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## ***Korematsu* Overruled? Far From It: The Supreme Court Reloads the Loaded Weapon**

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Lorraine K. Bannai<sup>1</sup>

In *Trump v. Hawaii*, Justice Roberts, on behalf of a majority of the Supreme Court, upheld the Trump administration's ban on travel from mainly Muslim-majority countries despite abundant evidence that the ban was motivated by anti-Muslim hostility.<sup>2</sup> In response to Justice Sotomayor's powerful dissent, which observed the numerous ways in which the majority's reasoning paralleled the Court's reasoning in *Korematsu v. United States*, the infamous decision that upheld the mass removal of Japanese Americans during World War II, Justice Roberts said that "*Korematsu* has nothing to do with this case."<sup>3</sup> Despite attempting to distinguish the travel ban from the Japanese American incarceration, Justice Roberts took the opportunity to repudiate *Korematsu*: "*Korematsu* was gravely wrong the day it was decided, and has been overruled in the court of history, and—to be clear—has no place in law under the Constitution."<sup>4</sup>

WHAT DOES IT MEAN THAT THE COURT OVERRULED *KOREMATSU*?<sup>5</sup>  
DOES IT MEAN ANYTHING AT ALL?

There is, of course, some importance to the fact that, at least in words, the Supreme Court expressly stated what so many have known for years: that *Korematsu* was "gravely wrong." In so stating, it rightly said it erred 74 years earlier when it upheld the mass removal of an entire community.<sup>6</sup> However, the Court's purported overruling of *Korematsu* is hollow when, in the same breath, it affirmed a presidential proclamation born of branding a whole group of people as terrorists based on unfounded religious stereotypes.<sup>7</sup> At the same time it said it disavowed *Korematsu*, the Court applied the same dangerous reasoning it used in that case: it abdicated its role as a check on its co-equal branches of government by accepting, without question, the

government's claim that its actions were required by national security; it turned a blind eye to the foundation of prejudice, stereotype, and hate upon which the challenged orders rested; and, as a consequence, it has now "reloaded" the loaded weapon Justice Jackson feared when he wrote his *Korematsu* dissent.<sup>8</sup>

First, *what* exactly did the Court overrule when it overruled *Korematsu*? One can only guess. The Court in *Korematsu* embraced a number of dangerous principles, and, in *Trump v. Hawaii*, the Court failed to identify which principle or principles it was repudiating. For example, when most think of *Korematsu*, they think of it as infamously upholding the mass removal and incarceration of Japanese Americans—acts we know were based solely on their race.<sup>9</sup> But in overruling *Korematsu*, did the Court condemn only *that* wartime incarceration? Or can its ruling be read more broadly to condemn any removal or incarceration of a group based on race? Did it repudiate the removal and incarceration of Japanese Americans because, in hindsight, the government's evidence of military necessity was lacking, suggesting that such a race-based removal and incarceration would be proper on another set of facts?

While *Korematsu* is most often condemned for upholding an egregious racial discrimination, the decision has also rightfully been condemned for other reasons: because of the weak and illogical nature of its reasoning<sup>10</sup>; because it has been shown to have been decided on a fraudulent record<sup>11</sup>; and, as further explained next, because it set the perilous precedent that courts have no role when the government claims its actions are based on national security concerns.<sup>12</sup>

Although the Court failed to identify the aspect of *Korematsu* it overruled, given its conclusion upholding a presidential travel ban shown to be rooted in anti-Muslim animus, it overruled very little. One thing is clear: the Court's opinion itself shows it did not overrule one of the most dangerous aspects of *Korematsu*—the proposition that courts should step aside and defer to the government's actions whenever the government claims that they are justified

by national security.<sup>13</sup> Instead of burying *Korematsu*, the Court's opinion upholding the travel ban gave that dangerous principle of deference employed in *Korematsu* new life. Justice Sotomayor stated this point well in her dissent. While recognizing that the Court took an "important step" in "finally overruling *Korematsu*," it had done nothing to change its stance of judicial abdication upon which that decision was based.<sup>14</sup> She explained, "[b]y blindly accepting the government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."<sup>15</sup>

During World War II, the Supreme Court stepped aside when Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu asked it to rule unconstitutional the orders that led to the incarceration of 120,000 persons of Japanese ancestry.<sup>16</sup> The Court said that it had no role in questioning government decisions on issues involving national defense: "Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warring, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."<sup>17</sup> In *Hawaii v. Trump*, the Court similarly said it had no role in questioning the judgment of the president in the travel ban case: "we cannot substitute our own assessment for the Executive's predictive judgments on [national security] matters, all of which 'are delicate, complex, and involve large elements of prophecy.'"<sup>18</sup>

Thus, what still persists is the very real danger that whenever the government claims its actions are based on national security—even actions that may, in intent or impact, single out racial or religious groups—the courts will, as they did in *Korematsu* and *Trump v. Hawaii*, step aside and defer to the government's judgment, fail to serve their democratic function as a check

on government power, and fail to protect vulnerable communities as well as the rights and values contained in our constitution and laws.

Second, as it did during World War II, the Court accepted, without question, the government's self-serving "evidence" that its actions were justified. During World War II, in *Korematsu*, the government—lacking any specific evidence that Fred Korematsu or any Japanese American had committed or threatened to commit any acts of espionage or sabotage—based its claim of military necessity on the Final Report of General John L. DeWitt, Commander of the Western Defense who oversaw the program of removal and incarceration.<sup>19</sup> In his dissent in *Korematsu*, Justice Jackson criticized the Court's reliance on DeWitt's report: "[s]o 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."<sup>20</sup> In *Trump v. Hawaii*, the government and the Court similarly relied on an unsworn, self-serving report—a 17-page report by the Department of Homeland Security (DHS) purporting to summarize the results of a worldwide review of the extent to which various countries shared information about individuals seeking entry into the United States.<sup>21</sup>

Worse, however, was that while the Court in *Korematsu* was given a copy of DeWitt's report (albeit a copy later discovered to have been altered, as discussed below<sup>22</sup>), the government in *Trump v. Hawaii* refused to produce the DHS report allegedly supporting the travel ban, and the Court upheld the ban without even viewing it.<sup>23</sup>

As the *coram nobis* cases of the 1980s proved, the failure of courts to question and examine the government's claims of necessity can create fertile ground for fraud and misrepresentation. In those cases, Messrs. Korematsu, Yasui, and Hirabayashi brought successful *coram nobis* actions challenging their wartime convictions based on proof that the World War II government suppressed, altered, and destroyed material evidence that contradicted its claim that its actions were based on military necessity.<sup>24</sup> For example, the government withheld from the Supreme Court intelligence reports from the

FBI, the FCC, and the Office of Naval Intelligence that refuted DeWitt's claims that Japanese Americans were engaged in espionage or sabotage.<sup>25</sup> Further, the coram nobis cases established that, when it was discovered that DeWitt's Report contradicted the government's arguments before the *Korematsu* Supreme Court, the report was ordered altered, DeWitt's "true" report was ordered destroyed, and the altered version was provided to the Supreme Court.<sup>26</sup> Thus, at the same time the government argued that the Court should defer to its judgment that its actions were required by military necessity,<sup>27</sup> it presented the Court a record manufactured to support that judgment. While it cannot be said with certainty that the Court would have discovered the government's fraud if it conducted a more searching inquiry, the Court's deference to the government certainly gave the government much room to argue what it wished.

Justice Sotomayor compared the government's refusal to disclose the DHS report with the government's failure to disclose its intelligence reports during World War II: "As here, the Government [in *Korematsu*] was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect."<sup>28</sup> And she criticized the majority for allowing the government to withhold the report: "Ignoring [the President's anti-Muslim rhetoric], the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public."<sup>29</sup>

The concern about the administration's refusal to disclose the DHS report was also raised by Maryland Federal District Court Judge Theodore Chuang in the related travel ban case of *IRAP v. Trump*. During oral argument on October 16, 2017, Judge Chuang asked Justice Department attorney Hashim Mooppan, "Are you representing to me now as an officer of the court that there's nothing in [the report] that's inconsistent with the proclamation?"<sup>30</sup> Mooppan evaded the question: "you can judge the proclamation on its own terms."<sup>31</sup> Recalling the suppression of evidence proved in the coram nobis cases, Judge Chuang asked, "So how is this different than *Korematsu* where

they relied on an executive order by the president and many years after the fact, it was determined that there was information within the justice department that contradicted representation made to the court[?] . . . [C]an you assure me that there's nothing in [the DHS report] that's inconsistent with what's in the proclamation because if it were, I would feel that would be a material fact that you need to disclose."<sup>32</sup> Mooppan evaded again, arguing that he could not "make representations about what's in the report."<sup>33</sup> Further, he argued that he need not disclose whether there were any disagreements within the government because that information would be protected from disclosure as part of the government's "deliberative process."<sup>34</sup> However, he stated, "[W]e stand behind the factual representations in the proclamation."<sup>35</sup>

Third, just as the Court ignored the racist underpinnings of the government's actions in *Korematsu*, it turned a blind eye to the travel ban's xenophobic roots.<sup>36</sup> Throughout its opinion upholding the travel ban, the Court repeatedly emphasized the fact that the proclamation was neutral on its face: "The text says nothing about religion."<sup>37</sup> The Court said that *Korematsu* was different: "It is wholly inapt to liken that morally repugnant order [in *Korematsu*], to a facially neutral policy denying certain foreign nationals the privilege of admission."<sup>38</sup> The Court failed to recognize that Executive Order 9066 was also facially neutral; it similarly said nothing about race.<sup>39</sup> Yet there was no question that it was intended to authorize the removal of only the Japanese American population on the West Coast. After exhaustive research, the Congressional Commission on Wartime Relocation and Internment of Civilians concluded, "Executive Order 9066 was not justified by military necessity, and the decisions that followed it—detention, ending detention, and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership."<sup>40</sup>

Further, in the travel ban case, the Court went so far as to describe, but then discount, statements bearing on the ban's anti-Muslim roots. In *Korematsu*, the Court dismissed any claim that the orders were based on racism, stating

that “Korematsu was not excluded from the Military Area because of hostility to him or his race”; instead, his exclusion was based on military necessity.<sup>41</sup> In the travel ban case, the Court did much worse. The Court recounted just part of President Trump’s anti-Muslim vitriol and then stated that vitriol did not really matter. The Court quoted Trump’s campaign call for a “total and complete shutdown of Muslims entering the United States” and his statement that “Islam hates us.” It quoted a campaign adviser who said that, after the election, Trump asked him to “[s]how me the right way to do [the Muslim ban] legally.”<sup>42</sup> The Court, however, explained that these statements mattered little in the context of the president’s wide discretion on matters of national security: “the issue before us is not whether to denounce these statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”<sup>43</sup>

In her dissent, Justice Sotomayor condemned the travel ban as “driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.”<sup>44</sup> She criticized the majority for holding otherwise, “ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”<sup>45</sup> Justice Sotomayor recounted the litany of statements showing the travel ban was motivated by anti-Muslim hostility, including President Trump’s statements “[W]e can’t allow people coming into this country who have this hatred of the United States,”<sup>46</sup> and she underscored that the Proclamation “overwhelmingly targets Muslim-majority nations.”<sup>47</sup> She pointed to Trump’s statement that Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II.<sup>48</sup> She explained that, in the travel ban case, as in *Korematsu*, “the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion.”<sup>49</sup> And, as in the travel ban case, the World War II “exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular



group’s supposed inability to assimilate and desire to harm the United States.”<sup>50</sup>

In the end, the Court found President Trump’s “extrinsic” anti-Muslim statements irrelevant because the travel ban was a facially neutral policy within the President’s expansive powers over matters of immigration and national security.<sup>51</sup>

As a consequence of all of the above, instead of effecting the end of *Korematsu*, the Court “reloaded” the “loaded weapon” that *Korematsu* has long represented. In his 1944 dissent in *Korematsu*, Justice Jackson warned that the decision “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>52</sup> The Trump administration took up that loaded weapon, arguing both that its travel ban was necessary to secure our country and that the courts have no role in questioning that judgment. In upholding the Muslim travel ban, the Court, just as it did in *Korematsu*, provided a rubber stamp to an egregious discrimination and affirmed the principle that the courts should step aside when the government incants the phrase “national security.”

*Korematsu v. United States* has been overruled in name only. The Supreme Court’s decision in *Trump v. Hawaii* has instead solidified the pernicious principle that *Korematsu* has represented for 74 years: judicial capitulation to government-sponsored discrimination in the name of national security. While no one might now cite *Korematsu* for that principle of judicial capitulation, they might now cite *Trump v. Hawaii*.

During this time when anti-Muslim, anti-immigrant, and racist hostility increasingly fuels public policy, we are each called upon to be civically engaged to both provide and ensure responsible leadership.<sup>53</sup> And those of us who are lawyers are called upon to be persistent and creative in asking our courts to exercise “watchful care” to make certain that government actors, including the president, do not act outside the bounds of their authority and that every person, especially the most vulnerable among us, is treated with fairness and humanity.<sup>54</sup>

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<sup>1</sup> Professor of Lawyering Skills and Director of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law, as well as a member of the legal team that gained the vacation of Fred Korematsu's World War II conviction. I am grateful to Eric Yamamoto, Robert Chang, Dale Minami, and Don Tamaki for their thoughts and assistance on this essay. I have chosen to use endnotes, not footnotes, so that the footnotes do not distract from the flow of the essay.

<sup>2</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). In concluding that the president's second travel ban was rooted in anti-Muslim hostility, the Fourth Circuit declared, for example, that it "in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (mem.) (2017); see also *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 268 (4th Cir. 2018) (concluding that third travel ban based on religious animus).

<sup>3</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423, responding to Justice Sotomayor's statement that "Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*." *Id.* at 2447 (Sotomayor, J., dissenting).

<sup>4</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423.

<sup>5</sup> The majority opinion did not itself say that the Court overruled *Korematsu*; instead, it said that *Korematsu* had been overruled "in the court of history." *Trump v. Hawaii*, 138 S. Ct. at 2423. However, Justice Sotomayor, in her dissent, characterizes the Court as overruling it: "Today, the Court takes the important step of finally overruling *Korematsu*." *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting). This essay takes the view that, while the Court may have overruled or repudiated *Korematsu* in words, it did not overrule the most insidious legal principles it represents, that the Court instead reinvigorated those principles, and that those principles remain a danger today.

<sup>6</sup> If the Supreme Court has denounced *Korematsu* at all, it has done so after the case and the wartime Japanese American incarceration have been soundly denounced by legal commentators, officials at every level of government, and the lower courts. See, e.g., Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 503 (1945); Eric 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 (1986), <https://digitalcommons.law.scu.edu/lawreview/vol26/iss1/1/> [hereinafter Yamamoto, *Korematsu Revisited*]. In 1976, President Gerald Ford formally rescinded Executive Order 9066, which provided authority for the incarceration: "I call upon the American people to affirm with me this 'American Promise'—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated." Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976). In 1983, the Congressional Commission on Wartime Relocation and Internment of Civilians concluded that "Executive Order 9066 was not justified by military necessity, and the decisions that followed it—detention, ending detention, and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and

a failure of political leadership.” COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (CWRIC), PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON THE RELOCATION AND INTERNMENT OF CIVILIANS (1983) 18. On August 10, 1988, President Ronald Reagan signed into law the Civil Liberties Act of 1988, which provided a formal apology and redress of \$20,000 to each survivor of the wartime removal and incarceration and established a fund to educate the public on the lessons to be learned from that dark chapter in history. He stated, “[H]ere we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law.” Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as amended at 50 U.S.C. App. §§ 1989–1989(d) (1988)). In vacating Fred Korematsu’s World War II conviction, Judge Marilyn Hall Patel referred to the wartime incarceration of Japanese Americans as a “profound and publicly acknowledged injustice,” *Korematsu v. United States*, 584 F. Supp. 1406, 1413 (D.C. Cal. 1984), and in vacating Gordon Hirabayashi’s wartime conviction, Judge Mary Schroeder wrote, “A United States citizen who is convicted of a crime on account of race is lastingly aggrieved,” *Hirabayashi v. United States*, 828 F.2d 591, 607 (9th Cir. 1987).

<sup>7</sup> Commentators have taken a range of views on the effect of the Supreme Court’s disavowal of the *Korematsu* decision in *Trump v. Hawaii*. Some view the Court’s disavowal of *Korematsu* positively. See Amy Davidson Sorkin, *One Really Good Thing in the Supreme Court’s Travel-Ban Ruling: Korematsu Is Gone*, NEW YORKER, June 26, 2018, <https://www.newyorker.com/news/daily-comment/one-really-good-thing-in-the-supreme-courts-travel-ban-ruling-korematsu-is-gone> [<https://perma.cc/L6L8-L7N5>] (expressing the belief that the decision placed limits on executive power). Some legal commentators said the Court’s language purporting to overrule *Korematsu* has no legal or binding effect on future courts because it was dicta—superfluous legal reasoning not necessary to upholding the travel ban. See *Dictum*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dictum> [<https://perma.cc/9Q2L-NU7M>] (defining dictum as “a judge’s expression of opinion on a point other than the precise issue involved in determining a case”); Scott Bomboy, *Did the Supreme Court just overrule the Korematsu decision?* (June 26, 2018), <https://constitutioncenter.org/blog/did-the-supreme-court-just-overrule-the-korematsu-decision> [<https://perma.cc/QZ2X-N5VV>] (quoting Professor Lyle Denniston’s view that the Court did not actually overrule *Korematsu* because, among other things, the court did not actually state that it was overruling the case and its language was dicta, “statements made in a court opinion that do not affect the actual outcome”). Most commentators, however, shared the concern that the Court did not at all overrule the dangerous principles that *Korematsu* represented; instead, as it did in *Korematsu*, it turned a blind eye to discrimination carried out in the guise of national security. Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts’s “Korematsu Overruled” Parlor Trick* (June 29, 2018), <https://www.acslaw.org/acslblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick/> [<https://perma.cc/TK47-GHDB>] (explaining that “a careful reading of both *Trump v. Hawaii* and *Korematsu* demonstrates that the Court has overruled precisely nothing[;] . . . [i]nstead, [it] purport[ed] to ‘overrule’ a narrow, distorted version of *Korematsu* while simultaneously embracing and replicating that decision’s actual logic and reasoning”); Nimra Azmi, *The Roberts Court Would’ve Allowed Japanese Internment*, SLATE (June 27, 2018) <https://slate.com/news-and-politics/2018/06/trump-v-hawaii-korematsu-v-united-states-the-roberts-court-wouldve-allowed-japanese-internment.html>

[<https://perma.cc/C487-XWWY>] (explaining that the Court’s “overruling” was so narrow that it “has done nothing to prevent the possible replication of *Korematsu*”); Harold Hongju Koh, *Symposium: Trump v. Hawaii—Korematsu’s ghost and national-security masquerades* (June 28, 2018), <http://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematsus-ghost-and-national-security-masquerades/> [<https://perma.cc/76WZ-9N9U>] (calling the Court’s statement that “*Korematsu* has nothing to do with this case” dissembling self-deception when both the World War II order and the travel ban “rested on . . . judging and harming people based not on the content of their individual character, but on their membership in a supposedly dangerous group . . . whose dangerousness the government never proved”); Charlie Savage, *Korematsu, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES (June 26, 2016), <https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html> [<https://perma.cc/7ZCU-H8L4>] (quoting Professor Hitoshi Motomura as stating, “[o]verruling *Korematsu* the way the court did in this case reduces the overruling to symbolism that is so bare that it is deeply troubling, given the parts of the reasoning behind *Korematsu* that live on in [the travel ban] decision: a willingness to paint with a broad brush by nationality, race or religion by claiming national security grounds”).

<sup>8</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). See text accompanying n.52.

<sup>9</sup> The *Korematsu* Court technically upheld only the “exclusion order,” the order that Japanese Americans could not be present on the West Coast; it did not decide the legality of their incarceration. 323 U.S. at 219, 222. In reality, as the Court recognized, the exclusion orders necessarily required detention. *Id.* at 222–23 (“The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected.”). The Court, however, chose not to decide explicitly whether the detention of Japanese Americans was lawful, saying that exclusion and detention involved different questions and that it could address the issue of detention another day. *Id.* at 222. In doing so, the Court separated the inseparable; removal was part of one seamless program that resulted in incarceration. *Id.* at 243 (Jackson, J., dissenting) (emphasizing that the military orders were drawn in such a way that *Korematsu* could comply with them only by “submission to [military] custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps”). One could hardly imagine when the Court felt it would decide the constitutionality of the program of incarceration; as of December 1944, when the Court decided *Korematsu*, many Japanese Americans had been incarcerated for over 2-1/2 years. In fact, the Court never did address whether the original incarceration was lawful. While the Court in *Ex parte Endo*, decided the same day as *Korematsu*, held that the government could no longer continue to incarcerate concededly loyal Japanese Americans, it did not rule on whether it was proper to place them in camps to begin with. *Ex parte Endo*, 323 U.S. 283, 302 (U.S. 1944). For purposes of this essay, and in the minds of most people, the wartime Supreme Court in effect, although perhaps not in words, validated both the wartime removal and, by implication, the incarceration.

<sup>10</sup> Rostow, *supra* note 6, at 503 (referring to the Supreme Court’s *Hirabayashi*, *Yasui*, and *Korematsu* decisions as “a bewildering and unimpressive series of opinions); Lorraine K. Bannai and Dale Minami. *Internment during World War II and Litigations*, in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 755, 768-75 (H.

Kim, ed., 1992) (explaining how the wartime *Korematsu*, *Hirabayashi*, and *Yasui* cases are “analytically unsound, inconsistent, both internally and in relation to each other, and disregard obvious precedent”).

<sup>11</sup> See text accompanying n.24 regarding the suppression of evidence before the Supreme Court.

<sup>12</sup> See ERIC YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 5 (2018) [hereinafter Yamamoto, *Shadow of Korematsu*] (observing that *Korematsu* has stood not only for “its formal approval of the wartime racial exclusions but also its embrace of judicial passivity whenever the government intones national security”).

<sup>13</sup> In *Trump v. Hawaii*, the Court applied a highly deferential standard in reviewing the constitutionality of the travel ban, one that would uphold the ban if it was simply “plausibly related” to the Government’s stated objective to protect the country. 138 S. Ct. at 2420 (citing *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). In their amicus brief to the Supreme Court in *Trump v. Hawaii*, the children of Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi warned the Court of the danger of deferring to the government as it did in their fathers’ wartime cases. Brief of Karen Korematsu, Jay Hirabayashi, Holly Yasui, the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color as Amici Curiae in Support of Respondents, at 20, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1586445, at \*20 (“This Court need not look [further than the wartime Japanese American incarceration] for a reminder of the constitutional costs and human suffering that flow from the Judiciary’s failure to rein in sweeping governmental action against disfavored minorities.”); see also Yamamoto, *Korematsu Revisited*, supra note 6; Kalhan, supra note 7 (drawing parallels between the Court’s deference to the government’s national security judgments in *Korematsu* and *Trump v. Hawaii*). For an insightful analysis of *Korematsu* as dangerous precedent that courts should defer to the government when it claims its actions are justified by national security and a framework for balancing concerns for security against the need to protect civil liberties, see Yamamoto, *Shadow of Korematsu*, supra note 12, at 27-29.

<sup>14</sup> “Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as ‘gravely wrong the day it was decided.’ This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right.” *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

<sup>15</sup> *Id.*

<sup>16</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943), conviction vacated, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943), conviction vacated as noted in 772 F.2d 1496, 1498 (9th Cir. 1985); *Korematsu*, 323 U.S. 214, conviction vacated, 583 F. Supp. 1406.

<sup>17</sup> *Hirabayashi*, 320 U.S. at 93. The Court based its decision in *Korematsu* on its reasoning in *Hirabayashi*. “Here, as in the *Hirabayashi* case, ‘we cannot . . . say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons . . . constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.’” *Korematsu*, 323 U.S. 214, 218 (quoting *Hirabayashi*, 320 U.S. at 99). While the Court in *Korematsu* famously articulated the need to strictly scrutinize government actions based on race, 323 U.S. at 216 (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights

of a single racial group . . . must [be] subject . . . to the most rigid scrutiny”), it just as infamously failed to apply that standard, Yamamoto, *Shadow of Korematsu*, *supra* note 12, at 27-28.

<sup>18</sup> *Trump v. Hawaii*, 138 S. Ct. at 2421 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

<sup>19</sup> Brief for the United States at 11 n.2, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) 1944 WL 42850, at \*12. Cryptically, the government’s brief states, “We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.” *Id.* at 11 n.2.

<sup>20</sup> *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

<sup>21</sup> *Trump v. Hawaii*, 138 S. Ct. at 2408.

<sup>22</sup> See *infra* text accompanying notes 24 and 26 regarding the government’s alteration of the DeWitt Report before it was given to the Supreme Court.

<sup>23</sup> *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

<sup>24</sup> A petition for writ of error coram nobis is a rarely used procedure that seeks relief from a conviction when the sentence had already been served, based on errors “of the most fundamental nature” that amount to “manifest injustice. With coram nobis meaning “before us,” a petition for a writ of error *coram nobis* seeks relief for an error committed “before” the court. Margaret Chon, *Remembering and Repairing: The Error Before Us, in Our Presence*, 8 SEATTLE J. FOR SOC. JUST. 643, 645 (2010). For a discussion of the evidence that formed the basis for reopening the *Korematsu*, *Hirabayashi*, and *Yasui* cases, see ERIC YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 221–46 (2d ed. 2013); LORRAINE K. BANNAL, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 137–49 (2015); Yamamoto, *Korematsu Revisited*, *supra* note 6, at 9–19. For copies of the coram nobis petition memorandum of law, oral argument, and related documents, see JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 125–209 (Peter Irons, ed., 1989); for copies of the exhibits to the coram nobis petition and other related documents, see Professor Jerry Kang’s website accompanying the second edition of YAMAMOTO ET AL, RACE, RIGHTS AND REPARATION, CORAM NOBIS CASE, <http://jerrykang.net/racerrightsreparation/resources/coram-nobis/> [<https://perma.cc/M9PY-V6G8>].

<sup>25</sup> See, e.g., Yamamoto, *Korematsu Revisited*, *supra* note 6, at 12–19.

<sup>26</sup> See, e.g., *id.* at 10–12.

<sup>27</sup> In his oral argument in *Korematsu*, Solicitor General Charles Fahy asserted that, because the removal orders were military orders, “issued by a military commander, DeWitt, in an area declared a ‘theater of operations,’ and made under authority invested in him by Roosevelt in his capacity as President and Commander-in-Chief,” they were subject to “limited review” by the Court. Transcript of Proceedings before the Supreme Court at 4 (Oct. 12, 1944), *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>28</sup> *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

<sup>29</sup> *Id.* at 2443 (Sotomayor, J., dissenting).

<sup>30</sup> Transcript of Motions Hearing (Hearing on Plaintiffs’ Motion for Preliminary Injunction) at 48-49 (Oct. 16, 2017), *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 585 (D. Md. 2017), *vacated and remanded*, *Trump v. Int’l Refugee*

Assistance Project, 138 S. Ct. 2710 (Mem) (U.S.,2018) [hereinafter IRAP Preliminary Injunction Transcript]; see also Josh Gerstein, *Federal Judge Hears Challenge to Third Version of Trump’s Travel Ban*, Politico (Oct. 16, 2017), <https://www.politico.com/story/2017/10/16/trump-travel-ban-judge-maryland-243840> [<https://perma.cc/BA5P-3DVH>].

<sup>31</sup> IRAP Preliminary Injunction Transcript, *supra* note 30, at 49.

<sup>32</sup> *Id.* at 50.

<sup>33</sup> *Id.* at 51.

<sup>34</sup> *Id.* at 51.

<sup>35</sup> *Id.* at 52.

<sup>36</sup> See Kalhan, *supra* note 7 (comparing the Court’s dismissal of race as an issue in *Korematsu* to its dismissal of religious animus as a relevant factor in *Trump v. Hawaii*).

<sup>37</sup> *Trump v. Hawaii*, 138 S. Ct. at 2421.

<sup>38</sup> *Id.* at 2423.

<sup>39</sup> The order authorized the Secretary of War, and any military commanders he designated, to prescribe military areas “from which any or all persons may be excluded” and within which the right of any person to enter, remain in, or leave may be restricted. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). During the May 15, 2017, oral argument before the Ninth Circuit in *Hawaii v. Trump*, Judge Richard Paez expressed concern about the government’s argument that the court look only to the face of the president’s order to determine its legitimacy and not consider the president’s anti-Muslim statements behind it. Judge Paez asked Acting Solicitor General Jeffrey Wall, “Would the *Korematsu* executive order pass muster under your test today? . . . You emphasize [that the president’s order was] *facially legitimate*.” Wall responded, “This case is not *Korematsu*, and if it were I wouldn’t be standing here and the United States would not be defending it.” Judge Paez persisted, “How do you apply your ‘facially legitimate’ standard to an executive order like that? There was no reference to Japanese in that executive order and look what happened.” Wall responded that he was not familiar with “all the ins and outs” of Roosevelt’s order. Oral argument at 20:25, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000011579](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011579) (emphasis added) [<https://perma.cc/FL5M-YW2A>].

<sup>40</sup> *Personal Justice Denied*, *supra* note 6, at 18.

<sup>41</sup> *Korematsu*, 323 U.S. at 223.

<sup>42</sup> *Trump v. Hawaii*, 138 S. Ct. at 2417.

<sup>43</sup> *Id.* at 2418.

<sup>44</sup> *Id.* at 2438 (Sotomayor, J., dissenting).

<sup>45</sup> *Id.* at 2433 (Sotomayor, J., dissenting).

<sup>46</sup> *Id.* at 2436 (Sotomayor, J., dissenting).

<sup>47</sup> *Id.* at 2441 (Sotomayor, J., dissenting).

<sup>48</sup> *Id.* at 2435 (Sotomayor, J., dissenting).

<sup>49</sup> *Id.* at 2447 (Sotomayor, J., dissenting).

<sup>50</sup> *Id.*

<sup>51</sup> *Trump v. Hawaii*, 138 S. Ct. at 2420.

<sup>52</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

<sup>53</sup> “To finally inter *Korematsu*’s ghost, we will all need to keep resisting these new national-security masquerades. . . . Although the *Trump* majority declined to require that commitment here, the rest of us need not similarly surrender.” Koh, *supra* note 7.

<sup>54</sup> “The goal is to create in the public culture a compelling sense that it must be the courts that exercise ‘watchful care’ over our constitutional liberties.” Eric Yamamoto, *White House Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285, 292 (2005) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall). 2, 124 (1866) (describing the judiciary’s role during national crisis as one of ‘watchful care’ over fundamental liberties)).