long as possible.”

Should we worry about the swashbuckling rhetoric of the head of the U.S. Justice Department? Should we be concerned about the new expansive executive edicts, agency actions and Congressional enactments? Don’t we have a Constitution that gives the government strong national security powers while protecting the civil liberties of all in America? More specifically, aren’t the U.S. courts the bulwark against violations of the Bill of Rights? The answers are that yes, we have explicit constitutional guarantees of due process and equal protection, but that no, the actual performance of our judiciary during times of national stress suggests that the courts will be influenced by popular politics and will subtly renounce their role as constitutional backstop; they will instead defer almost completely to the executive and legislative branches.
We submit that this is how U.S. courts tend to perform during times of national distress—taking a hands-off approach in reviewing government national security actions, even where fundamental liberties are sharply restricted. As a consequence, the courts most often legitimize, rather than check, the actions of the executive and legislative branches reacting to the “ephemeral emotions of their political constituencies.” In times like these, we therefore must ask, as a democracy, how do we hold the executive and legislative branches accountable for military or national security actions inimical to the civil liberties of those in America, and who will insure that accountability? Insights from the law of the Japanese American internment help illuminate the complex dimensions to these questions.

**Insights from Japanese American Internment: The Hands-off Role of the Courts**

The politically popular and legally-sanctioned internment of 120,000 Japanese Americans during World War II illustrates the dangers of political and racial scapegoating during national crisis. On February 19, 1942, President Franklin Roosevelt issued Executive Order 9066, authorizing military commanders to protect West Coast military facilities. Based on fear and racial stereotypes, the government then interned 120,000 Japanese Americans without charges, indictment or hearing. The internees were forced to abandon their homes, farms and businesses with only what they could carry. They lost their property, jobs and sense of security. They endured the desert heat, cold and dust storms in ten desolate camps surrounded by barbed wire and armed guards.

Three American citizens of Japanese ancestry challenged the internment as a violation of the constitutional guarantee of equal protection of laws. In *Hirabayashi, Yasui, and Korematsu*, the government countered by asserting that the danger of espionage and sabotage by persons of Japanese ancestry on the West Coast justified its extraordinary actions. The government argued that “all Japanese, including American citizens, were, by culture and race, predisposed to loyalty to Japan and to disloyalty to the United States; that Japanese on the West Coast had committed and were likely to commit acts of espionage and sabotage against the United States; and that mass action was needed because there was insufficient time to determine disloyalty individually.” No evidence supported these assertions.

In deciding the cases, the Supreme Court announced that it
would subject the government’s discriminatory actions to the highest level of scrutiny. “[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.” “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”

Despite its pronouncements, however, the Court deferred completely to the military’s unsubstantiated assertions of “necessity.” It simply adopted the military’s sweeping conclusions about disloyal Japanese Americans. The Court thus upheld the constitutionality of the internment (specifically, the curfew and exclusion) and thereby sanctioned the government’s extraordinary civil liberties abuses. Thousands of innocent Japanese Americans remained imprisoned on account of their race, later to carry into private life the legally sanctioned stigma of disloyalty.

**War Plus Racism Plus Law**

Forty years passed before unearthed documents revealed that there had been no military necessity to justify the internment, that government decisionmakers knew this at the time and later lied about it to the Supreme Court. In fact, the War and Justice Departments altered, destroyed and suppressed key exonerating evidence from the Office of Naval Intelligence, Federal Bureau of Investigation, and Federal Communications Commission. In extraordinary *coram nobis* proceedings in the 1980s, the lower federal courts reversed course and acknowledged egregious government misconduct in justifying the internment and the resulting “manifest injustice” for all interned Japanese Americans. In 1988, as the U.S. intensified its pro-democracy and human rights fight against communism, Congress passed the Civil Liberties Act. The law provided $20,000 reparations for each surviving internee, mandated a presidential apology and established a civil liberties public education fund.

Despite the *coram nobis* victories and the Civil Liberties Act, the original *Korematsu* case remains on the law books. The Supreme Court “has not overruled or formally discredited the *Korematsu* decision or its principle of judicial deference to government claims of military necessity. Nor has the Court announced in principle that the demanding standards of review now normally applicable to government restrictions of constitutionally protected liberties are unaltered by the government’s claim of military necessity or national security.” In fact, in a whole range of modern-day cases, courts have deferred to government assertions of national security at the expense of civil liberties. Indeed, U.S.
Chief Justice Rehnquist, ignoring the stark revelations of the *Korematsu* and *Hirabayashi coram nobis* cases, recently defended the internment as legally justified, at least as to first generation Japanese Americans. The Chief Justice also opined that the judiciary should defer to the executive branch and military during times of war, even in the face of harsh treatment of civilians in the U.S. on the basis of ancestry, even in the absence of martial law.9

In the minds of many Americans the internment is an aberration, a bad mistake during war. Wartime exigencies gave rise to hasty actions. The Supreme Court erred for this reason, not because of individual prejudices and the forces of popular sentiment. In sharp contrast, and in light of the revelations of the *coram nobis* cases, Professor Jerry Kang maintains that the important lesson of the internment is not just that wartime generates unfortunate but inevitable mistakes—akin to the errant bombing of a Red Cross field hospital. Instead, he posits, “wartime coupled with racism and intolerance create particular types of social mistakes”10—like the politically popular incarceration of a group by reason of that group’s presumed disloyalty.

We add another dimension to Professor Kang’s calculus: national security crises coupled with racism or nativism and backed by the force of law generate deep and lasting social injustice. Court rulings, in particular, legitimize even extreme, albeit popular, governmental actions—in the 1940s, the internment; yesterday, Ahmed’s three-year secret incarceration; today, potentially, groundless detentions, secret trials and deportations and government racial profiling and harassment. Once legitimated by the courts, government excesses and human suffering take on the mantle of normalcy. Once broadly sanctioned by law, hostile or vengeful members of the public sense a license to harm. It is the law’s stamp of approval on wartime exigencies plus racism that transforms mistakes of the moment into enduring social injustice.

**What Now?: National Security, Civil Liberties and Democracy**

No one doubts the broad powers of government to protect people and institutions. The problem, history tells us, lies in harsh government excess in the exercise of that power.

The most far-reaching recent government national security law is the hastily-enacted, 342-page “USA Patriot Act” (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act). Signed into law
only six weeks after the attacks, the law authorizes expansive new powers for law enforcement agencies to wiretap phones, track Internet traffic, conduct secret searches, examine private financial and educational records and prosecute anyone who supports a “terrorist.” The law also allows the government to detain immigrants for seven days without charges and permits the possible indefinite detention of non-citizens without meaningful judicial review.11

Because the law creates a new, broadly defined crime of “domestic terrorism,” groups engaged in acts of political protest could be deemed terrorist organizations and their members criminally prosecuted as “terrorists.” The American Civil Liberties Union warned that “Americans who oppose U.S. policies and who are believed to have ties to foreign powers could find their homes broken into and their telephones tapped.” Those found providing assistance to designated terrorists could also be charged, even if the assistance is only providing food or shelter. Small monetary contributions of humanitarian aid from the U.S., when administered regionally by a group deemed to engage in terrorist activity, as in areas of Sri Lanka, make the donor a terrorist accomplice subject to prosecution. Analysts warn that the Patriot Act will allow the government to intimidate people of color and immigrants on the basis of innuendo and conjecture. 12

Even before the Act’s passage, government agents targeted Arab Americans and Muslims in the U.S. Several colleges and universities were approached for information about foreign students, students of particular ethnicities and students with strong political leanings. FBI agents entered mosques, interrupted prayer services and harassed worshippers and awakened Arab Americans late at night to interrogate them at length, even though they lacked any connection to terrorists.13

Many Americans were also subjected to private attacks and discrimination because they remotely resembled Arabs or Muslims. Commercial airline pilots expelled from their planes Arab Americans, South Asians and others who “looked like terrorists”—the airline “has no choice but to reaccommodate a passenger or passengers if their actions or presence make a majority of passengers uncomfortable and threaten to disrupt normal operations in flight.”

Hundreds were physically assaulted, harassed, fired or demoted because of their ethnicity, religion or appearance. Many others were intimidated by law enforcement, profiled at the airports and
discriminated against in the schools. Still others received hate mail, death threats and bomb threats. Five people were killed. The Justice Department commenced 170 investigations into hate crimes, including killings, shootings and arson.14

What will happen when those profiled, detained, harassed or discriminated against turn to the courts for legal protection? How will the U.S. courts respond to the need to protect fundamental democratic values of our political process—that people are to be treated fairly and equally? No definitive answers emerge. As the internment cases and more recent court rulings suggest, however, the judiciary most often yields to political pressure and declines to hold the government accountable for restrictions of civil liberties during times of national stress. Indeed, court observers warn that the same courts that frowned upon racial profiling in the past will authorize it “more definitively than before” to protect national security.15

Korematsu Revisited: The Call for Community Political Education and Mobilization

During World War II Fred Korematsu challenged the constitutionality of the internment and lost. The Supreme Court blindly accepted the government’s false assertion of “military necessity.” In the 1984 coram nobis case, federal judge Marilyn Hall Patel declared the original Korematsu case a “manifest injustice.” In her ruling, Judge Patel echoed Justice Jackson’s “loaded weapon” warning forty years earlier: The Korematsu case debacle “stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.”16

Judge Patel thus exhorted “institutions” during national crisis to be vigilant in order to “protect all citizens from the petty fears and prejudices.” Yet, institutions, particularly government, lean hard toward the powerful, not the powerless. On their own they are disinclined to struggle to “protect all.” Those institutions, including the courts, however, are responsive in varying ways to political will. They will exercise the vigilance called for by Judge
Patel, but only when pushed to do so by the coordinated efforts of frontline community and political organizations, scholars, journalists and politicians. The institutions will respond, but only to up-front education, in-your-face organizing and strategic political mobilization.

The real bulwark against governmental excess and lax judicial scrutiny, then, is political education and mobilization, both at the front end when laws are passed and enforced and at the back end when they are challenged in courts. During World War II internment, at the front end, no one spoke against it. Not the ACLU, not the NAACP. Not even the Japanese American Citizens League. All were silent, feeling vulnerable and fearing the repercussions of appearing to be unpatriotic. And the internment proceeded apace, and the high court legitimated it. Forty years later, at the back end challenge to the injustice, the Korematsu coram nobis legal team took a different tack. It engaged a multifaceted legal-political strategy—litigation, community organizing, public education, media storytelling and scholarly writing. Civil rights and community groups and concerned individuals joined the struggle in the courts, Congress and President’s office, as well as in the schools, churches, union halls and community centers. The legal process provided a focal point for these efforts, but political education and mobilization shaped the larger public understandings crucial to the success of the internment justice movement.

In today’s climate of fear and anger, our first task in protecting both people and key democratic values is to be pro-active at the front end—to prevent post-modern forms of internment. We need to organize and speak out to assure that the expansive new national security regime does not overwhelm the civil liberties of vulnerable groups and move the country toward a police state. We need to mobilize and raise challenges to prevent Ahmed-like secret incarcerations, particularly en masse. Through political analysis, education and activism, our job is to compel powerful institutions, particularly the courts, to be vigilant, to “protect all.” Our second task is to be assertive at the back end—to call out injustice when it occurs, to spell out the damage it does to real people in our midst and to our constitutional democracy, and to demand accountability to principles of equality and due process.

Our collective task, then, is to turn Justice Jackson’s warning into an affirmative challenge. The time is now to unload that weapon.
Notes

1. This description is based on the accounts of Professor Natsu Saito, Professor David Cole, and various news articles. See Natsu Saito, “Symbolism Under Siege: Japanese American Redress and the ‘Racing’ of Arab Americans as ‘Terrorists,’” Asian Law Journal 8:1 (2001), 17, 19-20 (noting that the INS has attempted to deport at least two dozen people on the basis of secret evidence, almost all of them Muslim, most of them Arab Americans); David Cole, “Secret Trials,” Human Rights 28:8 (2001), 8-9 (noting that the U.S. government detained Ahmed based on his alleged association with a terrorist organization, but would not reveal the name of the group, “much less when and how Ahmed had been associated and what, if anything, he allegedly did for the group”); David Cole, “Secrecy, Guilt by Association, and the Terrorist Profile,” Journal of Law and Religion 15 (2000-2001), 267, 273-275 (emphasizing that “[m]uch of the evidence declassified in Ahmed’s case should never have been classified in the first place” because “Ahmed’s association with Abdel-Rahman was no secret; Ahmed served as the sheik’s court-appointed paralegal and translator during Abdel-Rahman’s criminal trial.”); Douglas Montero, “U.S. Secret Evidence Law Terrorizes Innocent Arabs,” New York Post, January 9, 2000, 22; Jim Lobe, “Opponents of Secret Evidence Make Headway,” Inter Press Service, June 8, 2000. Saito also reports that the FBI and Immigration and Naturalization Service tried to force Ahmed to inform on Abdel-Rahman and threatened to deport him and his family if he did not. Even though an immigration judge ruled that Ahmed would be imprisoned and likely tortured if he was returned to Egypt—and was therefore eligible for political asylum—Ahmed was not released until the Board of Immigration Appeals forced the government to reveal its “secret evidence.”) See Saito, 19-20. While Ahmed, along with many others, worshipped at the mosque where Abdel-Rahman led prayer, there was no evidence that Ahmed engaged in any terrorist activity. See Susan M. Akram, “Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion,” Georgetown Immigration Law Journal 14:51 (1999), 76; Cole, “Secret Trials,” 8; “House Holds Hearings on Use of Secret Evidence, Visa Waiver Pilot Program,” Interpreter Releases, March 13, 2000, 301-302.

2. See Neil A. Lewis, “Detentions After Attacks Pass 1,000, U.S. Says,” New York Times, October 30, 2001, B1; Joan Mazzolini, “Arab Immigrant’s Detention Raises Host of Concerns,” The Plain Dealer, October 21, 2001, A1; Tamar Lewin, “For Many of Those Held in a Legal Tangle, Little is Revealed,” New York Times, November 1, 2001 (reporting that detainees have been held for weeks, even after the FBI has cleared them of involvement in the attacks and of even the most minor charges).


