“Loaded Weapon” Revisited: The Trump Era Import of Justice Jackson’s Warning in *Korematsu*

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

INTRODUCTION .................................................................5
I. FROM 9/11 INTO THE TRUMP ERA ........................................10
A. 9/11 .................................................................10
B. Paris, San Bernardino and the Presidential Campaign—Calls
   for Sweeping Surveillance, Exclusion, and Detention ..............15
C. January 2017 Executive Orders—Religion-Targeting
   Exclusion and Removal .................................................18
II. LEGAL CHALLENGES TO THE WORLD WAR II INTERNMENT ...........23
A. The World War II Supreme Court Rulings ..........................23
B. The Coram Nobis Reopenings and Enuing Redress ..................27
C. Still Standing as Precedent? .........................................30
III. LAW AND POLITICS—INTO THE FUTURE ............................32
A. Front-end Prevention ...............................................35
B. Back-end Accountability .............................................39
CONCLUSION—LOOKING BACK TO FORGE AHEAD .......................46

INTRODUCTION

Even though the World War II internment† 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

DOI: https://dx.doi.org/10.15779/Z38VD6P434
Copyright © 2017 Regents of the University of California.
† 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.
The authors appreciate the valuable research and editing assistance of Anna Jang.
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 internment” encompasses the initial curfew, the following forced removal (exclusion,
   relocation, or evacuation), and ultimately the mass incarceration. ERIC K. YAMAMOTO, MARGARET
   CHONG, 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.”

Anticipating the Trump era and the security and liberty tensions following the 2015 Paris and San Bernardino attacks, Justice Scalia envisioned a politically driven mass exclusion or segregation of Muslims in America. Observing that “in times of war, the laws fall silent,” 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. 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. 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. These post-into-the-

---


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

4. See supra note 2 and accompanying text.


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. As described in Professors Yamamoto and Serrano’s 2002 Loaded Weapon essay, 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.”

The 1984 coram nobis reopening of Korematsu and the 1983 Congressional Commission investigation 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.

Together, the Hirabayashi, Yasui, and Korematsu coram nobis rulings and the congressional investigation laid the cornerstones for a path-forging presidential apology and legislative reparations.

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.” Equally significant, for those jurists and others, Korematsu’s contested principle of “unconditional judicial deference” to the government’s poorly substantiated claim of

---

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

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—revivify Justice Jackson’s warning. That warning and U.S. District Judge Marilyn Hall Patel’s later Korematsu coram nobis call for judicial vigilance 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.

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 . . . .

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.
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\(^1\) with a call for torturing Muslim terror suspects.\(^2\) 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.\(^3\)

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*.\(^4\) 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.\(^5\)

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.\(^6\) 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

---


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


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 security.

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. 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.” It did so by expanding executive and military powers to pursue a war against terrorism. Some of “these measures [were] needed and only reasonably burdensome . . . . But others, like secret detentions, [were] immensely troubling.” 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.

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. After 9/11, claims of wrongful government and business

30. Id. at 54.
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/dhsc/vol2/iss1/4/ [https://perma.cc/A477-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://www2.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 Muslims 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

\(^{36}\) 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.” The “public would be less concerned about any perceived erosion of civil liberties than they are about protecting their own lives.”

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.”

Public observers and civil liberties organizations—many themselves facing initial sharp criticism for standing up—challenged government abuses through protests, public education, and litigation. With the Iraq way we can thwart is to make sure that there is a balance between protecting civil rights, but also protecting safety at the same time.” See Lynette Clement, 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”).


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).


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].

War morass and the end of the Bush presidency, public opinion appeared to sway toward the center,\textsuperscript{35} with concerns about both security and fundamental freedoms. The Obama Administration stopped some of the abuses, including torture,\textsuperscript{46} although it continued wide-ranging surveillance programs\textsuperscript{47} and drone killings.\textsuperscript{48}


\textsuperscript{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”).

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. With Syrian civil war refugees pouring into Europe, gunmen and suicide bombers attacked Parisians, killing 130 and wounding hundreds. Shortly after, a Muslim couple, ISIS followers without direct ISIS contact, killed 14 in San Bernardino, California. In early 2016, suicide bombers killed thirty and wounded hundreds at the Brussels airport and metro stations. 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.


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,” [but he said that investigators had not found evidence that the killers were part of a larger group or terrorist cell].” Id.


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.”

Like Tennessee Republican Casada, 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.

Fanning similar flames of fear-mongering immediately after the 2015 Paris attacks, Roanoke, Virginia, Mayor David Bowers invoked the Japanese American internment as justification for mass internment of Muslims. Bowers called for the suspension of local assistance to Syrian refugees and for sweeping incarceration (“sequester”) as a response to public fears. “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.”

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].


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


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


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. 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. 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. And third, the U.S. Congress passed and President Reagan signed the Civil Liberties Act of 1988. That legislation acknowledged that the actual causes for the mass racial incarceration were “racial prejudice, wartime hysteria, and a failure of political leadership,” and it apologized for the United States’ race-based violation of civil liberties and conferred individual reparations.

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.” Indeed, Bowers’s national security story spun wildly off kilter. 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. Second, after the San Bernardino and Orlando attacks, then-

---


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


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).


70. See Dean Obeidallah, Know Whose Ideas About Muslims Are Scarier Than 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

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_575dabece4b0ed23ca85ad5/ [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 Hirshfeld 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.


74. Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. at 8978.
vetting” plan for future Muslim entry. 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.”

The executive mandates justified the sweeping restrictions as necessary to “protect the American people from terrorist attacks”—citing the government’s failure to properly vet the 9/11 Muslim hijackers/bombers (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 known for torture. It also potentially removed President Obama-imposed restrictions on Muslim detainee abuse.

Shortly after the 2016 election, presidential transition advisor Kris Kobach signaled these coming Muslim exclusionary measures. 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. “[I]t is legal,” Trump’s transition policy advisors “say [a Muslim registry and tracking system will] hold Constitutional muster.”


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

78. Id.


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”).


84. On Fox, Trump Supporter Carl Higbie Calls 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

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

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.
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?**

U.S. courts during times of national distress tend to take a hands-off approach in reviewing government national security restrictions. 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, Hirabayashi, and Yasui legal challenges to the internment 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,”** the Supreme Court in Korematsu passively accepted the military’s...

---

100. Yamamoto & Serrano, supra note 9, at 59.
101. Id. at 55.
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.
unsubstantiated assertions of “pressing public necessity” 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. Justice Hugo Black, a former Ku Klux Klan member, 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.” Relying upon what turned out to be significantly falsified military claims of Japanese American disloyalty and insufficient time to ascertain disloyalty individually, the Court upheld the constitutionality of the forced removal leading to mass incarceration. 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.” It made no bona fide showing of “immediate, imminent, and impending” public danger. Justice Murphy crucially observed that government intelligence agencies investigated West Coast Japanese Americans and “not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor.” Indeed, after thorough investigations the Federal Bureau of Investigation, Federal Communications Commission, and the Office of Naval Intelligence

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.\textsuperscript{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.\textsuperscript{118} The British government conducted over 50,000 individual hearings during the same approximate time frame.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{122}

In addition to anti-Asian and agribusiness organizations,\textsuperscript{123} news media and
government officials, including then-California Attorney General Earl Warren, had pushed for the politically popular security measures.

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.” He concluded by characterizing the Court’s decision as a descent into “the ugly abyss of racism.”

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. 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 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. DeWitt himself had not testified under oath.

_Over and produce everything the Jap grows._

Id.

---


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.\textsuperscript{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.”\textsuperscript{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:

\cite{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).}

\begin{itemize}
\item \textsuperscript{131}. Korematsu, 323 U.S. at 245 (Jackson, J., dissenting).
\item \textsuperscript{132}. \textit{Id}. (Jackson, J., dissenting).
\item \textsuperscript{133}. \textit{Id}. at 246 (Jackson, J., dissenting) (emphasis added).
\item \textsuperscript{134}. Drawing upon World War II government documents, discovered by researchers Peter Irons and Aiko Herzig-Yoshinaga, the Congressional Commission’s investigation and the \textit{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 \textit{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


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 “declined[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.


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.\textsuperscript{143}

In concluding, Judge Patel echoed Justice Jackson’s loaded weapon warning forty years earlier. She characterized Korematsu—the combined original decision and the \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{146}

\textsuperscript{143} AMAMOTO ET AL., supra note 1, at vii. Korematsu, 584 F. Supp. at 1424; see supra note 134 (describing the fabricated, altered and suppressed evidence).

\textsuperscript{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 \textit{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.

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

\textsuperscript{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, \textit{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, \textit{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 and scholars,\(^{150}\) as well as by the *coram nobis* decisions, the Court’s original ruling formally still stands—if

---


\(^{148}\) 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).

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.”\(^{156}\)

\(^{152}\) 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.

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, 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 sociolgal 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. 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.”

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—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

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.


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

159. Id.

“hand of any authority that can bring forward a plausible,” even if exaggerated or falsely grounded, “claim of an urgent need.”

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) differs from the environment of the original World War II internment (with few calling for independent judicial scrutiny as a check on government power). Recent litigation now challenges wide-ranging government civil liberties violations, placing security and liberty tensions squarely in the public eye. Court challenges,

---

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.


public education, and organizational advocacy\textsuperscript{165} collectively signal what Justice Sonia Sotomayor describes as a “modicum of progress.”\textsuperscript{166} But politicians’ regressive prescriptions in the Trump era, with its deeply conservative national security leadership, foreclose deep political backsliding.\textsuperscript{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.\textsuperscript{168} The second, at the back-end, is through blocking or removing “the law’s stamp of approval” of those abuses once they occur.\textsuperscript{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.”\textsuperscript{170}
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 BANNAH, 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.\textsuperscript{177}

Other front-end actions after 9/11 contributed to heightened scrutiny by domestic and international human rights organizations.\textsuperscript{178} They also fueled Congressional investigations into regressive Bush Administration policies.\textsuperscript{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.”\textsuperscript{180} Looking forward, Feinstein highlighted the importance of preventive action. She pressed the

\begin{flushright}
Fred Korematsu, \textit{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.\ldots 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.


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.” \textit{STUDY OF THE CIA’S DETENTION AND INTERROGATION PROGRAM}, supra note 37, at 4.
\end{flushright}
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

---

181. *Id.*
185. See Salahi, supra note 69.
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).
These sharp responses, along with strong criticism by U.S. Representatives Doris Matsui and Mike Honda, coalesced into potent and timely frontline preventive action. In the face of mounting criticism, Bowers apologized to “those offended” and effectively retracted his call.

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.” 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.

The Council on American-Islamic Relations characterized Higbie’s reliance upon the internment as precedent as “absolutely deplorable” and

---


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.


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/ (quoting Takano’s statement).

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/ (reporting that following Trump’s
warned that it would “return America to one of the darkest chapters of its history.” 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.”

When President Trump issued the January 2017 Muslim exclusion and removal orders, public protests erupted. Those protests built on earlier organized resistance. Combined with critical legal advocacy, those efforts temporarily blocked enforcement of the most prominent executive order. 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. It also deemed factually unsubstantiated (thus far) the government’s national security claim of “urgent need.” And it rejected the government’s contention that national security restrictions of noncitizens liberties should be “unreviewable” by the courts.

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”—and the very idea of judicial independence—on center stage.

B. Back-end Accountability

Combined critical legal advocacy and political pressure are essential

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


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.


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.” The aim is to rectify injustice. And the demand for accountability is expressed through advocacy and pressure for heightened judicial scrutiny of proffered government justifications for curtailing essential democratic liberties.

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, relying upon, if not citing, the 1944 Korematsu majority. In this fashion, the Supreme

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.


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 raise[e] the Constitution as a shield against
Court in its 1993 Reno decision implicitly recognized Korematsu as precedent. Justice Scalia, writing for the majority, employed a highly deferential approach to reject juvenile detainees’ due process claims challenging their indefinite detentions en masse. 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. The “Court’s holding in Korematsu obviously supports the majority’s analysis.” 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.

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. These latter courts would undertake independent scrutiny as an integral separation-of-powers component of government accountability in a constitutional democracy.

Justice Sotomayor overall perceives a “modicum of progress.” 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 carefully scrutinized the

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

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”).
YAMAMOTO CLEAN_formatted_4.24

(YƠballs) designation of American citizen Hamdi as an “enemy combatant.” While recognizing deference due to the executive branch in matters of military personnel and tactics, Judge Doumar, a Reagan appointee, announced the court’s commitment to “meaningful judicial review” 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.

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

The government urged the district court essentially to “stay out of it.” It asserted that the court should defer to the executive and legislative

---

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).


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).


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. Judge Forrest acknowledged the importance of the government’s need for latitude in safeguarding the country. She maintained, however, that this partial deference “does not eliminate the judicial obligation to rule on properly presented constitutional questions,” especially because “[c]ourts must safeguard core constitutional rights.” Judge Forrest therefore subjected the restrictions to “exacting scrutiny” and concluded that the executive and legislative branches failed to show that the restrictions—particularly indefinite detention without procedural safeguards—were necessary.

In Hassan v. City of New York, 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.” The district court granted the City’s motion to dismiss. On appeal, the Third Circuit concluded that plaintiffs had pleaded enough factual content to state a claim. The City argued that, nevertheless, the program was justified by 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. 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.
230. 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).
231. 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.
232. Id. at 288.
233. Id. at 297 (concluding “because Plaintiffs have pleaded ample ‘factual content [that] allows
national security.\textsuperscript{236} The court disagreed. It acknowledged that elective branches possess broad power over most security matters.\textsuperscript{237} To justify impinging upon protected liberties, however, “[t]he gravity of the threat alone cannot be dispositive.”\textsuperscript{238} The government’s necessity contention needs to “be substantiated by objective evidence.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{237} Id. at 306 (acknowledging “a principal reason for a government’s existence is to provide security”).

\textsuperscript{238} Id.

\textsuperscript{239} Id.


\textsuperscript{241} Hassan, 804 F.3d at 307 (emphasis added) (citations omitted).

\textsuperscript{242} Id. (emphasis added) (citing Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 635 (Marshall, J., dissenting)).
the case before it.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{248} The judicial role “will sometimes require the resolution of litigation challenging the constitutional authority of one of the three branches.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{251}

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

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