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Erik K. Yamamoto

Maria Amparo Vanaclocha Berti

Jaime Tokioka

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Eric K. Yamamoto,[†] Maria Amparo Vanaclocha Berti,[††] & Jaime Tokioka[†††]

INTRODUCTION

Even though the World War II internment[1] was "wrong," the late-Justice Antonin Scalia proclaimed in 2014, "you are kidding yourself if you think the same thing will not happen again." "It [the *Korematsu* Japanese American internment decision] was wrong, but I would not be surprised to

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† Fred Korematsu Professor of Law and Social Justice, William S. Richardson School of Law, University of Hawai'i.
†† William S. Richardson School of Law, University of Hawai'i, Class of 2016.
††† William S. Richardson School of Law, University of Hawai'i, Class of 2017.
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1. The term "internment" is used here broadly, in the way it is often used in legal opinions and popular discourse, to mean more than the detention of foreign nationals during war. The "World War II Japanese American interment" encompasses the initial curfew, the following forced removal (exclusion, relocation, or evacuation), and ultimately the mass incarceration. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 19 (2d ed. 2013) (discussing differing terminology, including incarceration, confinement, and detention).

see it happen again, in time of war. It's no justification but it is the reality."[2]

Anticipating the Trump era and the security and liberty tensions following the 2015 Paris and San Bernardino attacks,[3] Justice Scalia envisioned a politically driven mass exclusion or segregation of Muslims in America. Observing that "in times of war, the laws fall silent,"[4] he also intimated that, when challenged, the government would resort to the Supreme Court's 1944 *Korematsu* decision as shaky but still standing precedent for the forced removal and possible incarceration of an entire ethnic or religious group.

In this way the national security and civil liberties tensions of the World War II internment link 9/11 and 2015 Paris and San Bernardino to the Trump era in America. This era is tarnished by accelerating Muslim harassment and discrimination.[5] It is also marked by the intimidation of those asserting fundamental rights to free speech, association, and religious choice and by increasingly volatile protests. Those protests target Trump's campaign prescription for a "total and complete shutdown" of Muslim entry and his post-inauguration Muslim exclusion and removal executive orders.[6] They are heightened by a high-profile supporter's citation to the World War II internment—and by implication *Korematsu*—as legal justification for sweeping anti-Muslim measures.[7] These past-into-the-

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2. Joel Gehrke, *Justice Antonin Scalia Says World War II-style Internment Camps Could Happen Again*, WASH. EXAMINER (Feb. 4, 2014), http://www.washingtonexaminer.com/justice-antonin-scalia-says-world-war-ii-style-internment-camps-could-happen-again/article/2543424 [https://perma.cc/5QDW-CQQ3] (describing Scalia's speech to a broad audience at the University of Hawai'i Law School and his relevance to the precedential import of the World War II *Korematsu* case).

3. *See infra* notes 49–54 and accompanying text (discussing the Paris and San Bernardino attacks).

4. *See supra* note 2 and accompanying text.

5. *See* Jenna Amatulli, *People Share Frightening Images in the Aftermath of Trump's Victory*, HUFFINGTON POST (Nov. 12, 2016), http://m.huffpost.com/us/entry/day-1-trumps-america_us_582497afe4b0cdd5e7e99e86?ncid=fcbklnkushpmg00000013&section+politics/ [https://perma.cc/Q4PG-DFAN] (detailing harassment of Muslims and Latinos directly linked to the 2016 presidential election); Shayna Freisleben, *Muslim Women in Hijabs Report Harassment, Intimidation Following Election*, CBS NEWS (Nov. 11, 2016, 12:56 PM), http://www.cbsnews.com/news/muslim-women-in-hijabs-report-harassment-intimidation-following-election/ [https://perma.cc/DPG6-4CYV] (recounting intimidation and harassment against Muslim women post-election).

6. *See* Tessa Berenson, *Donald Trump Calls for 'Complete Shutdown' of Muslim Entry to U.S.*, TIME (Dec. 7, 2015), http://time.com/4139476/donald-trump-shutdown-muslim-immigration/ [https://perma.cc/PF53-UXRX] (reporting Trump's "total and complete shutdown" of Muslims entering the United States); Richard Perez-Pena, *Trump's Immigration Ban Draws Deep Anger and Muted Praise*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/trumps-immigration-ban-disapproval-applause.html?_r=0/ [https://perma.cc/67GT-2G9V] (describing condemnation from Nobel Prize recipients, religious groups, business leaders, politicians and scholars who called Trump's orders "inhumane, discriminatory"); John Knefel, *Mayors and Activists Revolt Against Trump's "Muslim Ban" Executive Order*, TRUTHOUT (Jan. 26, 2017), http://www.truth-out.org/news/item/39236-mayors-and-activists-revolt-against-trumps-muslim-%20ban-executive%20order [https://perma.cc/858V-PVRH] (detailing widespread protests against Trump's executive orders).

7. *See infra* notes 21–23, 83–86 and accompanying text.

present linkages and the broader civil liberties challenges they pose form the heart of this Article.

After 9/11, in addition to taking needed steps to secure the nation's people, the government with public support denigrated Arabs and Muslims in America through harassment, discrimination, indefinite detentions, and even torture.[8] As described in Professors Yamamoto and Serrano's 2002 *Loaded Weapon* essay,[9] these actions recalled Justice Jackson's warning in his *Korematsu* dissent that the Court's ruling lay lurking as a dangerous precedent—a "loaded weapon" ready for the "hand of any authority that can bring forward a plausible," even if exaggerated or falsely grounded, "claim of an urgent need."[10]

The 1984 *coram nobis* reopening of *Korematsu* and the 1983 Congressional Commission investigation[11] illuminated the significance of Justice Jackson's warning. They undercut the military necessity pillars of the Supreme Court's 1944 ruling. They revealed no bona fide national security justification for the internment. They also showed the government's unethical alteration and fabrication of key evidence presented to the Supreme Court and, despite vehement protests by its own attorneys, the Justice Department's deliberate suppression of intelligence investigations effectively exonerating Japanese Americans as a group.[12] Together, the *Hirabayashi*, *Yasui*, and *Korematsu coram nobis* rulings[13] and the congressional investigation laid the cornerstones for a path-forging presidential apology and legislative reparations.[14]

Nevertheless, America's high court has yet to overrule its discredited original *Korematsu* decision upholding the forced removal leading to the mass incarceration. Indeed, former Chief Justice William Rehnquist and influential Court of Appeals Judge Richard Posner both say, in differing ways, that "*Korematsu* was correctly decided."[15] Equally significant, for those jurists and others, *Korematsu*'s contested principle of "unconditional judicial deference" to the government's poorly substantiated claim of

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8. *See infra* Section I.A for a discussion of post-9/11 national security measures targeting Arabs and Muslims.

9. Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, AMERASIA J. 27:3 (2001)/28:1 (2002), at 51–56.

10. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

11. *See infra* Section II.B for a discussion of the *coram nobis* reopenings.

12. *See infra* notes 141 & 142 and accompanying text (exposing specific instances of government dissembling).

13. *See* Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, No. 83-151-BE (D. Or. Jan. 26, 1984) (unpublished order); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); and *Korematsu coram nobis* decisions for an integrated judicial cornerstone for Civil Liberties Act redress. *See* YAMAMOTO ET AL., *supra* note 1, at 318–23.

14. *See infra* note 148 and accompanying text (describing the presidential apology and the reparations for each surviving internee).

15. *See infra* note 153–155 and accompanying text.

national security necessity still stands—in future cases, they indicate, "We're going to defer."[16]

The vituperative calls for mass exclusion and detention after the Paris and San Bernardino attacks and President Trump's ensuing Muslim exclusion and removal orders—against a backdrop of still pending post-9/11 civil liberties litigation by torture victims, religious communities, journalists and humanitarian groups[17]—revivify Justice Jackson's warning. That warning and U.S. District Judge Marilyn Hall Patel's later *Korematsu coram nobis* call for judicial vigilance[18] remain hotly relevant. Could "it"—a post-modern form of mass civil liberties violations—happen again? With the courts' stamp of approval?

Consider a snapshot of recent events. In 2015, retired U.S. Army General Wesley Clark fueled the anti-Muslim fire of American politicians. The former Commander of the NATO Allied Forces and once Democratic presidential candidate called for placing into internment camps American Muslims who possessed "radicalized" views irrespective of actions.

> [T]hese people [radicalized Muslims] are . . . disloyal to the United States as a matter of principle, fine, that's their right. . . . It's our right and our obligation to segregate them from the normal community for the duration of the conflict.[19]

After the 2015 Paris attacks, Tennessee General Assemblyperson Glen Casada channeled the World War II internment in calling for Syrian refugees' blanket segregation within, if not complete exclusion from, the state. The Republican Caucus Chair suggested National Guard mobilization to round up Syrian refugees.

> We need to activate the Tennessee National Guard and stop [Syrian refugees] from coming in to the state by whatever means we can . . . . I'm not worried about what a bureaucrat in D.C. or an unelected judge thinks. . . . We need to gather [them] up . . . .[20]

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16. *Id.*; *see also* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (describing the *Korematsu* majority's "unconditional deference" to the government's claim of military necessity); David A. Harris, *On the Contemporary Meaning of* Korematsu*: Liberty Lies in the Hearts of Men and Women*, 76 MO. L. REV. 1, 20 (2011) (describing *Korematsu*, despite significant criticism, as "still a standing precedent").

17. *See infra* notes 21–23 and accompanying text; Section III.B.

18. *See infra* note 139 and accompanying text.

19. Ben Marquis, *Alert: Dem. Army General Calls for Putting "Radicalized" Americans into Internment Camps,* CONSERVATIVE TRIB. (July 21, 2015), http://conservativetribune.com/americans-internment-camps/ [https://perma.cc/93VF-DMW5].

20. Steven Hale, *Glen Casada*, *Who Once Called for Syrian Refugees to Be Rounded Up and Detained*, NASHVILLE SCENE (Nov. 18, 2015), http://www.nashvillescene.com/pitw/archives/2015/11/18/glen-casada-who-once-called-for-syrian-refugees-to-be-rounded-up-and-detained/ [https://perma.cc/T4MB-UXHK] (describing Casada's call for National Guard to round up and detain Syrians in response

Then-Republican candidate Trump upped the ante. In the wake of the 2015 San Bernardino attack, he bolstered his call for a complete and total Muslim shutdown[21] with a call for torturing Muslim terror suspects.[22] And after the 2016 election, the spokesperson for a pro-Trump political action committee cited the Japanese American internment as precedent for sweeping repressive Muslim targeting measures.[23]

With these linkages in mind, this Article first recalls government harassment, indefinite detention, and torture following 9/11. It then concisely examines the dark shadow of the Court's 1944 *Korematsu* decision alongside the mid-1980s *coram nobis* correctives in *Korematsu* and *Hirabayashi*.[24] Those case reopenings showed that the government deliberately and unethically misled a passive Court and fearful American public about the constitutional validity of the World War II mass racial treatment.[25]

The Article then reviews in *Korematsu*'s wake the recent court struggles over judicial independence in national security and civil liberties controversies, recognizing both a "modicum of progress" and the risk of backsliding.[26] At bottom, in charting the judicial role, the Article calls for an accommodation of both security and liberty. It accounts for the government's broad powers in securing the country's people and institutions. But it calls simultaneously for careful judicial protection of fundamental liberties during times of distress as the foundational check and

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to Paris attacks); Michael Patrick Leahy, *Exclusive: Tennessee State Representative Casada Wants Governor to Call Out National Guard to Stop New Syrian Refugees, Current Refugees Should Be 'Re-vetted,'* BREITBART, (Nov. 18, 2015), http://www.breitbart.com/big-government/2015/11/18/exclusive-tennessee-state-representative-casada-wants-governor-call-national-guard-stop-new-syrian-refugees-current-refugees-re-vetted/ [https://perma.cc/C7AB-NJNV]; *see also infra* notes 54–72 (discussing politicians' reactions after Paris and San Bernardino).

21. Press Release, Donald J. Trump, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration [https://perma.cc/9EPF-FE6P]; *see also* Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN (Dec. 8, 2015), http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/ [https://perma.cc/4BVS-RJ36] (describing Trump's campaign press release).

22. *See* Tracy Jan & Annie Linskey, *Clinton, Trump Offer Contrasting Responses to Brussels Attacks,* B. GLOBE (Mar. 22, 2016), https://www.bostonglobe.com/news/politics/2016/03/22/donald-trump-renews-call-for-torture-after-brussels-bombings-contrasting-with-hillary-clinton-more-measured-response/3soyhwUAkfEtpiZFulNOmJ/story.html/ [https://perma.cc/HR2P-FDLH] (observing Trump's call for greater reliance on torture and border lock-downs); Benjy Sarlin, *Trump Hails Torture, Mass Killings with 'Pigs Blood' Ammo in SC*, MSNBC (Feb. 20, 2016), http://www.msnbc.com/msnbc/trump-hails-torture-mass-killings-pigs-blood-ammo-sc/ [https://perma.cc/5NKS-4PN4] (describing Trump's encouragement of torture of terror suspects).

23. *See infra* notes 83–86 and accompanying text.

24. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

25. *See infra* Section II.A–B.

26. *See infra* Section II.C.

balance pillar of a constitutional democracy. And it identifies combined critical legal advocacy and public pressure at both the front-end (prevention) and back-end (rectification) as the "real bulwark" against the government civil liberties excesses and passive courts in a rapidly evolving international security milieu.

The "*Loaded Weapon Revisited"* thus responds to pressing realpolitik questions for the Trump era and beyond: How are we, as a civil society, and particularly our courts, to continue overall progress in the face of politicians' regressive policy prescriptions and public hostility; and how, "in times of international hostility and antagonisms," as Judge Patel cautioned, are "our institutions, legislative, executive and judicial . . . to exercise their authority to protect all" from the "fears and prejudices . . . so easily aroused"?[27]

I. FROM 9/11 INTO THE TRUMP ERA

A. 9/11

Shortly after the 9/11 attacks on New York and Washington D.C., Professors Yamamoto and Serrano expressed sympathy for the victims of the horrific violence in their *Loaded Weapon* essay.[28] They also worried about over-reactive government scapegoating and vilification.[29]

Professors Yamamoto and Serrano worried, in light of public fears and officials' swashbuckling 9/11 rhetoric, that the U.S. government would far exceed what was necessary to protect people and institutions. It would likely visit politically popular civil and human rights abuses upon vulnerable Arabs and Muslims in America in the name of national

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27. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).
28. Yamamoto & Serrano, *supra* note 9, at 52.
29. To illustrate, they recounted Ahmed's pre-9/11 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, asserting only that it has evidence "concerning respondent's association with a known terrorist organization." The government refuses to identify the organization. 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 terrorist activity. . . . The government imprisoned and sought to deport Ahmed on national security grounds because of his "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.

Id. at 51–52.

security.[30] Indeed, Yamamoto and Serrano worried about a partial replay of the World War II internment.

This apprehension emerged from what many observed in the months after 9/11. 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."[31] It did so by expanding executive and military powers to pursue a war against terrorism.[32] Some of "these measures [were] needed and only reasonably burdensome . . . . But others, like secret detentions, [were] immensely troubling."[33] Those measures curtailed rights of speech, press, and association, as well rights to freedom from racial and religious discrimination and harassment and from indefinite detention without charges or trials.[34]

The Bush Administration employed its new anti-terrorism powers not only to address legitimate security concerns but also to broadly target Arabs and Muslims in ways that fostered public hostility toward them generally.[35] After 9/11, claims of wrongful government and business

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30. *Id.* at 54.

31. *Id.* at 53; *see also Preventing Terrorism and Enhancing Security*, HOMELAND SECURITY (Feb. 9, 2016), https://www.dhs.gov/preventing-terrorism-and-enhancing-security/ [https://perma.cc/32C5-KXP9] (explaining how the federal government, public and private sectors and communities built a new homeland national security system).

32. *See* Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 521 (2009) (observing that the USA Patriot Act, which significantly expanded the power of law enforcement and intelligence agencies, authorized the government to detain any noncitizen terrorism suspect without charges); *see also* Natsu T. Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 2 DUKE F. FOR L. & SOC. CHANGE 71, 82–83 (2010), http://scholarship.law.duke.edu/dflsc/vol2/iss1/4/ [https://perma.cc/A47T-PEJN] (cataloguing Foreign Intelligence Surveillance Act of 1978 and the Wiretap Act of 1968 post-9/11 amendments to allow geographically unrestricted wiretap warrants for unspecified persons, tracking of telephone and internet calls without notice, expanded access to voicemail messages and e-mail communications, the subpoena of business records without notice, and "sneak and peek" warrants for searches of homes or offices).

33. Yamamoto & Serrano, *supra* note 9, at 52.

34. *See* Saito, *supra* note 32, at 76 (observing the post-9/11 Justice Department's detention of thousands of noncitizens indefinitely without charges or access to counsel); Matthew Green, *How 9/11 Changed America: Four Major Lasting Impacts (with Lesson Plan)*, KQED NEWS (Sept. 6, 2016), http://ww2.kqed.org/lowdown/2014/09/10/13-years-later-four-major-lasting-impacts-of-911/ [https://perma.cc/6X3V-Y6N4] (assessing how government intrusions following 9/11 attacks—primarily through a vast, clandestine network of phone and web surveillance following—violated civil liberties); *see also* Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 L. & CONTEMP. PROBS. 217 (2005) (analogizing profiling harassment of Muslim to "driving while black").

35. *See generally* Chon & Arzt, *supra* note 34 (describing vilification and scapegoating after 9/11). The Bush Administration's Department of Homeland Security initiated many security measures that were salutary, like enhanced airport and public transportation security and targeted electronic surveillance. Other measures, later investigations showed, encompassed: (1) designation and indefinite detention of American citizens and noncitizens as "enemy combatants " who were innocent of wrongdoing; (2) harassment and detention of several thousand innocent Arab and Muslim Americans on vague national security grounds and later warrantless surveillance and harassment of Muslim American communities; (3) warrantless sweeping surveillance of Americans based on a broad definition of "terrorist activity;" (4) deployment of new immigration security powers to expand investigation of Arabs, Muslims, and South Asians for activities unconnected to terrorism; and (5)

targeting of racial and religious groups ranged from unnecessary removals from air flights to religion-based harassment to prolonged detentions and torture of men uninvolved in terrorism.[36]

The U.S. Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program[37] found "overwhelming and incontrovertible" evidence of torture.[38] The Senate Select Committee concluded that "the conditions of confinement and the use of authorized and unauthorized interrogation and conditioning techniques were cruel, inhumane, and degrading."[39]

A Bush Administration policymaker predicted a public demand for mass ethnic incarceration. Shortly after the 9/11 attacks, Peter Kirsanow, a controversial President George W. Bush appointee to the U.S. Commission on Civil Rights, suggested that Arab Americans might be broadly confined if the United States suffered another major attack.[40] Kirsanow reportedly

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"torture" of detainees authorized by the President's Office of Legal Counsel. *See generally* YAMAMOTO ET AL., *supra* note 1, at 392 (listing charges of Bush Administration power abuses); *see also* Saito, *supra* note 32, at 76–80 (describing detentions without safeguards following 9/11 attacks); Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005(e)(1), and Pub. L. No. 109-163, § 1405(e)(1) (amended 1006) (current version at 28 U.S.C. § 2241 (2012); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 168–171 (2002) (discussing the government's ethnic profiling after 9/11); David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (Oct. 8, 2009), http://www.nybooks.com/articles/2009/10/08/the-torture-memos-the-case-against-the-lawyers/ [https://perma.cc/4RH8-YFYP] (discussing the CIA's Inspector General's report strongly criticizing the techniques employed to interrogate high-value suspects at CIA secret prisons).

36. AMERICAN-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH (2003) (reporting on Arab American travelers facing removal from flights due to unfounded concerns of passengers and crew); *see also* Mary M. Sevandal, *Special Registration: Discrimination in the Name of National Security*, 8 J. GENDER RACE & JUST. 735, 740 (2005) (noting registration and surveillance of over 290,000 Arab and Muslim noncitizens by September 2003). Suits by civil liberties organizations revealed that the Justice Department incarcerated over 5,000 suspects—some for months, other for years—and only a handful of detainees were charged with terrorist-related offenses. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR OF TERRORISM 25, 26 (2005).

37. The U.S. Senate Select Committee on Intelligence's study of the CIA's Detention and Interrogation Program documented numerous serious CIA abuses between late 2001 and 2009. SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014).

38. Chairman Dianne Feinstein, *Foreword* to SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 4 (2014). Among the U.S. Senate Select Committee's study findings and conclusions: (1) detainees' interrogations were brutal and far worse than the CIA represented to policymakers; (2) interrogation techniques such as slaps and "wallings" were used in combination, frequently concurrent with sleep deprivation and nudity; (3) waterboarding was physically harmful, inducing convulsions and vomiting; (4) sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions; and (5) detainees were subjected to "rectal rehydration" or rectal feeding without documented medical necessity. SENATE SELECT COMM. ON INTELLIGENCE, *supra* note 37, at 3–4.

39. Feinstein, *supra* note 38, at 4; *see also* CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010); DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009).

40. Kirsanow concluded, "I think we will have a return to Korematsu [sic], and I think the best

declared that in the event of another attack, Arab Americans—those "from a certain ethnic community"—could "forget civil rights in this country . . . . Not too many people will be crying in their beer if there are more detentions, more stops, more profiling."[41] The "public would be less concerned about any perceived erosion of civil liberties than they are about protecting their own lives."[42]

Echoing Kirsanow, but with a twist, North Carolina Republican Congressperson Howard Coble supported group incarceration and condoned the World War II internment. Speaking as head of the House Subcommittee on Terrorism and Domestic Security, Coble maintained that the internment was appropriate, declaring that some Japanese Americans were likely "intent on doing harm to us, just as some of these Arab Americans are probably intent on doing harm to us."[43]

Public observers and civil liberties organizations—many themselves facing initial sharp criticism for standing up—challenged government abuses through protests, public education, and litigation.[44] With the Iraq

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way we can thwart that is to make sure that there is a balance between protecting civil rights, but also protecting safety at the same time." *See* Lynette Clemetson, *Traces of Terror: Arab-Americans; Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES (July 23, 2002), http://www.nytimes.com/2002/07/23/us/traces-terror-arab-americans-civil-rights-commissioner-under-fire-for-comments.html [https://perma.cc/9556-NNMX] (describing Kirsanow's comments and repercussions).

41. *Id.* (interpreting Kirsanow's comments as "making [the idea of detention camps] an acceptable debate").

42. Niraj Warikoo, *Arabs in U.S. Could Be Held, Official Warns*, DETROIT FREE PRESS (July 20, 2002), http://www.prisonplanet.com/news_alert_072002_camps.html/ [https://perma.cc/8TER-S8P7]. Kirsanow indicated that although he might not favor internment, Arab and Muslim Americans should accept government anti-terrorism actions and not complain about civil rights violations. *See id.* (describing Kirsanow's comments and subsequent critique). According to Professor David Harris, "Kirsanow's comments reveal a genuinely frightening and dark fact. In the aftermath of another serious attack by extremists based in Arab or Muslims countries, or, worse yet, an attack that originates with Arab or Muslim extremists who live in the U.S., some will argue that the internment of Arabs and Muslims is a necessary measure that national security demands." Harris, *supra* note 16, at 22. *See generally* YAMAMOTO ET AL., *supra* note 1, at 397–400 (describing the Kirsanow controversy).

43. *See* Carl Ingram, *Assembly Demands Head of House Panel Quit*, L.A. TIMES (May 20, 2003), http://articles.latimes.com/2003/may/20/local/me-internment20/ [https://perma.cc/N3X8-4LXC]; *California Legislature Rebukes N.C.'s Coble; Congressman Offended by Saying Internment Was to Protect Japanese*, CHARLOTTE OBSERVER, June 3, 2003, at 2B.

44. Journalists sought to expose Bush administration civil liberties abuses. John W. Dean—former White House Counsel for President Richard Nixon—highlighted the Bush administration's dissembling in justifying the Iraq war, particularly its claim that Iraq possessed weapons of mass destruction. *See* John W. Dean, *Missing Weapons of Mass Destruction: Is Lying About the Reason for War an Impeachable Offense?*, FIND LAW (June 6, 2003), http://writ.news.findlaw.com/dean/20030606.html/ [https://perma.cc/VNA3-YZGZ]. Undercover CIA agent Valerie Plame's spouse Ambassador Joe Wilson condemned Bush for falsely claiming that Iraq was obtaining nuclear-weapons. In apparent retaliation, two Bush administration officials leaked Plame's identity, ending her career. *See* Joe Rubino, *Valerie Plame, Outed CIA Spy, Urges People To 'Hold Our Government To Account' At Conference On World Affairs*, HUFFINGTON POST (Apr. 12, 2013), http://www.huffingtonpost.com/2013/04/12/valerie-plame-cia-conference-on-world-affairs-2013_n_3069289.html/ [https://perma.cc/4AXN-T56K]. Professor Anita Ramasastry raised concerns over the Guantanamo military prison and

War morass and the end of the Bush presidency, public opinion appeared to sway toward the center,[45] with concerns about both security and fundamental freedoms. The Obama Administration stopped some of the abuses, including torture,[46] although it continued wide-ranging surveillance programs[47] and drone killings.[48]

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highlighted the American Bar Association's "Task Force on Treatment of Enemy Combatants" that criticized the Bush administration's violations of domestic law and the Universal Declaration of Human Rights. Anita Ramasastry, *Do Hamdi and Padilla Need Company? Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants Is Shocking and Wrong*, FIND LAW (Aug. 21, 2002), http://writ.news.findlaw.com/ramasastry/20020821.html/ [https://perma.cc/4EL7-C86Z]. In early 2003, tens of thousands of protesters—including the Gray Panthers, the Code Pink, the Black Voices for Peace and the Green Party—marched in the U.S. and overseas against the Bush administration's planned military attack on Iraq. Lynette Clemetson, *Threats and Responses: Rally; Thousands Converge in Capital to Protest Plans for War*, N.Y. TIMES (Jan. 19, 2003), http://www.nytimes.com/2003/01/19/us/threats-responses-rally-thousands-converge-capital-protest-plans-for-war.html/ [https://perma.cc/QN5M-UVLD]. In 2008, the American Civil Liberties Union posted a 2003 memo by the Department of Justice concluding that the president had the authority to bypass constitutional law, including due process. Am. Civil Liberties Union, *ACLU Calls for Immediate Release of Withheld Legal Memo* (Apr. 2, 2008), https://www.aclu.org/news/bush-administration-memo-says-fourth-amendment-does-not-apply-military-operations-within-us/ [https://perma.cc/BU3H-BXK6] (characterizing the memo as "a mockery of the Constitution and the rule of law").

45. *See* Michael Isikoff, *Obama's Order Ends Bush-Era Interrogation Tactics,* NEWSWEEK (Jan. 21, 2009), http://www.newsweek.com/obamas-order-ends-bush-era-interrogation-tactics-77965/ [https://perma.cc/32C4-CYE8] (observing that Obama's executive orders represented a clean break from Bush Administration polices); Michael D. Shear, *In Pushing for Revised Surveillance Program, Obama Strikes His Own Balance,* N.Y. TIMES (June 3, 2015), http://www.nytimes.com/2015/06/04/us/winning-surveillance-limits-obama-makes-program-own.html/ [https://perma.cc/ALZ7-S56L] (explaining how President Obama directed his national security team to obtain vast quantities of telephone data, including records of citizens); Ilari Kaila, *Little Hope for Change: A Summary of the Bush-Obama Legacy*, OBAMA CONSERVATIVE (Oct. 5, 2013), http://www.obamatheconservative.com/ [https://perma.cc/3Y8P-U72Z] (summarizing Obama's executive actions).

46. Exec. Order No 13491, 74 Fed. Reg. 4893 (2009); *see also* Leonard Doyle, *Obama Orders CIA to Stop Torturing Terror Suspects*, INDEPENDENT (Jan. 22, 2009), http://www.independent.co.uk/news/world/americas/obama-orders-cia-to-stop-torturing-terror-suspects-1513428.html/ [https://perma.cc/4JCD-EGWV] (observing Obama's Executive Order to stop the CIA from torturing terror suspects).

47. *Power Wars: How Obama Continued Bush's National Security State After Campaigning Against It*, DEMOCRACY NOW (Nov. 4, 2015), http://www.democracynow.org/2015/11/4/power_wars_how_obama_continued_bushs/ [https://perma.cc/J7N3-X6UZ] (highlighting "[w]hile Obama has shut down the CIA's secret prisons and banned the harshest of Bush's torture methods, many others—the drone war, presidential secrecy, jailing whistleblowers and mass surveillance—either continue or have even grown").

48. *See Refocus on Extrajudicial Killings Through CIA-Operated Drones*, STRATEGIC CULTURE FOUND. (Mar. 13, 2016), http://www.strategic-culture.org/news/2016/03/13/refocus-extrajudicial-killings-through-cia-operated-drones.html/ [https://perma.cc/L7CT-C9UC] (observing Obama's Administration killing of more than 5,000 civilians through CIA-operated drone attacks); Nicole Gaouette, *Obama: 'No Doubt' U.S. Drones Have Killed Civilians*, CNN (Apr. 1, 2016), http://www.cnn.com/2016/04/01/politics/obama-isis-drone-strikes-iran/ [https://perma.cc/9CK8-M4LY] (noting President Obama's admission of drone killings of innocent civilians).

B. Paris, San Bernardino and the Presidential Campaign—Calls for Sweeping Surveillance, Exclusion, and Detention

The public mood and political environment shifted markedly in late 2015.[49] With Syrian civil war refugees pouring into Europe,[50] gunmen and suicide bombers attacked Parisians, killing 130 and wounding hundreds.[51] Shortly after, a Muslim couple, ISIS followers without direct ISIS contact, killed 14 in San Bernardino, California.[52] In early 2016, suicide bombers killed thirty and wounded hundreds at the Brussels airport and metro stations.[53] And in June 2016 a gunman shot and killed forty-nine and wounded fifty at a gay nightclub in Orlando, Florida—one of the worst mass shootings in America.[54]

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49. Preceding the November Paris attack, in early 2015 gunmen killed workers at the office of satirical magazine Charlie Hedbo. *Charlie Hebdo Attack: Three days of Terror*, BBC NEWS (Jan. 14, 2015), http://www.bbc.com/news/world-europe-30708237/ [https://perma.cc/DCD2-HHG7]. In April 2013, a terrorist explosion at the Boston marathon killed three and injured hundreds. Josh Levs & Monte Plott, *Boy, 8, One of 3 Killed in Bombings at Boston Marathon; Scores Wounded*, CNN (Apr. 18, 2013), http://www.cnn.com/2013/04/15/us/boston-marathon-explosions/ [https://perma.cc/BCA8-GYWG]. The FBI killed one perpetrator. The second was convicted and sentenced to death in May 2015. Bev Ford Corky Siemasko, *Dzhokhar Tsarnaev Sentenced to Death for Boston Marathon Bombing That Killed 3, Injured 260*, N.Y. DAILY NEWS (May 16, 2015), http://www.nydailynews.com/news/national/tsarnaev-sentenced-death-boston-marathon-bombing-article-1.2223921/ [https://perma.cc/7DZ5-3VHT].

50. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), http://www.bbc.com/news/world-europe-34131911/ [https://perma.cc/DVC9-47VB] (noting that more than a million migrants and refugees crossed into Europe in 2015 and that Syrians constituted the vast majority).

51. *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), http://www.bbc.com/news/world-europe-34818994/ [https://perma.cc/6FKC-74FK] (narrating the events and noting that French police carried out hundreds of raids across the country).

52. Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html/ [https://perma.cc/CY2F-C75T]. FBI Director James B. Comey announced, "'The investigation so far has developed indications of radicalization by the killers, and of potential inspiration by foreign terrorist organizations,' [b]ut he said that investigators had not found evidence that the killers were part of a larger group or terrorist cell." *Id.*

53. *Brussels Attacks: Zaventem and Maelbeek Bombs Kill Many*, BBC NEWS (Mar. 22, 2015), http://www.bbc.com/news/world-europe-35869254/ [https://perma.cc/N2YQ-3M2D]. The Islamic State claimed responsibility for the attacks. Griff Witte, Souad Mekhennet & Michael Birnbaum, *Islamic State Claims Responsibility for the Brussels Attacks*, WASH. POST (Mar. 22, 2016), https://www.washingtonpost.com/world/brussels-on-high-alert-after-explosions-at-airport-and-metro-station/2016/03/22/b5e9f232-f018-11e5-a61f-e9c95c06edca_story.html/ [https://perma.cc/Z7KD-BDXY] (observing apparently the Islamic State targeted Belgium because of its participation in an anti-ISIS international coalition in Syria and Iraq).

54. Lizette Alvarez & Richard Pérez-Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead,* N.Y. TIMES (June 12, 2016), http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html/ [https://perma.cc/DS9U-GJFW]. The perpetrator, a twenty-nine-year-old, New York-born Omar Mateen, called 911 to pledge allegiance to ISIS. *Id.* Investigators, however, found no evidence of ISIS control. *See Vigils and Vigilantes*, ECONOMIST (June 18, 2016), http://www.economist.com/news/united-states/21700639-reactions-mass-murder-show-stark-choice-facing-voters-november-vigils-and/ [https://perma.cc/YGJ3-2DHC]. Earlier FBI investigations revealed Mateen's incongruous statements in support of al-Qaeda and Hizbullah (two opposing organizations)

In this setting—in the heat of presidential electioneering, with intensifying stridency—American politicians called for mass exclusion of Muslims outside the country's borders and for detention (or "sequester") within it. They vilified all Muslims as threats to the nation. And, looking at *Korematsu* as precedent, they implied or outright predicted that mass exclusion and even incarceration would survive judicial scrutiny.

Rhode Island Senator Elaine Morgan characterized Muslims as a unified terrorist group aiming to "murder, rape, and decapitate anyone who is a non Muslim."[55] Like Tennessee Republican Casada,[56] Morgan pushed to keep Muslim communities, and Syrian refugees in particular, segregated from the American populace in internment camps:

> I think this is a major plan by these countries to spread out their people to attack all non Muslim persons. . . . If we need to take these people in we should set up refugee camp [sic] to keep them segregated from our populous [sic]. The Muslim religion and philosophy is to murder, rape, and decapitate anyone who is a non Muslim.[57]

Fanning similar flames of fear-mongering[58] immediately after the 2015 Paris attacks, Roanoke, Virginia, Mayor David Bowers invoked the Japanese American internment as justification for mass internment of Muslims.[59] Bowers called for the suspension of local assistance to Syrian refugees and for sweeping incarceration ("sequester") as a response to public fears.[60] "I'm reminded . . . that President Franklin D. Roosevelt felt compelled to sequester Japanese foreign nationals after the bombing of Pearl Harbor, and it appears that the threat of harm to America from ISIS now is just as real and serious as that from our enemies then."[61]

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and found no other action in furtherance of that support. *Id.* CIA Director John Brennan told the Senate Intelligence Committee that CIA had seen "no sign" that Mateen was in contact with the Islamic State. Brian Bennett, *CIA Director Predicts More Terrorist Attacks Like Those in Orlando, Brussels and Paris*, L.A. TIMES (June 16, 2016), http://www.latimes.com/world/la-fg-cia-intel-20160610-snap-story.html/ [https://perma.cc/97GN-MJR5].

55. *See* Tomo Hirai, *Politicians Link Wartime Incarceration of Japanese Americans in Syrian Refugee Crisis*, NICHI BEI WEEKLY (Dec. 3, 2015), http://www.nichibei.org/2015/12/politicians-link-wartime-incarceration-of-japanese-americans-in-syrian-refugee-crisis/ [https://perma.cc/3EVD-P6EU].

56. *See supra* note 20 and accompanying text (discussing Casada's anti-Muslim rhetoric).

57. *See* Elise Foley, *State Senator Says Syrian Refugees In U.S. Should Be Segregated in Camps*, HUFFINGTON POST (Nov. 20, 2015), http://www.huffingtonpost.com/entry/state-senator-syrian-refugee-camps_us_564ca10fe4b08cda348ba78a/ [https://perma.cc/67FE-NMME] (examining Morgan's email and anti-Muslim backlash after the Paris attacks).

58. *See infra* notes 185–190 and accompanying text (reviewing immediate criticism of Bower's statement).

59. David Bowers Statement on Syrian Refugees, ROANOKE TIMES (Nov. 18, 2015), http://www.roanoke.com/david-bowers-statement-on-syrian-refugees/pdf_54895fc2-dcfa-50a9-9e40-4c382ed7ab4e.html/ [https://perma.cc/3YB7-EY8Q].

60. *See* Daniel Victor, *Roanoke Mayor Apologizes for Japanese Internment Remarks*, N.Y. TIMES (Nov. 20, 2015), http://www.nytimes.com/2015/11/21/us/roanoke-mayor-apologizes-for-japanese-internment-remarks.html?_r=0/ [https://perma.cc/8CMS-7MF2] (detailing Bowers's anti-Muslim sentiment and favorable view of the Japanese American internment).

61. *Id*. (quoting Bowers).

As critics observed, by claiming that the threat "from ISIS now is just as real and serious" as the threat "from our enemies then," Bowers's twisted logic badly misstated the reality of the Japanese American internment.[62] The reality is that, first, the Japanese American internment targeted primarily American citizens, not "foreign nationals." Imprisoned Japanese nationals were mostly long-term U.S. residents who were prevented by U.S. law from naturalizing.[63] Second, the World War II American intelligence services, the 1983 Congressional Commission, the U.S. District Court in 1984, and the Ninth Circuit Court of Appeals in 1986 all determined that Japanese Americans posed no real and serious threat to American security—there had been no military necessity.[64] And third, the U.S. Congress passed and President Reagan signed the Civil Liberties Act of 1988.[65] That legislation acknowledged that the actual causes for the mass racial incarceration were "racial prejudice, wartime hysteria, and a failure of political leadership,"[66] and it apologized for the United States' race-based violation of civil liberties and conferred individual reparations.[67]

Mayor Bowers's apparent "failure of political leadership" brought to life Justice Jackson's loaded weapon warning about the "hand of any authority that can bring forward a plausible"—even if exaggerated or falsely grounded—"claim of an urgent need."[68] Indeed, Bowers's national security story spun wildly off kilter.[69] Except in three respects.

First, a sizeable percentage of Trump's supporters endorsed the sweeping Muslim exclusion and removal at the heart of Bower's suggestion.[70] Second, after the San Bernardino and Orlando attacks, then-

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62. Asian American organizations responded immediately to Bowers—many drawing lessons from the World War II internment and 1988 redress. Hirai, *supra* note 55. *See also infra* notes 186–187 and accompanying text (highlighting Japanese American organizations criticizing Bowers' comments).

63. *See* Ozawa v. United States, 260 U.S. 178 (1922).

64. *See infra* notes 134–143 and accompanying text.

65. Civil Liberties Act of 1988, Pub. L. No 100-383, 102 Stat 903 (codified at 50 U.S.C § 1989(b) (2012)).

66. *Id.* Section 2(a) of the Act states that "these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." *Id.*

67. *See infra* note 148 and accompanying text.

68. *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

69. Bowers's statement triggered broad national and international criticism. *See, e.g.*, Yaman Salahi, *Echoes of Internment: Don't Let Our Leaders Scapegoat Syrian Refugees*, MEDIUM (Nov. 18, 2015), https://medium.com/@yaman/echoes-of-internment-don-t-let-our-leaders-scapegoat-syrian-refugees-13b55ea5d917#.6ejjq6e80/ [https://perma.cc/RG6W-ETU7] ("That a political leader in 2015 is willing to hold Japanese Internment up as a shining example of American national security policy should be a clarion call for action.").

70. *See* Dean Obeidallah, *Know Whose Iideas Aabout Muslims Aare Sscarier Tthan Trump's?*, CNN (Dec. 9, 2015, 2:05 PM), http://www.cnn.com/2015/12/09/opinions/obeidallah-trump-muslims/ [https://perma.cc/TEN6-F5U8] (reporting three quarters of Trump's supporters favoring deporting 11 million undocumented immigrants and banning all Syrian refugees); *see also supra* notes 21–23, 52 and accompanying text.

presidential candidate Trump bolstered his continuing call for mass Muslim exclusion by characterizing Muslim Americans as terrorist sympathizers.[71] And third, the Republican-controlled U.S. House of Representatives, reacting to widespread anti-Muslim public sentiment, quickly passed the "American Security Against Foreign Enemies Act" that imposed additional onerous vetting of Syrian refugees aimed at closing the door to all Syrians.[72]

C. January 2017 Executive Orders—Religion-Targeting Exclusion and Removal

Transforming campaign rhetoric into action, a week after inauguration, President Trump issued national security executive orders aimed at closing the nation's borders to many Muslims—both refugees and ordinary immigrants. One order indefinitely banned all Syrian refugee entry and temporarily blocked all forms of admission (including green-card holders) from seven Muslim-majority countries (Iraq, Iran, Somalia, Syria, Sudan, Yemen, and Libya)[73]—while carving out an effective exception for Christians.[74] The order also set in motion, in Trump's words, an "extreme

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71. The Orlando killings in June 2016, by an apparently "lone wolf" assailant who cited ISIS as inspiration, spurred public fears and intensified anti-Muslim reactions. *See Vigils and Vigilantes*, *supra* note 54. Investigators found no evidence of ISIS control. *See* Jonathan Landay & Mark Hosenball, *U.S. Official: No Evidence of Direct Islamic State Link to Orlando Shooting,* HUFFINGTON POST (June 12, 2016), http://www.huffingtonpost.com/entry/islamic-state-claims-responsibility-for-gay-nightclub-shooting-in-orlando_us_575dabcbe4b0ced23ca85ad5/ [https://perma.cc/Z593-DHAA]. Even then, Republican candidate Trump immediately "cast Muslim-Americans as a fifth column, accusing them of knowing about bad actors in their midst but failing to report them" and again proposed a "ban on immigration from 'areas of the world where there is a proven history of terrorism' against America or allies, until arrivals can be screened 'perfectly.'" *See Vigils and Vigilantes*, *supra* note 54. President Obama responded, criticizing suggestions that "entire religious communities are complicit in violence." Julie Hirschfeld Davis & Matt Flegenheimer, *Obama Denounces Donald Trump for His 'Dangerous' Mind-Set,* N.Y. TIMES (June 14, 2016), http://www.nytimes.com/2016/06/15/us/obama-orlando-shooting.html?_r=0/ [https://perma.cc/6XWJ-TCK5]. Republican Speaker of the House Paul Ryan contended: "Trump's proposed ban on Muslim immigrants was not in the country's interest." *Id.*

72. The Editorial Bd., *Refugees from War Aren't the Enemy*, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/opinion/refugees-from-war-arent-the-enemy.html/ [https://perma.cc/JH35-PW6H]. Proponents of the proposed American Security Against Foreign Enemies Act, the bill seeking to pause admission of Syrian and Iraqi refugees, maintained that the Act "would put in place the most robust national-security vetting process in history." *Id.*; *see also* Natalie Johnson, *Find Out How Your Senators Voted on the Refugee Bill*, DAILY SIGNAL (Jan. 20, 2016), http://dailysignal.com/2016/01/20/find-out-how-your-senators-voted-on-the-refugee-bill/ [https://perma.cc/TW4V-WGEJ] (noting that the legislation did not pass the Senate).

73. Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017). The president's administration quickly issued a directive instructing non-enforcement of the executive order as it pertained to green card holders. *See* Evan Perez, Pamela Brown & Kevin Liptack, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/ [https://perma.cc/6SAE-HBV7].

74. Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. at 8978.

vetting" plan for future Muslim entry.[75] Another order aimed to invalidate state and city immigrant sanctuaries. It also broadly authorized removal of legally present noncitizens who "an immigration officer" (not a judge) finds "pose a risk to public safety or national security."[76]

The executive mandates justified the sweeping restrictions as necessary to "protect the American people from terrorist attacks"[77]—citing the government's failure to properly vet the 9/11 Muslim hijackers/bombers[78] (who ironically were not from any of the seven excluded countries). Highlighting the president's broad scheme of national security necessity, one planned, though delayed, executive order authorized the C.I.A. to reopen overseas "black site" prisons[79] known for torture.[80] It also potentially removed President Obama-imposed restrictions on Muslim detainee abuse.[81]

Shortly after the 2016 election, presidential transition advisor Kris Kobach signaled these coming Muslim exclusionary measures.[82] Former spokesman for the pro-Trump Great America PAC, Carl Higbie, followed by resurrecting the World War II internment as precedent for the sweeping religion-targeting treatment.[83] "[I]t is legal," Trump's transition policy advisors "say [a Muslim registry and tracking system will] hold Constitutional muster."[84] "We've done it based on race, we've done it

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75. *NYC: Thousands Protest Trump Plan to Impose Ban on Refugees, Block Visas from 7 Muslim Nations*, DEMOCRACY NOW (Jan. 26, 2017), https://www.democracynow.org/2017/1/26/thousands_rally_in_nyc_to_protest/ [https://perma.cc/83AQ-RE73] (quoting Trump, "[W]e're going to have extreme vetting").

76. Enhancing Public Safety in the Interior of the United States, Exec. Order No.13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017).

77. Protecting the Nation From Foreign Terrorists Entry Into the United States, 82 Fed. Reg. at 8978.

78. *Id.*

79. *See* Charlie Savage, *Trump Poised to Lift Ban on C.I.A. 'Black Site' Prisons*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html [https://perma.cc/XBZ6-XYH4].

80. *Id.* (reciting the proposed "Detention and Interrogation of Enemy Combatants").

81. *Id.* (observing that the "order does not direct any immediate reopening of C.I.A. prisons or revival of torture tactics, which are now banned by statute").

82. Reena Flores, *Kris Kobach Says Trump Team Considering a Muslim Registry*, CBS NEWS (Nov. 17, 2016), http://www.cbsnews.com/news/kris-kobach-says-trump-team-considering-a-muslim-registry/ [https://perma.cc/3BFQ-QH8L] (reporting on Kobach's implementation of post-9/11 Muslim registry immigrant program). Kobach, the then president-elect's transition adviser on immigration, advanced plans for an updated system of tracking foreigners from "high risk" areas. He reportedly met Trump with a "Department of Homeland Security Kobach Strategic Plan for First 365 Days" that restarted the National Security Entry-Exit Registration System. *See* Alicia Caldwell, *Obama Scraps Registry*, SENTINEL (Dec. 23, 2016), http://www.fairmontsentinel.com/news/national-news-apwire/2016/12/23/obama-scraps-registry/ [https://perma.cc/R8WN-FMRE].

83. *See* Jonah Engel Bromwich, *Trump Camp's Talk of Registry and Japanese Internment Raises Muslims' Fears*, N.Y. TIMES (Nov. 17, 2016), http://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html?_r=0/ [https://perma.cc/4NMK-26FL].

84. *On Fox, Trump Supporter Carl Higbie Cites Japanese Internment Camps as "Precedent" for Muslim Registry*, MEDIA MATTERS (Nov. 16, 2016), http://mediamatters.org/video/2016/11/16/fox-

based on religion," and "[w]e did it during World War II with Japanese."[85] Higbie later clarified what he meant by precedent, explaining that the Supreme Court "upheld things as horrific as Japanese internment camps"—directly implicating the 1944 *Korematsu* decision.[86]

Many sharply criticized Trump's, Kobach's, Higbie's and Bowers's rhetoric and prescriptions. The Minoru Yasui Tribute Committee, for instance, compared the fierce anti-Muslim rhetoric underlying policy proposals with the intense anti-Japanese American portrayals preceding the World War II internment. It condemned the "xenophobic thinking" behind those portrayals that "fires the flames of war hysteria" and drives "shameful" exclusionary policies.[87]

Many also reacted quickly to the January 2017 presidential orders. Some lauded the Muslim exclusion orders as making the country safer.[88] But condemnation erupted from Nobel Prize recipients, religious groups, business leaders, politicians, and scholars who called the orders "inhumane, discriminatory" and fodder for anti-American extremists.[89] Muslim organizations portrayed the orders as feeding into "a false narrative that Americans should fear every Muslim."[90] Widespread protests targeted airports, and city mayors committed to resisting the executive orders.[91] The American Civil Liberties Union immediately challenged the airport

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trump-supporter-carl-higbie-cites-japanese-internment-camps-precedent-muslim-registry/214509/ [https://perma.cc/6F83-RS2L].

85. *Id.*

86. Bromwich, *supra* note 83.

87. Hirai, *supra* note 55 (reporting on Yasui Tribute Committee statement). The Japanese American Citizens League criticized Higbie's statement, emphasizing that the widely discredited World War II internment is not precedent for sweeping Muslim registration and tracking. Doug Tsuruoka, *Japanese Group Blasts Idea of Muslim Registry in US*, ASIA TIMES (Nov. 20, 2016), http://www.atimes.com/article/japanese-group-blasts-idea-muslim-registry-us/ [https://perma.cc/KL8W-YB43] ("[T]he true lesson[] [is that the] 'broad historical causes which shaped these decisions (to incarcerate Japanese Americans) were race prejudice, war hysteria, and a failure of political leadership.'"); *see also ACLU: It's Factually Wrong to Blame Refugees for Terror They're Fleeing*, ACLU (Nov. 17, 2015), https://www.aclusandiego.org/aclu-comment-on-efforts-to-restirct-refugee-resettlement-to-us/ [https://perma.cc/5GZT-PL5K]*; The War Within*, ECONOMIST, May 14, 2016, at 7.

88. Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html [https://perma.cc/4WXH-ABMQ] (reporting from interview statements that "the majority of terrorists worldwide seem to be of the Muslim faith," [t]he mad rush to bring them in at all costs actually is not a good thing," and "[t]here's [sic] many, many fine Muslim people in this world, but there's [sic] many many people who want to kill us, and we need to vet them, and we need to find out").

89. Perez-Pena, *supra* note 6.

90. Richard Perez-Pena & Laurie Goodstein, *Reaction to Ban on Refugees is Swift and Divided*, BOS. GLOBE (Jan. 28, 2017), https://www.bostonglobe.com/2017/01/28/malala-yousafzai-members-congress-advocates-respond-trump-immigration-ban/wi4z5ajFgGS0c9YOnNypGJ/story.html (anticipating intensified discrimination against American Muslims already experiencing a spike in harassment, hate crimes, and mosque vandalism).

91. John Knefel, *Mayors and Activists Revolt Against Trump's "'Muslim Ban" Executive Order,* TRUTHOUT (Jan. 26, 2017*),* http://www.truth-out.org/news/item/39236-mayors-and-activists-revolt-against-trumps-muslim- ban-executive order/ [https://perma.cc/Z8HH-2HEL].

detention of an Iraqi who had ably served the U.S. military for over a decade in Iraq and had received, after two years vetting, all appropriate U.S. entry permissions. A Brooklyn federal district judge temporarily banned the executive order's enforcement.[92] Numerous other detained people, as well as state attorneys general, also filed legal challenges.[93]

Three important insights emerge from the 2015 and 2016 anti-Muslim virulence, Trump's election, and his 2017 executive orders, alongside the brewing lawsuits. The first is the seriousness of terror threats. Present-day terror attacks generate carnage and public fear and justify the need for security officials' swift and rational responses in apprehending and prosecuting perpetrators and in taking grounded pro-active steps to prevent future violence. The second is that since 9/11 the government has established a "robust system of vetting people for their terrorist threats"[94] and has "restructured" its immigration system, "with an emphasis on national security."[95] Under existing extensive information gathering and screening structures, "deadly terrorist attacks in the United States have been rare, and those carried out by foreigners exceedingly rare."[96]

The third insight is the importance of preventing politically driven—and not genuinely security based—government overreactions that scapegoat and harshly treat entire vulnerable groups.[97] This latter insight

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92. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Darweesh v. Trump, No. 1:17-cv-00480, 2017 WL 393446 (E.D.N.Y. Jan. 28, 2017); Darweesh v. Trump, No. 1:17-cv-00480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (Decision and Order).

93. *See Civil Rights Challenges to Trump Immigration/Refugee Orders*, CIVIL RIGHTS CLEARINGHOUSE, https://www.clearinghouse.net/results.php?searchSpecialCollection=44/ [https://perma.cc/3V7Q-7J9K] (canvassing 50 legal challenges in courts across the country as of January 31, 2017, including individual habeas corpus petitions and suits by state attorney generals); *see also* Jim Brunner, Jessica Lee & David Gutman, *Judge in Seattle Halts Trump's Immigration Order Nationwide; White House Vows Fight,* SEATTLE TIMES (Feb 4, 2017), http://www.seattletimes.com/seattle-news/politics/federal-judge-in-seattle-halts-trumps-immigration-order/ [https://perma.cc/F92D-7EBU] (describing both the Seattle judge's nationwide ban and the Boston judge's refusal to extend a temporary order). How the appellate courts, and likely the Supreme Court, will rule on the legal challenges is an open question.

94. Greg Myre, *Unlike Bush, Trump Invokes Terror Threat and Gets Pushback, Not Deference*, NPR (Feb. 11, 2017), http://www.npr.org/sections/parallels/2017/02/11/514330289/unlike-bush-trump-invokes-terror-threat-and-gets-pushback-not-deference/ [https://perma.cc/SBG3-V5B9] (quoting Muzaffar Chishti of the Migration Policy Institute).

95. *Id.* (reporting on Department of Homeland Security's 240,000 employees and $40 billion budget, put into place after 9/11, and on the world's largest database of persons arriving by land or sea).

96. *Id.*

97. The scapegoating emerged in the 2016 Republican presidential primary process. Republican candidate Ted Cruz advocated that the United States "empower law enforcement to patrol and secure Muslims neighborhoods." Sean Sullivan & Katie Zezima, *Republican and Democratic Presidential Candidates Issue Contrasting Responses to Brussels Attacks*, WASH. POST (Mar. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/22/republican-and-democratic-presidential-candidates-issue-contrasting-responses-to-brussels-attacks/ [https://perma.cc/M57C-W26M]. In March 2016 Trump called for waterboarding and urged U.S. law enforcement to "go a lot further than waterboarding." Jeremy Diamond & Eugene Scott, *Trump Asks Backers to Swear Their Support, Vows to Broaden Torture Laws*, CNN (Mar. 5, 2016), http://www.cnn.com/2016/03/05/

warrants close attention in light of President Trump's Supreme Court appointment[98] and America's starkly conservative Republican Congress and national security leadership, including Trump Administration heads of the Justice Department, Homeland Security Department, Defense Department, Federal Bureau Investigation, National Security Agency, and Central Intelligence Agency.[99]

These three insights inform the socio-legal questions first posed in 2002 by Yamamoto and Serrano about American courts' post-9/11 role in the crucial accommodation of security and liberties, questions that remain intensely relevant today. "What will happen when those profiled, detained, harassed or discriminated against turn to the courts for legal protection?

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politics/donald-trump-florida-pledge-torture/ [https://perma.cc/4ZQA-BYUA]; *see also Glenn Greenwald: Cruz, Trump, Clinton "Playing into the Hands" of ISIL After Brussels Bombings*, DEMOCRACY NOW (Mar. 24, 2016), http://www.democracynow.org/2016/3/24/glenn_greenwald_cruz_trump_clinton_playing/ [https://perma.cc/ZFR4-LNYB] (criticizing_Cruz's and Trump's anti-Muslim policy prescriptions).

98. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0/ [https://perma.cc/S9VM-2BLS].

99. Trump's consideration for national security leadership positions included Kris Kobach. Kobach, Trump's transition adviser, reportedly advanced a strategic plan to update and reintroduce the National Security Entry-Exit Registration System for screening and tracking noncitizens from "high-risk areas" and adding "extreme vetting questions for high-risk aliens." Amanda Terkel, *Reinstating a Muslim Registry Is Literally at the Top of Kris Kobach's Agenda for Trump Administration*, HUFFINGTON POST (Nov. 21, 2016), http://www.huffingtonpost.com/entry/kris-kobach-donald trump_us_58334007e4b030997bc0a1b9/ [https://perma.cc/43A9-CPF4]. Trump's first national security advisor, Michael Flynn, expressed anti-Muslim sentiment: "We're in a war against a messianic mass movement of evil people, most of them inspired by a totalitarian ideology: radical Islam." Guy Taylor, *Donald Trump's Team Puts 'Radical Islam' Front and Center in Terror Fight*, WASH. TIMES (Nov. 23, 2016), http://www.washingtontimes.com/news/2016/nov/23/donald-trumps-team-puts-radical-islam-front-and-ce/ [https://perma.cc/8CRD-GL8Q] (quoting Flynn in THE FIELD OF FIGHT: HOW WE CAN WIN THE GLOBAL WAR AGAINST RADICAL ISLAM AND ITS ALLIES (2016)). Flynn also referred to Islam as a "vicious cancer inside the body of 1.7 billion people" that has to be "excised." *Id.* Trump's selection for attorney general, Jefferson Sessions, reportedly "is a fierce opponent of immigration reform, and in 1986 Congress denied his confirmation as a federal judge because of concerns over racist comments and behavior"). Mohamad Bazzi, *Commentary: What Trump Should Do About Anti-Muslim Hate Crimes*, REUTERS (Nov. 24, 2016), http://www.reuters.com/article/us-hate-crimes-commentary-idUSKBN13I1HM/ [https://perma.cc/2JZ5-YCDP] (discussing Sessions' reputation, highlighted by Congress' rejection of his nomination for a federal judgeship); Sari Horwitz & Ellen Nakashima, *Jeff Sessions Is Expected to Bring Sweeping Changes to the Justice Department*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/world/national-security/jeff-sessions-is-expected-to-bring-sweeping-changes-to-the-justice-department/2016/11/18/f480019c-ad93-11e6-8b45-f8e493f06fcd_story.html?utm_term=.8d2436d7c786/ [https://perma.cc/W7L8-Z5KK] (calling attention to Sessions's troubling history on race issues). Sessions also reportedly endorsed Trump's call to ban Muslims from entering the U.S. Amy Davidson, *The Total Trumpism of Jeff Sessions, Attorney General Nominee*, NEW YORKER (Nov. 18, 2016), http://www.newyorker.com/news/amy-davidson/the-total-trumpism-of-jeff-sessions-attorney-general-nominee/ [https://perma.cc/4YY3-UA5F]. Trump's appointed head of Department of Homeland Security, retired General John Kelly, oversaw operations at Guantanamo Bay detention center and opposed its closure—"there are no innocent men down there." David Wright, *Trump Picks Retired Gen. John Kelly to Lead DHS*, CNN (Dec. 12, 2016), http://www.cnn.com/2016/12/07/politics/john-kelly-homeland-security-secretary-pick/ [https://perma.cc/VPX3-823N].

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?"[100]

U.S. courts during times of national distress tend to take a hands-off approach in reviewing government national security restrictions.[101] But not in all situations. As the non-elective third branch of government, courts at times carefully scrutinize the political branches' national security justifications for curtailing fundamental freedoms.

To illuminate the contested nature of the judicial role in a democracy and its relevance to present-day national security and civil liberties tensions, we turn to the *Korematsu,*[102] *Hirabayashi*,[103] *and Yasui*[104] legal challenges to the internment[105] and to their mid-1980s extraordinary *coram nobis* reopenings.

II. LEGAL CHALLENGES TO THE WORLD WAR II INTERNMENT

A. The World War II Supreme Court Rulings

Despite its stated commitment to the "most rigid scrutiny,"[106] the Supreme Court in *Korematsu* passively accepted the military's

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100. Yamamoto & Serrano, *supra* note 9, at 59.

101. *Id.* at 55.

102. In 1942 the government arrested Fred Korematsu—an American of Japanese ancestry—in San Leandro, California. The Supreme Court concluded that Korematsu knowingly violated the exclusion order and upheld his conviction. Korematsu v. United States, 323 U.S. 214, 222–24 (1944).

103. In 1941 Gordon Hirabayashi—an American of Japanese ancestry—turned himself into the FBI's Seattle Office to challenge the curfew and the exclusion orders in a calculated act of civil disobedience. The Supreme Court affirmed Hirabayashi's conviction for violating the curfew order. Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943).

104. Minoru Yasui—an American of Japanese ancestry and a U.S. Army officer—tried unsuccessfully to report for active duty after the bombing of Pearl Harbor. The Supreme Court affirmed Yasui's conviction for violating the curfew order. Yasui v. United States, 320 U.S. 115, 116–17 (1943).

105. On February 19, 1942, President Franklin Roosevelt issued Executive Order 9066, authorizing the military commander to protect West Coast facilities from espionage and sabotage. 7 Fed. Reg. 1407 (1942). Western Defense Commander General John DeWitt then issued a series of "relocation" orders that led to the internment of 120,000 Japanese Americans without charges or hearing. PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1982–83). Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu challenged the internment as a violation of the constitutional guarantee of due process. *See* YAMAMOTO ET AL., *supra* note 1, at 91–150 (detailing the three cases). The government countered that all Japanese people, including American citizens, were, by culture and race, predisposed to loyalty to Japan and disloyalty to the United States; that Japanese Americans on the West Coast had committed or were likely to commit acts of espionage and sabotage; and that mass action was needed because there was insufficient time to determine disloyalty individually. *Id.*; *see also* Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 490 (1945). The Supreme Court affirmed the resisters' convictions, effectively finding that military necessity justified the mass race-based deprivation of liberties. *Hirabayashi*, 320 U.S. at 104–05; *Yasui*, 320 U.S. at 117; *Korematsu*, 323 U.S. at 222–24.

106. *Korematsu*, 323 U.S. at 216; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 754 (3d ed. 2009) (observing "the [U.S.] Supreme Court first articulated the requirement for strict scrutiny for discrimination based on race and national origin in *Korematsu v. United States*").

unsubstantiated assertions of "pressing public necessity"[107] as justification for the internment of 120,000 mostly American citizens of Japanese ancestry, many of whom were women and children, without charges, trial, or palpable evidence of disloyalty.[108] Justice Hugo Black, a former Ku Klux Klan member,[109] authored the Court's majority opinion. Without a bona fide factual record and employing a double negative, Justice Black deferentially declared that the Court "cannot reject as unfounded the judgment of the military authorities . . . that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[110] Relying upon what turned out to be significantly falsified military claims of Japanese American disloyalty and insufficient time to ascertain disloyalty individually,[111] the Court upheld the constitutionality of the forced removal leading to mass incarceration.[112]

Justice Frank Murphy's dissent refuted the government's claim of military necessity. According to Murphy, the government failed to factually justify "one of the most sweeping and complete deprivation of constitutional rights."[113] It made no bona fide showing of "immediate, imminent, and impending" public danger.[114] Justice Murphy crucially observed that government intelligence agencies investigated West Coast Japanese Americans[115] and "not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor."[116] Indeed, after thorough investigations the Federal Bureau of Investigation, Federal Communications Commission, and the Office of Naval Intelligence

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

108. *See* Rostow, *supra* note 105, at 491 (noting the Supreme Court's affirmance of Korematsu's conviction without a factual record showing disloyalty); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945). *See generally* YAMAMOTO ET AL., *supra* note 1. *But see* MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR 'RACIAL PROFILING' IN WORLD WAR II AND THE WAR ON TERROR (2004) (defending the internment).

109. John P. Frank, *The Shelf Life of Justice Hugo L. Black*, 1997 WIS. L. REV. 1, 14 (1997).

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

111. The Court relied upon military findings of "disloyalty" by Japanese Americans and of insufficient time to ascertain disloyalty individually. *See* John L. Dewitt, *Final Report: Japanese Evacuation from the West Coast 1942*, HEADQUARTERS WESTERN DEFENSE COMMAND AND FOURTH ARMY, OFFICE OF THE COMMANDING GENERAL 9 (1943), http://jerrykang.net/wp-content/blogs.dir/1/files/2010/10/dewitt-revised-final-report.pdf/ [https://perma.cc/9TJB-8JU5] (recounting that because "no ready means existed for determining the loyal and the disloyal with any degree of safety," the internment "was necessary"); *see also infra* Section II.B (reviewing the 1984 *Korematsu coram nobis* proceedings and findings); PERSONAL JUSTICE DENIED, *supra* note 105, at 18 (describing grave injustice for Japanese Americans). *See generally* Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. REV. 1333 (2010) (observing that military officials knew that Japanese Americans posed no immediate threat, and even then, government officials ordered their mass incarceration).

112. *Korematsu*, 323 U.S. at 222–24.

113. *Id.* at 235 (Murphy, J., dissenting).

114. *Id.* (Murphy, J., dissenting).

115. *Id.* at 241 (Murphy, J., dissenting).

116. *Id.* (Murphy, J., dissenting).

found no instances of Japanese American espionage and sabotage or other acts of disloyalty.[117]

Justice Murphy also dismantled the government's claim of insufficiency of time. He highlighted the government's failure to justify its refusal to handle any possible Japanese American disloyalty through individual hearings, as it did for the German and Italian aliens.[118] The British government conducted over 50,000 individual hearings during the same approximate time frame.[119] Justice Murphy characterized the government's claim of temporal exigency as, at most, a claim of governmental inconvenience rather than a compelling reason for denying citizens individual hearings. "Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals."[120]

Justice Murphy thus characterized the government's claim of "urgent need" as nothing more than vague, unsupported insinuations grounded in conjecture, half-truths, and rumors advanced by military officials and those desirous of ridding the United States west coast of Japanese Americans.[121] He and the other dissenters vividly spelled out what was really going on behind this "abhorrent and despicable treatment":

> [T]he validity of the evacuation order . . . resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group . . . could not be trusted . . . . [T]his inference . . . has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.[122]

In addition to anti-Asian and agribusiness organizations,[123] news media and

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117. *See* Korematsu v. United States, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984); *see also* YAMAMOTO ET AL., *supra* note 1, at Chapter III.B.2.a (discussing these government findings).

118. *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting).

119. *Id.* at 242 n.16 (Murphy, J., dissenting). Justice Murphy concluded that "[i]t seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved . . . especially when a large part of this number represented children and elderly men and women." *Id.* at 242 (Murphy, J., dissenting). Because most Japanese American internees were children or elderly, the number of loyalty hearings would have been far fewer than 100,000 – near the number of loyalty hearings the British required. GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA 65–66 (2009).

120. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting).

121. *Id.* at 239 (Murphy, J., dissenting) (finding that the basis for the internment to be "largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates" of the internment).

122. *Id.* at 240 (Murphy, J., dissenting).

123. Justice Murphy highlighted that special interest groups were extremely active in applying pressure for the internment. *Id.* at 239 n.12 (Murphy, J., dissenting). Murphy quoted the admission of the managing secretary of the Salinas Vegetable Grower-Shipper Association:

> We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. . . . If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take

government officials, including then-California Attorney General Earl Warren,[124] had pushed for the politically popular security measures.[125]

Justice Murphy predicted that the majority's ruling would serve as dangerous precedent that could "destroy the dignity of the individual and . . . encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."[126] He concluded by characterizing the Court's decision as a descent into "the ugly abyss of racism."[127]

In his ringing *Korematsu* dissent, Justice Robert Jackson first highlighted the absence of probative evidence on military necessity and criticized the government's argument for near-total judicial deference.[128] Indeed, no evidence on military necessity had been presented at trial. The government's only proffered evidence came belatedly at the Supreme Court. The Justice Department asked the Court to take judicial notice[129] of the "undisputed facts" on military necessity recited in General DeWitt's Final Report on the internment, a highly contentious report that had never been admitted into evidence.[130] DeWitt himself had not testified under oath

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over and produce everything the Jap grows.

Id.

124. *See generally* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 19 B.C. THIRD WORLD L.J. 73 (1998). Former Chief Justice Warren's career began as the Attorney General of California and a gubernatorial candidate in the 1942 elections. *Id.* at 75. He played a key role in the 1942 internment. *Id.* Warren later regretted his actions. PERSONAL JUSTICE DENIED, *supra* note 105, at 18 (quoting Warren, "I deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens").

125. YAMAMOTO ET AL., *supra* note 1, at 88 (describing journalists' calls for the internment and confirming government officials' perception of "popular sentiments favoring the internment").

126. *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting).

127. *Id.* at 233.

128. *Id.* at 245 (Jackson, J., dissenting) (maintaining he could not "say, from any evidence before [him], that the orders of General DeWitt were not reasonably expedient military precautions, nor could [he] say that they were").

129. Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 18–19 (1986) (describing the government's use of judicial notice). Rule 201(b) of the Federal Rules of Evidence sets forth the requirements for judicial notice of adjudicative facts. Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

130. Yamamoto, Korematsu *Revisited*, *supra* note 129, at 10–12. General DeWitt prepared the completed, printed, and partially distributed the original version of his Final Report to explain the military's actual justification for the curfew and evacuation. A key passage of the original version of his Final Report recited that "[i]t was impossible to establish the identity of the loyal and the disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the 'sheep from the goats' was unfeasible." The key language in the original version of his Final Report appears at the bottom of page 9 of the Final Report, just after the underline. Dewitt, *Final Report*, *supra* note 111, at 9. Pressured by the War Department to alter crucial parts of his

or been subjected to cross-examination.[131]

Justice Jackson rejected the government's position that the Court should in essence take the government's claim of necessity as a matter of faith—"the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."[132]

Finally, Justice Jackson powerfully concluded with his prescient loaded weapon warning about the ominous precedential effect of the majority's discriminatory ruling without bona fide factual proof of necessity:

> [T]he Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.[133]

B. The Coram Nobis Reopenings and Ensuing Redress

Forty years later, unearthed World War II government documents revealed that there had been no military necessity to justify the internment and that the War and Justice Departments had deliberately and unethically deceived the high court and the American public in their attempt to justify it.[134] Based on those discovered documents, in rare *coram nobis*

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finished and partially distributed original version of his Final Report, DeWitt reluctantly and significantly changed the key passage (quoted above) to state the opposite of the military's actual rational for the internment in order to support the government's planned legal argument that the government lacked time for individual determinations of disloyalty. The altered version of DeWitt's Final Report stated that there was "no ready means" for determining disloyalty individually, and the Supreme Court specifically cited that "fact" as pivotal to its findings on "military necessity." Hirabayashi v. United States, 828 F.2d 591, 597–99 (9th Cir. 1987) (comparing the original version of the Final Report to the altered version submitted to the Supreme Court). *See generally* PETER H. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERMENT CASES (1993).

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

132. *Id.* (Jackson, J., dissenting).

133. *Id.* at 246 (Jackson, J., dissenting) (emphasis added).

134. Drawing upon World War II government documents, discovered by researchers Peter Irons and Aiko Herzig-Yoshinaga, the Congressional Commission's investigation and the *coram nobis* reopenings of the internment cases revealed three critical facts: (1) before the internment, the Office of Naval Intelligence, designated by President Roosevelt as the lead intelligence service on the "Japanese question," determined that West Coast Japanese Americans posed no serious danger and that there was no justification for mass treatment; (2) General DeWitt based his internment decisions on racial stereotypes of "inherently disloyal" Japanese Americans; and (3) the military and War and Justice Departments concealed, altered and destroyed crucial evidence showing that, (a) General Dewitt acknowledged that there was sufficient time for treating potential disloyalty individually, but when pressured by the War Department, recalled his finished Final Report and altered it to state the opposite, (b) all involved intelligence services determined that Japanese Americans had not committed acts of disloyalty; and (c) despite vehement protests by Justice Department lawyers drafting the *Korematsu* brief to the Supreme Court, the government deliberately misled the Court in 1944 when it considered

proceedings in the 1980s, the lower federal courts in *Korematsu*[135] *Hirabayashi*,[136] *and Yasui*[137] reversed course.

Drawing upon the World War II government documents and the 1983 Congressional Commission's findings,[138] U.S. District Judge Marilyn Hall Patel in the 1984 *Korematsu coram nobis* litigation acknowledged that the internment was driven by "race prejudice, war hysteria, and a failure of political leadership."[139] She determined that "[f]acts for the military justification were unsubstantiated facts, distortions, and representations of at least one military commander [DeWitt], whose views were seriously infected by racism."[140] Equally significant, Judge Patel ascertained egregious and unethical misconduct by high level War and Justice Department officials in presenting "intentional falsehoods"[141] to the Supreme Court in 1944—including fabricated and altered evidence—and in deliberately covering up the exonerating ONI, FBI, and FCC investigations.[142] Judge Patel ascertained "manifest injustice" for all West

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and accepted as true the government's contention on military necessity. *See* Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 13–14 (2009); *see also* PERSONAL JUSTICE DENIED, *supra* note 105, at 5–8 (detailing the facts showing the absence of "military necessity" and government dissembling); Kathryn A. Bannai, *Gordon Hirabayashi v. United States: "This is an American case,"* 11 SEATTLE J. FOR SOC. JUST. 41, 42 (2012) (explaining that the government suppressed, altered, and destroyed material evidence while it argued the three Japanese American internment cases before the Supreme Court). For in-depth descriptions, see IRONS, JUSTICE AT WAR, *supra* note 130; PETER H. IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989); ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR (2013).

135. *See generally* LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 150–79 (2015) (describing in depth the *Korematsu coram nobis* proceeding). This Article's co-author Yamamoto served as legal team member in the *Korematsu coram nobis* litigation.

136. District Judge Donald Voorhees granted Hirabayashi's *coram nobis* petition after trial, vacating one conviction (evacuation) but not the other (curfew). The Ninth Circuit, in an extensive opinion by Judge Mary Schroeder, affirmed the lower court's finding of egregious government dissembling and vacated both the curfew and exclusion convictions. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987); *see also* Kathryn A. Bannai, *supra* note 134, at 44–48 (describing the *Hirabayashi*'s *coram nobis* proceedings).

137. District Judge Robert C. Belloni vacated Yasui's conviction without a hearing on the merits. Yasui v. United States, No. 83-151-BE (D. Or. Jan. 26. 1984) (unpublished order). In granting the government's motion to dismiss Yasui's *coram nobis* petition, Judge Belloni "decline[d] to make findings [of fact] forty years after the events took place" because there was "no case nor [sic] controversy since both sides are asking for the same relief but for different reasons." *Id.*

138. *See* PERSONAL JUSTICE DENIED, *supra* note 105.

139. Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

140. Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States: *A Constant Caution in a Time of Crisis*, 10 ASIAN AM. L.J. 37, 44 (2003).

141. *Korematsu*, 584 F. Supp. at 1424 (emphasizing "[t]here is no doubt that these statements were intentional falsehoods"). Acting Solicitor General Katyal buttressed Judge Patel's finding of significant unethical government misconduct in *Hirabayashi* and *Korematsu* through a rare "confession of error." *See* YAMAMOTO ET AL., *supra* note 1, at 304–05; *see also infra* note 145 and accompanying text.

142. Historian Peter Irons characterized the government misconduct as "a deliberate campaign to present tainted records to the Supreme Court" and "a legal scandal without precedent in the history of

Coast Japanese Americans and vacated Fred Korematsu's conviction for his civil disobedience.[143]

In concluding, Judge Patel echoed Justice Jackson's loaded weapon warning forty years earlier. She characterized *Korematsu*—the combined original decision and the *coram nobis* reopening—as a cautionary tale of grave injustice arising out of popular fears, opportunistic politicians, and deferential courts:

> As historical precedent [Korematsu] 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.[144]

Judge Patel's ruling undercut the military necessity underpinning of the World War II *Korematsu* decision. Especially important, it underscored the danger of public scapegoating, government dissembling, and passive courts—all in the name of national security. Similarly, in vacating Hirabayashi's wartime curfew and exclusion convictions, Ninth Circuit Judge Mary Schroeder determined that the government's deliberately falsified claim of necessity in the original *Hirabayashi* case constituted prejudicial government deception.[145] And in 2012, in a remarkable "Confession of Error," Acting U.S. Solicitor General Neal Katyal acknowledged that his World War II predecessor had deliberately and prejudicially misled the Supreme Court about the military necessity justification for the internment.[146]

American law." IRONS, *supra* note 130, at vii. *Korematsu*, 584 F. Supp. at 1424; *see supra* note 134 (describing the fabricated, altered and suppressed evidence).

143. *Korematsu*, 584 F. Supp. at 1419.

144. *Id.* at 1420. *See* BANNAI, *supra* note 135, at 186 (describing the genesis of Judge Patel's decision and its impact). For further analysis of the *coram nobis* litigation and its impacts, see generally YAMAMOTO ET AL., *supra* note 1, at Chapter 5; PETER H. IRONS, JUSTICE DELAYED, *supra* note 134.

145. Hirabayashi v. United States, 828 F. 2d 591, 608 (1987).

146. *See* YAMAMOTO ET AL., *supra* note 1, at 304–05. Katyal's message acknowledged that then Solicitor General Fahy "had learned of a key intelligence report that undermined the rationale behind the internment . . . [b]ut . . . did not inform the Court of the report, despite warnings from Department of Justice attorneys." *See* Neal Katyal, *Confession of Error: The Solicitor General's Mistake During the Japanese-American Internment Cases,* JUST. BLOG (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases/ [https://perma.cc/5WKJ-8U37]. Katyal admitted that Solicitor General Fahy also "did [not] inform the Court that a key set of allegations used to justify the internment . . . had been discredited by the FBI and FCC." *Id.* Acting Solicitor General Katyal lastly acknowledged that, "[Fahy] relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by 'racial solidarity'" and that had Fahy fulfilled his ethical obligations, the Supreme Court would likely have ruled differently. *Id.*; *see also* Ling Woo Liu & Mariam Hosseini, *U.S. Dept. of Justice Releases*

With the *coram nobis* decisions and the Congressional Commission Report as backdrop, Congress passed the 1988 Civil Liberties Act[147] that mandated a presidential apology, provided $20,000 in reparations for each surviving internee, and established a civil liberties public education fund.[148]

C. Still Standing as Precedent?

The Justice Department declined to further appeal the *coram nobis* decisions. So the Supreme Court did not confront an opportunity to belatedly reverse its World War II rulings. Nor in other subsequent security and liberty disputes has the Court overruled *Korematsu*.[149] While the case has been sorely discredited by judges[150] and scholars,[151] as well as by the *coram nobis* decisions, the Court's original ruling formally still stands—if

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Unprecedented Admission of Error in Japanese American Incarceration Cases; Korematsu and Hirabayashi Families, Legal Teams React, KOREMATSU INST. (May 24, 2011), http://myemail.constantcontact.com/US-Dept—of-Justice-releases-unprecedented-admission-of-error-in-Japanese-American-incarceration-cases.html?soid=1103244704062&aid=MekXK7UQciU/ [https://perma.cc/RN7E-EE8M] (quoting Karen Korematsu's acknowledgments of Katyal's "remarkable stand to correct the record").

147. Civil Liberties Act of 1988, Pub. L. No 100-383, 102 Stat 903 (1996) (codified at 50 U.S.C § 1989(b)).

148. *See* Letter from U.S. President George H.W. Bush to surviving internees (Oct. 9, 1991); *see also* YAMAMOTO ET AL., *supra* note 1, at 315 (describing President George H.W Bush's apology to interned Japanese Americans); Civil Liberties Act of 1988, Pub. L. No 100-383, 102 Stat 903 (2012) (codified at 50 U.S.C § 1989(b)) (mandating reparations payments of $20,000 to each surviving internee and establishment of a public education fund).

149. *Korematsu*, 584 F. Supp. at 1420 (indicating the Supreme Court decision, although discredited, remains on the law books). The government did not appeal the lower courts' *coram nobis* decisions to the Supreme Court.

150. According to Professor David Harris's research, sitting Justices Kennedy, Thomas, Stevens, Ginsburg, Breyer and Alito and former Justice Scalia have written or joined opinions criticizing *Korematsu*. Harris, *supra* note 16, at 10 n.42. Justice Antonin Scalia ranked *Korematsu* among the worst decisions of the Supreme Court. *See* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (expressing his optimism to "believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott")*. At his confirmation hearing, Chief Justice Roberts expressed that "while *Korematsu* is not technically overruled yet," the case is "widely recognized as not having precedential value," and it is hard to comprehend "that *[Korematsu]* would be acceptable these days." *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary, United States Senate*, 109th Cong. 241 (2005). Roberts agreed with the characterization of *Korematsu* as ranking among "some of the worst decisions in the history of the Supreme Court." *Id.* During Justice Sotomayor's confirmation hearing, she also affirmed that *Korematsu* was wrongly decided. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary, United States Senate,* 111th Cong. 117 (2009).

151. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1043 (2004) (characterizing *Korematsu* as "bad law, very bad law, very very bad law"); Luppe B. Luppen, *Just When I Thought I Was Out, They Pull Me Back in: Executive Power and the Novel Reclassification Authority*, 64 WASH. & LEE L. REV. 1115, 1134 (2007) (describing courts' deliberate "movement away from *Korematsu*'s central holding"); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002) (describing *Korematsu* "as a deeply discredited decision").

not for its now widely recognized wrongful validation of the forced removal and incarceration, then for its embrace of unconditional judicial deference to government claims of national security as justification for broad civil liberties restrictions.[152]

Indeed, the late-Chief Justice William Rehnquist[153] and influential Seventh Court of Appeals Judge Richard Posner, in important respects, treat *Korematsu* as "correctly decided."[154] Underscoring *Korematsu*'s principle of judicial passivity, Judge Posner indicates that during times of hostility when faced with government national security claims of urgent need, as in *Korematsu,* the courts can say, "[W]e're going to defer."[155] As Justice Jackson predicted, "every repetition" of judicial deference to unsubstantiated government claims of exigency "embeds the principle more deeply in our law and thinking and expands it to new purposes."[156]

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152. Harris, *supra* note 16, at 12 (observing that "the Court never overturned its [*Korematsu*] decision, and no lower federal court has ever refused to follow the case as law"); *Korematsu*, 584 F. Supp. at 1420. ("[T]he Supreme Court's decision [in *Korematsu*] stands as the law of this case . . . . *Korematsu* remains on the pages of our legal and political history.").

153. For former Chief Justice Rehnquist, *Korematsu* in important respects remains good law. Rehnquist's book *All the Laws but One* characterized the WWII internment as a lamentable yet partially acceptable (at least as to the first generation) response to threats to the nation's security. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 206 (1998). "The 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." *Id.* Rehnquist also deemed salutary *Korematsu*'s deferential analytical framework—"in time of war a nation may be required to respond to a condition without making a careful inquiry as to how that condition came about." *Id.* at 206–07.

154. Seventh Circuit Court of Appeals Judge Richard A. Posner, in a debate with Professor Pamela S. Karlan, indicated that "*Korematsu* was correctly decided" and that judges might reasonably think, "if the military in the middle of a world war says we have to do this, then we're going to defer":

> [I] actually think *Korematsu* was correctly decided. In 1942, there was a real fear of a possible Japanese invasion of the West Coast. I believe there had actually been some minor shelling of the Oregon coast by a Japanese submarine. Unquestionably, the order excluding people of Japanese ancestry from the West Coast was tainted by racial prejudice. On the other hand, many Japanese Americans had refused to swear unqualified allegiance to the United States. Good or bad, it was a military order in a frightening war. Although the majority opinion, written by Justice Hugo Black, is very poor, the decision itself is defensible. The Court could have said: We interpret the Constitution to allow racial discrimination by government when there are urgent reasons for it, and if the military in the middle of a world war says we have to do this, then we're going to defer, because the Constitution is not a suicide pact.

Harris, *supra* note 16, at 18–19 (quoting Judge Posner's defense of *Korematsu* at a panel discussion described in Pamela S. Karlan & Richard A. Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER'S MAG., May 2001, at 31); *see* Kermit Roosevelt, *Richard A. Posner's 'Divergent Paths: The Academy and the Judiciary*,' N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/31/books/review/richard-a-posners-divergent-paths-the-academy-and-the-judiciary.html/ [https://perma.cc/F7S3-9WT2] (highlighting Judge Posner's defense of *Korematsu* as "correctly decided"). *See generally* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016).

155. Roosevelt, *supra* note 154.

156. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2575 (2003) (describing that not long after 9/11, scholars observed that *Korematsu* "has not proved to be the 'loaded weapon' that Justice Jackson feared"); Muller, *supra* note 151. Those

Thus the pivotal question for today and tomorrow can be reframed in the following way: If "it"—something akin to the World War II mass exclusion and incarceration—happens again,[157] would the Court's deferential approach in 1944 be expanded to "new purposes" in the Trump era to validate transgressions of essential democratic liberties?

We submit that the significance of this question is tied to a key socio-legal insight about the forces of lasting social injustice drawn from the Japanese American incarceration experience: national security fears coupled with racism, nativism, or religious animosity and backed by the force of law generate deep and lasting damage.[158] It is the "law's stamp of approval on wartime exigencies plus racism [or religious intolerance] that transforms mistakes of the moment into enduring social injustice."[159]

III. LAW AND POLITICS—INTO THE FUTURE

In light of policymakers' vociferous after-Paris and post-Trump election calls for sweeping harsh Muslim restricting security measures—along with accelerating harassment of and discrimination against Muslims and other communities of color in the United States[160]—Justice Jackson's warning and Judge Patel's call for vigilance remain hotly relevant. Justice Scalia envisioned the "same thing" happening again. He further foresaw a compliant judiciary, as in *Korematsu*, falling deferentially in line with the

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assessments, however, were made before documented reports of serious of civil liberties abuses and well before the post-Paris calls for mass exclusion and detention of Muslims by government officials and presidential candidates. *See supra* notes 38–39 and accompanying text.

157. *See* Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131, 134 (2000) (expanding "it" to encompass injustices well beyond the World War II internment).

158. Yamamoto & Serrano, *supra* note 9, at 57.

159. *Id.*

160. *See supra* Section I.C for a discussion on the January 2017 executive orders; *see also* Kirk Semple, *I'm Frightened: After Attacks in Paris, New York Muslims Cope with a Backlash,* N.Y. TIMES (Nov. 25, 2010), http://www.nytimes.com/2015/11/26/nyregion/im-frightened-after-paris-terrorist-attacks-new-york-city-muslims-cope-with-a-backlash.html/ [https://perma.cc/QCT8-VVBW] (reporting harassment of Muslims on Brooklyn streets); Winnie Hu, *Muslims in Queens Welcome Shift in Scrutiny to Police*, N.Y. TIMES (Jan. 7, 2016), http://www.nytimes.com/2016/01/08/nyregion/muslims-in-queens-welcome-shift-in-scrutiny-to-police.html/ [https://perma.cc/HC4V-2R97] (describing overbearing police surveillance because of the concentration of Muslim-owned businesses); Liam Stack, *College Student Is Removed from Flight After Speaking Arabic on Plane,* N.Y. TIMES (Apr. 17, 2016), https://www.nytimes.com/2016/04/17/us/student-speaking-arabic-removed-southwest-airlines-plane.html/ [https://perma.cc/2QZC-NED2] (describing a college student removal for speaking Arabic and searched in front of a crowd); Anna North, *A Wave of Harassment After Trump's Victory,* N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/18/opinion/a-wave-of-harassment-after-trumps-victory.html (reporting incidents of harassment and intimidation across the country following Trump's successful presidential election); Kelly Weill, *The Hate After Trump's Election: Swastikas, Deportation Threats, and Racist Graffiti*, THE DAILY BEAST (Nov. 13, 2016), http://www.thedailybeast.com/articles/2016/11/13/the-hate-after-trump-s-election-swastikas-deportation-threats-and-racist-graffiti.html (reporting harassment against African Americans and Mexican Americans).

"hand of any authority that can bring forward a plausible," even if exaggerated or falsely grounded, "claim of an urgent need."[161]

The time is ripe for revisiting and then proactively responding to the challenges posed by *the loaded weapon*.

The political and legal atmosphere after 9/11 (with some calling for reasoned temperance and judicial checks and balances, citing the WWII internment as a cautionary tale)[162] differs from the environment of the original World War II internment (with few calling for independent judicial scrutiny as a check on government power).[163] Recent litigation now challenges wide-ranging government civil liberties violations, placing security and liberty tensions squarely in the public eye.[164] Court challenges,

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161. David Harris asks, "Could *Korematsu* Happen Again"? and responds, "The Possibility is Real." Harris, *supra* note 16, at 20.

> Many thoughtful commentators now discount the danger Justice Jackson saw, but their views do not withstand analysis. The question of *Korematsu*'s resurrection, and, even the possibility of another internment, no longer constitutes idle speculation. 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.

Id.

162. *See infra* note 204 and accompanying text (describing Fred Korematsu's amicus brief in *Rasul v. Bush* cautioning against total judicial deference to the political branches); *see also* Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused,"* 2 SEATTLE J. SOC. JUST. 129, 172 (2004) (calling upon the judicial branch to "ensure executive adherence to constitutional standards" to prevent another *Korematsu*); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 49 (2002) (evaluating the historical pattern of judicial deference to political branches and characterizing it as the "shadow side" of American law and a "threat to the rule of law itself"). Former federal judges and attorneys submitted an amicus brief to the Supreme Court in Rumsfeld v. Padilla, 542 U.S. 426 (2004), urging the Court to maintain a check against the executive branch's actions in Guantanamo Bay—actions characterized as "the hallmark of despotism." Brief of Amici Curiae Hon Shirley M. Hufstedler, Hon. Nathaniel R. Jones, Hon. William A. Norris, Hon. H. Lee Sarokin, Hon. Herbert J. Stern, Hon. Harold R. Tyler, Jr., R. Scott Greathead, Robert M. Pennoyer, Barbara Paul Robinson, & William D. Zabel in Support of Respondents at 1. The brief referenced the WWII Japanese American internment cases to show that careful judicial review of due process restrictions in "wartime" should remain unaltered. *See id.* at 12 (citing *Korematsu* and *Hirabayashi*).

163. The national board of the ACLU, dominated by Roosevelt loyalists, prohibited any direct constitutional challenge to Executive Order 9066. YAMAMOTO ET AL., *supra* note 1, at 112; *see* IRONS, *supra* note 130, at 129–32. Even the Japanese American Citizens League declined to support legal challenges to the internment. *See generally* WILLIAM MINORU HOHRI, REPAIRING AMERICA: AN ACCOUNT OF THE MOVEMENT FOR JAPANESE-AMERICAN REDRESS 45 (1st ed. 1988); MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976); SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 117 (1991). Some among the African American press, particularly W.E.B. Du Bois's Amsterdam News column, voiced opposition to the internment. *See* YAMAMOTO ET AL., *supra* note 1, at 149–50 (describing Dubois' opposition).

164. *See infra* notes 220–244 and accompanying text. In 2013 Edward Snowden, a former CIA contractor, leaked details of secret, extensive internet and phone surveillance programs. *Edward Snowden: Leaks That Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), http://www.bbc.com/news/world-us-canada-23123964/ [https://perma.cc/2V8C-DR5B]. Subscribers to telecommunications and internet sources sued the federal government and the service providers. Klayman v. Obama, 957 F. Supp. 2d 1, 8 (D.D.C. 2013), *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015). The district court granted plaintiffs' requested preliminary injunction, barring government collection of plaintiffs' call

public education, and organizational advocacy[165] collectively signal what Justice Sonia Sotomayor describes as a "modicum of progress."[166] But politicians' regressive prescriptions in the Trump era, with its deeply conservative national security leadership, forefend steep political backsliding.[167]

An accommodation of security measures and civil liberties protections is essential in a constitutional democracy. But in light of the former's penchant for overwhelming the latter, we submit, it is combined critical legal advocacy and public pressure that erect the real bulwark against government civil liberties excesses.

We suggest that next steps should not focus entirely on political organizing or primarily on legal action. Rather, strategic steps forward need to embrace an integrated combination of critical legal advocacy and public pressure at two crucial stages. The first, at the front-end, is through organizing, educating, and litigating to prevent politically driven abuses of vulnerable communities before they occur.[168] The second, at the back-end, is through blocking or removing "the law's stamp of approval" of those abuses once they occur.[169] Combining critical legal advocacy and political organizing with public pressure is essential, in Justice Murphy's words, for closing "the door on discriminatory actions against other minority groups in the passion of tomorrow."[170]

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records. *Id.* at 43. The Court of Appeals reversed, stressing the "[*plaintiffs*'] burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing by revealing details of its surveillance priorities." Obama v. Klayman, 800 F.3d 559, 568 (D.C. Cir. 2015).

165. *See ACLU-NJ Seeks Details of Syrian Refugee Policy*, AM. CIV. LIBERTIES UNION (Nov. 24, 2015), https://www.aclu-nj.org/news/2015/11/24/aclu-nj-seeks-details-syrian-refugee-policy/ [https://perma.cc/2JJF-MXKE] (describing the ACLU New Jersey office's demand for public release of Governor Chris Christie's directive that barred state agencies from assisting in the resettlement of Syrian refugees). Daniel Prieto, adjunct senior fellow for counterterrorism and national security at the Council on Foreign Relations, noted in 2009 the importance of confronting terrorist groups while not "deviat[ing] from a commitment to protecting individual liberties." *Civil Liberties and National Security: Critical Issues Still Unresolved, Argues New CFR Study*, COUNCIL FOREIGN REL. (Feb. 6, 2009), http://www.cfr.org/terrorism-and-the-law/civil-liberties-national-security-critical-issues-still-unresolved-argues-new-cfr-study/p18477/ [https://perma.cc/N4MZ-CNXQ].

166. Eric K. Yamamoto, *The Evolving Legacy of Japanese American Internment Redress: Next Steps We Can (and Should) Take*, 11 SEATTLE J. FOR SOC. JUST. 77, 78–79 (2012) (citing Supreme Court Justice Sonia Sotomayor's observation about a "modicum of progress"); *see* Adam Liptak, *Civil Liberties Today,* N.Y. TIMES (Sept. 7, 2011), http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html/ [https://perma.cc/G2F6-NV3S] (maintaining "civil liberties are far more protected than what we've seen in past wars").

167. *See* Horwitz & Nakashima, *supra* note 99 (expressing alarm over Sessions' nomination for attorney general and the "growing list" of nominees with "troubling histories of bigotry and intolerance"); Davidson, *supra* note 99 ("The potential cooperation between Flynn and Sessions, when it comes to the use of tools like domestic surveillance and the indefinite-detention practices . . . is more than alarming.")

168. *See* YAMAMOTO ET AL., *supra* note 1, at 416.

169. Yamamoto & Serrano, *supra* note 9, at 60.

170. Korematsu v. United States, 323 U.S. 214, 240 (Murphy, J., dissenting).

A. Front-end Prevention

In today's climate of fear, "our first task in protecting both people and key democratic values is to be proactive at the front-end"—to afford government ample berth for security actions while preventing palpable government abuses.[171] As the original *Loaded Weapon* essay prescribed, to facilitate prevention through vigilance and action:

> 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 . . . [exclusion and] incarcerations, particularly en masse.[172]

More specifically, "[t]hrough political analysis, education, and activism, our job [before abuses occur] is to compel powerful institutions, particularly the courts, to be vigilant, to 'protect all.'"[173]

To illustrate, at the front-end, the *Korematsu coram nobis* legal team wrote an open letter to President George W. Bush sharply criticizing Commissioner Kirsanow's prediction of a mass internment of Arab Americans and his resort to the original *Korematsu* decision as precedent. The legal team stressed that by citing the 1944 *Korematsu* case and ignoring the *coram nobis* courts' later findings, Kirsanow sought to employ *Korematsu* wrongly as legal and moral justification for present-day imprisonment of another ethnic group in the United States.[174]

Similarly, Fred Korematsu publically responded to conservative commentator Michelle Malkin.[175] In 2004 Malkin argued that the World War II Japanese American internment had been justified and that using the mass incarceration after 9/11 to criticize the government's expansive war on terror jeopardized homeland security.[176] Korematsu responded in words worth quoting at length:

> It is painful to see reopened for serious debate the question of whether the government was justified in imprisoning Japanese Americans during World War II. It was my hope that my case and the cases of other Japanese American internees would be remembered for the dangers of racial and ethnic scapegoating.
>
> Fears and prejudices directed against minority communities are too easy to evoke and exaggerate, often to serve the political agendas of those who promote those fears. I know what it is like to be at the other end of such

171. YAMAMOTO ET AL., *supra* note 1, at 416.
172. Yamamoto & Serrano, *supra* note 9, at 60.
173. *Id.*
174. *See* YAMAMOTO ET AL., *supra* note 1, at 399–400 (quoting the *Korematsu coram nobis* legal team's open letter to the President (July 25, 2002)).
175. *See* BANNAI, *supra* note 135, at 205.
176. *See id.*

> scapegoating and how difficult it is to clear one's name after unjustified suspicious are endorsed as fact by the government. If someone is a spy or terrorist they should be prosecuted for their actions. But no one should ever be locked away simply because they share the same race, ethnicity, or religion as a spy or terrorist. If that principle was not learned from the internment of Japanese Americans, then these are very dangerous times for our democracy.[177]

Other front-end actions after 9/11 contributed to heightened scrutiny by domestic and international human rights organizations.[178] They also fueled Congressional investigations into regressive Bush Administration policies.[179]

One potent front-end effort emerged from the U.S. Senate Select Committee on Intelligence chaired by Senator Dianne Feinstein. That Committee concluded that the CIA's coercive interrogations—torture—following 9/11 did not produce "intelligence, result[ed] in false answers, and had historically proven to be ineffective."[180] Looking forward, Feinstein highlighted the importance of preventive action. She pressed the

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177. Fred Korematsu, *Do We Really Need to Relearn the Lessons of Japanese American Internment?*, SFGATE (Sept. 16, 2004), http://www.sfgate.com/opinion/openforum/article/Do-we-really-need-to-relearn-the-lessons-of-2724896.php/ [https://perma.cc/2XJX-PZCD]. During the Gulf War, after Iraq invaded Kuwait and the United States intervened, anti-Arab sentiment intensified and *Korematsu*'s case was again discussed as a cautionary tale. In "*Remembering Korematsu,*" Jamin Raskin observed,

> The Arabs are the Japanese of 1991. Never mind that Arab-Americans are American citizens and that they are more likely to be the victims than the perpetrators of racial violence. Never mind that most of their leaders have denounced Saddam Hussein and support the demand that Iraqi forces withdraw from Kuwait. There is great uneasiness in the Arab-American community and [the] whiff of a witch hunt in the F.B.I.'s curious "interviews" with Arab-Americans. Would the Supreme Court today find a violation of the equal protection clause if the government rounded up Arab-Americans or Palestinian-Americans [or Iraqi-Americans] as potential traitors and saboteurs? It is hard to know. . . . But wartime is wartime, and the Rehnquist Court accords much deference to the military's power. And then there is the strange fact that *Korematsu* is no dead letter. The decision is generally condemned, but it has not been overruled. It is a dismal precedent.

Jamin B. Raskin, *Remembering Korematsu: A precedent for Arab-Americans?,* NATION, Feb. 4, 1991, at 117–18.

178. *See generally Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit*, AM. CIV. LIBERTIES UNION (Apr. 1, 2008), https://www.aclu.org/news/secret-bush-administration-torture-memo-released-today-response-aclu-lawsuit/ [https://perma.cc/5DG2-JY3K]; Press Release, Esther Wang, Highest-level Bush Administration Officials Approved, Discussed U.S. Post-9/11 Torture Program, CTR. CONST. RIGHTS (Apr. 10, 2008), https://ccrjustice.org/home/press-center/press-releases/highest-level-bush-administration-officials-approved-discussed-us#/ [https://perma.cc/8NJU-GTAU].

179. *See* Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 DUKE L. & CONTEMP. PROBS. 285, 294 (2005) (pointing to 2004 and 2005 Special Congressional Reports documenting investigations of Bush Administration national security abuses).

180. The 525-page Senate Select Committee on Intelligence Study began with an introductory letter from Committee Chair Dianne Feinstein that concluded that the United States must not allow "grievous past mistakes to be repeated." STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM, *supra* note 37, at 4.

executive branch's security apparatus in the future to abide by articulated ethical dictates because "[w]e cannot again allow history to be forgotten and grievous past mistakes to be repeated."[181] To implement the kind of preventive measures envisioned by the Senate Committee, Feinstein and other senators crafted the "Due Process Guarantee Act" in 2012.[182] The proposed legislation, supported by testimony of *Korematsu coram nobis* attorney, Lorraine Bannai,[183] aimed to afford due process protections to citizens and permanent residents who were apprehended for ostensible security reasons on U.S. soil.[184]

Community advocates, too, figured significantly in halting or at least impeding proposals for potentially abusive actions before they mushroomed into widespread damage. Immediate national and international criticism followed Mayor Bowers's 2015 call for a mass Muslim "sequester."[185] Japanese American organizations immediately denounced Bowers's resort to the World War II internment as precedent.[186] The Japanese American Citizen League, for instance, rejected Bowers's "outrageous comments," criticizing the "fear-mongering proposals" and the "scapegoating of innocent people."[187] Mainstream media also weighed in.[188]

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181. *Id.*

182. The bill was introduced on December 15, 2011. Due Process Guarantee Act, S. 2003, 112th Cong. (2011). The bill was not enacted into law.

183. BANNAI, ENDURING CONVICTION, *supra* note 135, at 218–19. Senator Feinstein cited *Korematsu,* and Professor Lorraine Bannai, former *coram nobis* legal team member, testified in Congress about its continuing relevance. *The Due Process Guarantee Act: Banning Indefinite Detention of Americans: Hearing Before the United States Senate Committee on the Judiciary*, 112th Cong. 13–14 (2012) (statement of Professor Bannai). Professor Bannai highlighted the tangible meaning of the guarantee of Due Process; the danger of unfettered military discretion; and human frailty during times of crises. *Id.*

184. Due Process Guarantee Act, S. 2003, 112th Cong. (2011).

185. *See* Salahi, *supra* note 69.

186. *See* Hirai, *supra* note 55 (reporting the broad-scale criticism by Japanese American organizations). In December 2015, over sixty leaders from Asian American communities gathered at the National Japanese American Memorial to Patriotism in Washington, D.C. to counter anti-Muslim hate crimes and prejudice and support Muslim, Sikh, Arab, and South Asian American communities. Priscilla Ouchida, *JACL Stands with Asian American Leaders to Rally Against Anti-Muslim Hate*, JAPANESE AM. CITIZENS LEAGUE (Dec. 16, 2015), https://jacl.org/jacl-stands-with-asian-american-leaders-to-rally-against-anti-muslim-hate/ [https://perma.cc/6XHQ-H3MB]. The message delivered by these leaders: "Never again." *Id.*

187. Andy Noguchi, co-president of the Florin chapter of the Japanese American Citizens League, condemned Bower's proposal:

> We protest the fear-mongering proposals that Syrian refugees . . . be excluded from this country or even locked up in concentration camps, as WWII Japanese Americans were once unjustly imprisoned. . . . As those unjustly imprisoned before and their family members, we say no. No to this scapegoating of innocent people. . . . No to war hysteria. No to failed political leadership.

Hirai, *supra* note 55 (quoting Noguchi).

188. Lindsay Schubiner, *Roanoke Mayor Should Apologize and Welcome Refugees*, HUFFINGTON POST (Nov. 19, 2015), http://www.huffingtonpost.com/lindsay-schubiner/roanoke-mayor-should-apologize-and-welcome-refugees_b_8596506.html/ [https://perma.cc/K6JH-QTKF] (characterizing Bowers's statement as "truly shocking" and demanding an apology); Matt Chittum, *Roanoke Mayor*

These sharp responses, along with strong criticism by U.S. Representatives Doris Matsui[189] and Mike Honda,[190] coalesced into potent and timely front-end preventive action. In the face of mounting criticism, Bowers apologized to "those offended" and effectively retracted his call.[191]

Extending Bowers's earlier citation to the internment to bolster anti-Muslim proposals, presidential transition insider Carl Higbie provoked outrage when he relied on *Korematsu* as precedent for a sweeping Muslim registry and tracking system. California Representative Mark Takano denounced Higbie's remarks: "People connected to the incoming Administration are using my family's [racial incarceration] experience as a precedent for what President-elect Trump could do."[192] Takano added that "[t]hese comments confirm many Americans' worst fears about the Trump Administration, and they reflect an alarming resurgence of racism and xenophobia in our political discourse."[193]

The Council on American-Islamic Relations characterized Higbie's reliance upon the internment as precedent as "absolutely deplorable"[194] and

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Responds to Backlash over Refugee Comments, RICHMOND TIMES-DISPATCH (Nov. 19, 2015), http://www.richmond.com/news/virginia/article_c5b3104c-8ef0-11e5-a572-0b9c9e27d0cc.html/ [https://perma.cc/T54B-T8BB] (noting demands for Bower's resignation).

189. U.S. Representative Doris Matsui declared, "We know that there is much fear after the heinous attacks on the people of France. Fear can be understood, but fear-mongering has no place in the determination to make us safe. It only adds to more fear." Hirai, *supra* note 55 (quoting Matsui).

190. U.S. Representative Mike Honda spoke of his firsthand knowledge of the repercussions of wartime incarceration and sharply criticized Bowers's, Casada's, and Morgan's comments. Hirai, *supra* note 55.

191. Bowers apologized "to all those offended by my remarks . . . . I apologize to all Americans of Japanese descent. . . . It's not in my heart to be racist or bigoted." Heather Rousseau, *Roanoke Mayor Bowers: 'I Apologize to All Those Offended by My Remarks*,*'* ROANOKE TIMES (Nov. 20, 2015), http://www.roanoke.com/news/politics/roanoke/roanoke-mayor-bowers-i-apologize-to-all-those-offended-by/article_cd81a43c-b946-5488-aeee-9cdc156de49c.html/ [https://perma.cc/PU4F-FSAZ] (quoting Bowers).

192. Tal Kopan & Jason Kurtz, *Trump Backer Further Explains Internment Comments*, CNN (Nov. 17, 2016), http://www.cnn.com/2016/11/17/politics/trump-supporter-internment-muslim-registry/ [https://perma.cc/8H5L-HAV2] (quoting Takano's statement).

193. *Id*. Several representatives joined in Takano's sentiment. The Democratic Representative of Minnesota, Keith Ellison, pledged that if the Trump administration "moves forward with the racist and divisive policies his team have been advocating for, we will be the first ones to stand up to him [and] . . . tell him, 'No.'" Kat Chow, *Renewed Support For Muslim Registry Called 'Abhorrent*,' NPR (Nov. 17, 2016), http://www.npr.org/sections/codeswitch/2016/11/17/502442853/renewed-support-for-muslim-registry-called-abhorrent/ [https://perma.cc/HFD5-MXAJ]. The Democratic Representative of California, Judy Chu, rejected Higbie's proposition and declared, "Any proposal to force American Muslims to register with the federal government, and to use Japanese imprisonment during World War II as precedent, is abhorrent and has no place in our society." *Id.* The Democratic Representative of California, Mike Honda, remarked, "[N]o one should go through what my family and 120,000 innocent people suffered regardless of their race or religion or any other way they would choose to try and divide us." *Id.*

194. *See* Bromwich, *supra* note 83 (quoting Robert McCaw, spokesman for the Council on American-Islamic Relations); *see also* Mohamad Bazzi, *Commentary: What Trump Should Do About Anti-Muslim Hate Crimes*, REUTERS (Nov. 24, 2016), http://www.reuters.com/article/us-hate-crimes-commentary-idUSKBN13I1HM/ [https://perma.cc/XB8G-MGHG] (reporting that following Trump's

warned that it would "return America to one of the darkest chapters of its history."[195] The director of Anti-Defamation League announced that "if one day Muslims will be forced to register, that is the day that this proud Jew will register as a Muslim."[196]

When President Trump issued the January 2017 Muslim exclusion and removal orders, public protests erupted.[197] Those protests built on earlier organized resistance. Combined with critical legal advocacy, those efforts temporarily blocked enforcement of the most prominent executive order.[198] The Ninth Circuit Court of Appeals, in denying the government's request to stay the lower court's nationwide restraining order, cited "irreparable harm" to wide swaths of Muslims and to the states.[199] It also deemed factually unsubstantiated (thus far) the government's national security claim of "urgent need."[200] And it rejected the government's contention that national security restrictions of noncitizens liberties should be "unreviewable" by the courts.[201]

The long-term impacts of this type of front-end advocacy are uncertain. What is certain is that this advocacy has piqued public awareness, spurred watch groups, and built a platform for immediate public criticism of and preventive action against newly unfolding repressive policies and practices. And it has placed the courts and their "cultural performance"[202]—and the very idea of judicial independence—on center stage.

B. Back-end Accountability

Combined critical legal advocacy[203] and political pressure are essential

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successful presidential election, the Southern Poverty Law Center documented more than 400 incidents of "hateful harassment and intimidation" of minorities and attributing the incidents to the climate created by Trump and his top advisers).

195. *See* Bromwich, *supra* note 83 (covering the immediate backlash to Higbie's inflammatory remarks).

196. *Id.*

197. *See supra* note 6 and accompanying text

198. *See* Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (entering nationwide temporary restraining order).

199. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (rejecting Justice Department's motion to stay lower court's temporary restraining order).

200. *Id.* at 1168.

201. *Id.* at 1161–64; *see infra* notes 247–251 and accompanying text.

202. Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue,* 16 HAW. L. REV. 1 (1994) (characterizing the dynamic impact of the legal process on altered public understandings as a "cultural performance").

203. Critical legal advocacy encompasses,

> critical legal argument by lawyers and civil and human rights organizations aimed at shaping judges' threshold selections of the level of judicial scrutiny, and ultimately the judges' response to the specific legal challenges to executive actions. . . . [And by supplementing] traditional legal arguments . . . critical legal advocacy aims to reveal what is really at stake, who benefits and who is harmed . . . who wields the behind-the-scenes power, which social

to a second task. That task is for legal and community advocates, policymakers, businesses and journalists to be "assertive at the back-end – to call out injustice after it occurs, to spell out the damage it does to real people [and communities] in our midst and to our constitutional democracy, and to demand accountability to principles of equality and due process."[204] The aim is to rectify injustice.[205] And the demand for accountability is expressed through advocacy and pressure for heightened judicial scrutiny of proffered government justifications for curtailing essential democratic liberties.[206]

The task is crucial because uncertainty persists at the back-end. Some courts embrace an exceedingly deferential judicial posture, particularly where the president acts with congressional authorization,[207] relying upon, if not citing, the 1944 *Korematsu* majority.[208] In this fashion, the Supreme

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> values are supported and which are subverted, how political concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision.

Yamamoto, *supra* note 179, at 285, 291–92.

204. Yamamoto & Serrano, *supra* note 9*,* at 60.

205. *See generally* Yamamoto, *supra* note 179.

206. For an illustration of critical legal advocacy aimed at back-end accountability, see Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343); *see also* BANNAI, *supra* note 135, at 205. In *Rasul v. Bush*, Guantanamo Bay detainees were held incommunicado, without charges or access to counsel, and with no opportunity to contest their confinement as "enemy combatants." 542 U.S. at 472. When they sued, the government argued that the courts had no power to hear their claims. *Id.* at 475. *Korematsu*'s amicus brief urged the courts to carefully scrutinize the government's claims of necessity for abrogating the right to habeas corpus relief:

> The executive and legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored.

Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *supra*, at *4.

207. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson established a three-tier framework for executive wartime actions, with maximum presidential power when acting in conjunction with Congress and with the "lowest ebb" of presidential power when acting in opposition. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). But in *Boumediene v. Bush*, the Supreme Court implicitly rejected Justice Jackson's three-tier framework. 553 U.S. 723, 769–70 (2008). Rather than deferring to the combined executive and legislative policy denying habeas corpus relief to Guantanamo detainees, the Court closely scrutinized (and rejected as unfounded) the government's factual assertions of military necessity. *Id.*; *see also* Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 1026 (2011).

208. *See, e.g.,* Hamdi v. Rumsfeld, 296 F.3d 278, 283–84 (4th Cir. 2002) (agreeing with the government's argument that "courts may not second-guess the military's determination that an individual is an enemy combatant," confirming that "its determinations . . . [are the] final word," and declaring "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect [deference] at every step"); *see also* Kent v. Dulles, 357 U.S. 116, 128 (1958) (highlighting that "[i]n a case of comparable magnitude [*Korematsu*], we allowed the Government in time of war" to restrict their liberties "only on a showing of the gravest imminent danger to the public safety") (internal quotation marks omitted); Harisiades v. Shaughnessy*,* 342 U.S. 580, 591 (1952) (citing *Korematsu* and declaring, "When citizens rais[e] the Constitution as a shield against

Court in its 1993 *Reno* decision implicitly recognized *Korematsu* as precedent.[209] Justice Scalia, writing for the majority, employed a highly deferential approach to reject juvenile detainees' due process claims challenging their indefinite detentions en masse.[210] In dissent, Justice Stevens pinpointed Scalia's reliance on, but without citation to, the "one notable exception" to the rule of individualized due process—*Korematsu*.[211] The "Court's holding in *Korematsu* obviously supports the majority's analysis."[212] The Supreme Court exhibited similar *Korematsu*-like deference in its 2010 *Holder* decision in upholding chilling restrictions on free speech and association activities of a nonprofit humanitarian organization on thinly substantiated national security grounds.[213]

Other courts chafe at the jurisprudential notion that the judiciary should largely defer to the government whenever the government claims national security to justify curtailing civil liberties. They cite the *Korematsu* dissents and the *coram nobis* rulings as a cautionary tale and reject turning a blind eye to abuses by the elective branches.[214] These latter courts would undertake independent scrutiny as an integral separation-of-powers component of government accountability in a constitutional democracy.[215]

Justice Sotomayor overall perceives a "modicum of progress."[216] She sees judges, mindful of the need to accommodate both security and liberties, embracing heightened judicial solicitude. For instance, District Judge Robert G. Doumar in *Hamdi v. Rumsfeld*[217] carefully scrutinized the

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expulsion from their homes and places of business, the Court refuse[s] to find hardship a cause for judicial intervention").

209. Reno v. Flores, 507 U.S. 292 (1993).

210. *Id.* at 302, 315.

211. *Id*. at 344 n.30 (Stevens, J., dissenting).

212. Justice Stevens attributed the "majority's reluctance to rely [expressly] on *Korematsu*" to Congress' recognition through the Civil Liberties Act that *Korematsu* was wrongly decided. *Id.*

213. As in *Korematsu*, the majority in *Holder v. Humanitarian Law Project* articulated a strict scrutiny standard of review of the government's apparent curtailment of a humanitarian organization's fundamental rights to free speech and association. 561 U.S. 1, 14–15, 28 (2010). Yet, the Court deferred to the government's largely unsubstantiated factual claim of national security necessity. *Id.* at 35. The Court accepted without careful review the State Department employee Kenneth R. McKune's bare conclusory affidavit. *Id.* at 33. The majority declared that the government, "when seeking to prevent imminent harms in the context of international affairs and *national security*, is *not required to conclusively link all the pieces in the puzzle* before we grant weight to its empirical conclusions." *Id*. at 35 (emphasis added). In dissent, Justice Breyer highlighted both the government's shortcomings in satisfying its evidentiary burden and the majority's failure to insist upon "specific evidence rather than general assertion." *Id*. at 62 (Breyer, J., dissenting).

214. *See, e.g.*, Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015) (rejecting judicial deference and citing the *Korematsu coram nobis* decision); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

215. *See infra* notes 217–246 and accompanying text.

216. Yamamoto, *supra* note 166, at 78–79 (citing Justice Sonia Sotomayor's observation about a "modicum of progress").

217. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir.

executive branch's designation of American citizen Hamdi as an "enemy combatant."[218] While recognizing deference due to the executive branch in matters of military personnel and tactics,[219] Judge Doumar, a Reagan appointee, announced the court's commitment to "meaningful judicial review"[220] of the government's proffered evidence justifying Hamdi's continued detention. Judge Doumar's demand for bona fide government proof of necessity underscored a well-recognized if unevenly employed "watchful care" approach to judicial scrutiny—notably articulated in *Ex parte Milligan*.[221]

U.S. District Judge Katherine B. Forrest similarly scrutinized the government's necessity claim in *Hedges v. Obama*.[222] American citizens, writers, journalists and civil liberties advocates sued the President, challenging their potential indefinite incarceration under the National Defense Authorization Act.[223] Plaintiffs feared their free speech and associations would subject them to prolonged military detention as vaguely defined supporters of terrorist groups.[224]

The government urged the district court essentially to "stay out of it."[225] It asserted that the court should defer to the executive and legislative

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2003), *vacated*, 542 U.S. 507 (2004).

218. Judge Doumar proclaimed, "The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time." *Hamdi*, 243 F. Supp. 2d at 536.

219. *Id.* at 532.

220. *Id.* at 532. The court announced that meaningful judicial review must, at a minimum, determine:

> (1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.
>
> (2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural [Due Process] requirements . . . .
>
> (3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security. . . .

Id. at 532–33.

221. *Ex parte Milligan* held that the military lacked jurisdiction to try and punish civilians, even during times of national rebellion, like the Civil War, when civil courts are open and functioning. Noting that a civilian's constitutional rights to a civil court trial by jury "cannot be frittered away on any plea of state or political necessity," the Court declared that the judiciary during war must exercise great diligence to protect constitutional liberties against the aroused "passions of men" and the weakened "restraints of law." 71 U.S. 2, 123–24 (1866). The Court then determined that "these safeguards need, and should receive, the *watchful care* of those intrusted with the guardianship of the Constitution and laws." *Id.* at 124 (emphasis added). *See also* Yamamoto, *supra* note 129, at 28–30 (explaining that the Court ignored *Ex parte Milligan* in *Korematsu* and inappropriately distinguished *Ex parte Milligan* in *Hirabayashi* and *Ex parte Endo*).

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

223. Section 1021(b)(2) of the Act purported to affirm the President's authority to detain designated "enemy combatants." Pub. L. No. 112-81, 125 Stat. 1298 (2011).

224. *Hedges*, 890 F. Supp. 2d at 427.

225. *See id.* at 430 (interpreting the government's argument as telling the Court to "'stay out of

branches' contention that national security justified the restrictions and, on that basis, uphold the government's expansive security reach.[226] Judge Forrest acknowledged the importance of the government's need for latitude in safeguarding the country.[227] She maintained, however, that this partial deference "does not eliminate the judicial obligation to rule on properly presented constitutional questions,"[228] especially because "[c]ourts must safeguard core constitutional rights."[229] Judge Forrest therefore subjected the restrictions to "exacting scrutiny"[230] and concluded that the executive and legislative branches failed to show that the restrictions—particularly indefinite detention without procedural safeguards—were necessary.[231]

In *Hassan v. City of New York,*[232] American Muslim communities claimed to be targets of excessive post-9/11 surveillance and harassment by New York City police. They sued "to affirm the principle that individuals may not [be subject to] pervasive surveillance that cause[s] them continuing harm simply because they profess a certain faith."[233] The district court granted the City's motion to dismiss.[234] On appeal, the Third Circuit concluded that plaintiffs had pleaded enough factual content to state a claim.[235] The City argued that, nevertheless, the program was justified by

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it'—that is, exercise deference to the executive . . . and decline to rule on the statute's constitutionality").

226. The government argued that the statute's relation to military detention during wartime justifies §1021(b)(2)'s breadth and requires judicial deference. *Id.* at 430.

227. *Id.* at 430 ("The Court is mindful of the extraordinary importance of the Government's efforts to safeguard the country from terrorism.").

228. *Id.* at 430.

229. *Id.* at 430.

230. Instead, Judge Forrest delineated the heightened level of governmental proof required "[t]o pass this 'most exacting scrutiny,' . . . § 1021(b)(2) must be 'justified by a compelling government interest' and 'narrowly drawn to serve that interest.'" *Id.* at 461. Forrest emphasized that "courts should look at such restrictive regulations [by the government] with exacting scrutiny and ask whether it is '*actually necessary*' to achieve its interests." *Id.* at 465. Forrest thus demanded that the government produce probative evidence to pass the "most exacting scrutiny." *Id.* at 472.

231. *See id*. at 461–62. "Although there may be a very compelling government interest . . . the Court finds that § 1021(b)(2) is not narrowly tailored in any way. The imposition of indefinite military detention, without the procedural safeguards of precise definition of what can subject an individual to such detention . . . cannot be said to be narrowly tailored." *Id.* On appeal the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui submitted a supporting amicus brief on behalf of their fathers. Brief of Amici Curiae Karen and Ken Korematsu, et al. in Support of Plaintiffs-Appellees and Affirmance, Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012) (Nos. 12-3176, 12-3644). Referring to the *coram nobis* revelations, the brief asserted "the internment was far more than an unfortunate 'mistake,' as many had concluded, but was the product of a fundamental and pervasive abuse of [executive] power" and a deferential Supreme Court. *Id*. at *2. The Court of Appeals reversed on standing grounds. Hedges v. Obama, 724 F.3d 170, 173 (2d Cir. 2013).

232. Hassan v. City of New York, 804 F.3d 277, 285 (3d Cir. 2015).

233. *Id.* at 284. Plaintiffs sued the City of New York for damages for discriminating against them as Muslims. They also sought expungement of any unlawfully obtained records, a judgment declaring that the City had violated fundamental rights, and an order enjoining their future discriminatory surveillance. *Id.* at 288.

234. *Id.* at 288.

235. *Id.* at 297 (concluding "because Plaintiffs have pleaded ample 'factual content [that] allows

national security.[236] The court disagreed. It acknowledged that elective branches possess broad power over most security matters.[237] To justify impinging upon protected liberties, however, "[t]he gravity of the threat alone cannot be dispositive."[238] The government's necessity contention needs to "be substantiated by objective evidence."[239]

To legitimize careful scrutiny, Judge Thomas L. Ambro, writing for the Third Circuit, recounted lessons from the World War II internment and the McCarthy-era witch hunts about government persecution of innocent people driven by "unfounded fears."[240] Judge Ambro first highlighted how those fears led to harsh discrimination against one hundred thousand innocent Japanese Americans on an unfounded claim of necessity and how a deferential judiciary passively accepted the government's misrepresentations:

> Yet when these citizens pleaded with the courts to uphold their constitutional rights, we passively accepted the Government's representations that the use of such 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.[241]

Judge Ambro then highlighted how that passive judicial stamp of approval sacrificed fundamental freedoms and led later to national regret:

> The World War II relocation-camp cases and the Red scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.[242]

Judge Ambro's summary account of the World War II internment focused the appellate court's specific inquiry into alleged police harassment and disruption of Muslim religious and community life in the name of national security. Turning a blind eye in *Korematsu*, he observed, enabled a Supreme Court majority to constitutionally validate the continuing incarceration of innocent citizens and noncitizens on a badly flawed factual claim of necessity—something the Third Circuit would not countenance in

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[us] to draw the reasonable inference that the [City] is liable for the misconduct alleged' . . . we decline to dismiss their Complaint") (citing Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009)).

236. *Id.* at 298. The City argued that "the more likely explanation for the NYPD's actions was public safety rather than discrimination based upon religion." *Id*. at 306.

237. *Id.* at 306 (acknowledging "a principal reason for a government's existence is to provide security").

238. *Id.*

239. *Id.*

240. *See generally* Mari J. Matsuda, *Foreword: McCarthyism, the Internment and the Contradictions of Power*, 19 B.C. THIRD WORLD L.J. 9 (1998) (describing McCarthy's damaging persecution of Americans wrongly accused of communist ties).

241. *Hassan*, 804 F.3d at 307 (emphasis added) (citations omitted).

242. *Id.* (emphasis added) (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 635 (Marshall, J., dissenting)).

the case before it.[243]

Echoing Judge Patel's call for vigilance, Judge Ambro described what "[w]e have learned from experience"—that courts "must be most vigilant in protecting constitutional rights."[244] On behalf of the Third Circuit, Judge Ambro therefore cautioned all federal judges to avoid similar future injustices and to apply "the same rigorous standards [of judicial scrutiny] even where national security is at stake."[245]

> Unconditional [court] deference to the government's . . . invocation of emergency . . . has a lamentable place in our history, . . . bending our constitutional principles merely because an interest in national security is invoked. . . . We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights.[246]

In 2017, the Ninth Circuit similarly embraced judicial vigilance in language that mirrored Judge Ambro's. The court denied the Trump Administration's motion to stay the lower court's nationwide temporary order restraining enforcement of the President's Muslim exclusion and removal order.[247] In doing so, it soundly rejected the Justice Department's broad contention that "national security" renders an executive order's immigrant restrictions judicially "unreviewable" even if the order transgresses constitutional freedoms. Total judicial deference, the court observed, "runs contrary to the fundamental structure of our constitutional democracy."[248] The judicial role "will sometimes require the resolution of litigation challenging the constitutional authority of one of the three branches."[249]

The Ninth Circuit therefore chided the Justice Department for failing to submit evidence of "urgent need" to justify the executive order's immediate enforcement. As in *Korematsu,* "[r]ather than present evidence to explain the need for the Executive Order, the Government has taken the position" that the courts simply must acquiesce.[250] While counseling deference to executive and legislative national security measures generally, the Ninth Circuit declared that the "Government's 'authority and expertise in [national security] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals,' even in times of war."[251]

The judges in these cases evinced—in Justice Sotomayor's words—a

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243. *See supra* notes 134–144 and accompanying text (discussing *Korematsu coram nobis* case).
244. *Hassan*, 804 F.3d at 306–07.
245. *Id.* at 306.
246. *Id.* at 306– 07 (citation and internal quotation marks omitted).
247. Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017).
248. *Id*. at 1161.
249. *Id.* (internal quotation marks omitted).
250. *Id.* at 1168.
251. *Id.* at 1163.

"modicum of progress" toward shaping the judicial role and affirmatively blocking or removing the law's stamp of approval on government sponsored injustice.

CONCLUSION—LOOKING BACK TO FORGE AHEAD

Despite incremental progress, the Supreme Court has never formally overruled its sorely discredited 1944 *Korematsu* decision. Most significant, it has not definitively rejected the case's contested principle—advanced by the Trump Justice Department—that when the government asserts national security, the courts should "stay out of it," even when the government transgresses civilians' fundamental liberties.

Harassment of and violence against Muslim individuals and communities has intensified. Republican presidential candidates called loudly for broad Muslim surveillance, exclusion, and "sequestration." Then-candidate Trump bolstered his call for a complete and total shutdown of Muslim entry with a call for torturing Muslim terror suspects. And after Trump's election, transition insiders signaled coming repressive religion-targeting measures and cited the Japanese American internment as precedent. The President followed with his thinly vetted January 2017 Muslim exclusion and removal executive orders.

The questions posed earlier thus remain intensely relevant today: "What will happen when those profiled, detained, harassed or discriminated against [or tortured] turn to the courts for legal protection? How will the courts respond to the need to provide for society's security and to protect fundamental democratic values?"

One response is that former Justice Scalia is correct: a serious violation of peoples' liberties en masse could happen again, and, following former Chief Justice Rehnquist's and the Trump Justice Department's lead, conservative judges may well defer to the government's loosely or even falsely grounded assertion of national security necessity. Another and contrasting response is that many judges now will carefully scrutinize the government's national security justifications for curtailing liberties essential to a functioning democracy—endeavoring to accommodate both security and liberty. Those courts, in an exercise of judicial independence, will require a bona fide government showing of "urgent need" and strike down unsubstantiated sweeping restrictive measures. Lower court rulings in *Hassan*, *Hedges*, and *Washington* offer a glimpse.

Legal commentators, at this juncture, tend to end their national security-civil liberties analyses of Supreme Court cases by noting divergent judicial approaches and expressing worry yet cautious hope for the future.

The *Loaded Weapon Revisited* steers further analysis in a different direction—it does so in broad fashion, leaving explication for longer works. It outlines the realpolitik dynamics of how: How we as a society are to continue overall progress in the face of politicians' regressive policy

prescriptions and public fear-mongering; and how, "in times of international hostility and antagonism," as Judge Patel cautioned, "our institutions, legislative, executive and judicial, [are to] exercise their authority to protect all citizens from the . . . fears and prejudices . . . so easily aroused."

Peering into the future, for those committed to both security and liberty, this Article charts realpolitik dynamics along dual paths of critical legal advocacy (for heightened judicial scrutiny and against mass ethnic or religious restrictions) and public pressure (to compel policymakers' and judges' accountability). The first path, at the front-end, is through organizing, educating, and litigating to prevent politically popular abuses of vulnerable communities before they occur. The second, at the back-end, is through blocking or removing "the law's stamp of approval" upon those abuses once they occur. For it is the failure at both the front and back ends—where national security fears "coupled with racism or nativism [are] backed by the force of law"—that generates deep and lasting social injustice.

Combined critical legal advocacy and public pressure—through assertive communities supported by justice groups, lawyer and scholar advocates, attuned media, and an informed public—heighten prospects for shutting the "door to discriminatory actions against other minority groups in the passions of tomorrow." More broadly, collective action for both prevention up-front and accountability at the back-end empowers communities to break the cycle Justice Jackson envisioned of "repetition that embeds that principle" of judicial passivity and harsh government discrimination "more deeply in our law and expands it to new purposes."

It may be this kind of collective strategic action that compels the Supreme Court to formally, and finally, overrule *Korematsu*—both its approval of the internment and its principle of unconditional court deference—while reclaiming the *Korematsu coram nobis* call for judicial vigilance.

This, then, is the post-9/11 and Trump era import of Justice Jackson's loaded weapon warning in *Korematsu* and Judge Patel's call for vigilance. Not so much about what government officials might attempt to do during the heat of the public moment. But rather, what we as a civil society can do to proactively prevent or rectify the deep, lasting injustice we would otherwise later come to regret.