Disarming Jackson's (Re)Loaded Weapon: How *Trump v. Hawaii* Reincarnated *Korematsu* and How They Can Be Overruled

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> "The story of Fred Korematsu, for me, is very much a story about the story of so many Americans at this moment in time . . . These Americans are not sure whether America wants them and whether America will allow them to stay and how they fit into the fabric of this land, and yet are willing to fight for their place . . . [T]hat, for me, is the most American thing to do, is to declare yourself."[1]

> "Upon signing the first travel ban, entitled *Protecting the Nation From Foreign Terrorist Entry Into the United States*: 'We all know what that means.'"[2]

Introduction

On June 25, 2017, the *Korematsu* precedent was nearly dead.[3] No courts dared to refer to *Korematsu* as good case law. The dark history of Japanese American internment during World War II plagues the Supreme Court as one of the worst decisions ever made, alongside *Plessy v. Ferguson* and *Dred Scott v. Sanford*. Justice Samuel Alito referred to *Korematsu* as one of the "great constitutional tragedies that our country has experienced."[4] During Justice Sonia Sotomayor's confirmation, Senator Lindsay Graham asked her if she believed *Korematsu* was wrongly decided.[5] She responded, "[i]t was, sir . . . It is inconceivable to me today that a decision permitting the detention and arrest of an individual solely on the basis of their race would be considered appropriate by our government."[6] Moreover, Chief Justice Roberts stated, "[*Korematsu*] is widely recognized as not having precedential value."[7]

Yet, on June 26, 2017, the *Korematsu* spirit was revived by the Supreme Court's decision in *Trump v. Hawaii.* In a 5–4 decision, Chief Justice John Roberts, writing for the majority, held that the Trump administration had provided "a sufficient national security justification to survive rational basis review" and validated Proclamation 9645, commonly known as the "travel

1. Sarah Larson, *"More Perfect," Where "Radiolab" Meets the Supreme Courts*, The New Yorker (Oct. 12, 2017) https://www.newyorker.com/culture/podcast-dept/more-perfect-where-radiolab-meets-the-supreme-court.

2. Richard Wolf, *Travel Ban Lexicon: From Candidate Donald Trump's Campaign Promises to President Trump's Tweets*, USA Today (Apr. 24, 2018) https://www.usatoday.com/story/news/politics/2018/04/24/travel-ban-donald-trump-campaign-promises-president-tweets/542504002 (quoting Donald Trump).

3. Korematsu v. United States, 323 U.S. 214 (1944).

4. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary*, Serial No. J-109–56, 109th Cong. 418 (2006), https://www.gpo.gov/fdsys/pkg/CHRG-109shrg25429/pdf/CHRG-109shrg25429.pdf.

5. Transcript of the Sotomayor Confirmation Hearings, 69, (2009) https://epic.org/privacy/sotomayor/sotomoyor_transcript.pdf.

6. *Id* at 69–70.

7. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary*, Serial No. J- 109–37, 109th Congress 241 (2005), https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.

ban" or the "Muslim Ban."[8] The travel ban "indefinitely suspends the issuance of immigrant and nonimmigrant visas to applicants from the Muslim-majority countries Libya, Iran, Somalia, Syria, and Yemen—plus North Korea and Venezuela."[9] Because of President Trump's travel ban, countless American lives have been deeply affected: spouses have been separated; children have been unable to reunite with their parents; students feel hopeless about gaining employment in the United States; and many more people feel like prisoners who are unable to leave the country for fear of not being allowed back in despite their legal status.[10]

In Justice Jackson's dissenting opinion in *Korematsu v. United States*, he refers to the majority's opinion as a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[11] More than seventy years later, the Supreme Court reloaded this weapon and handed its instruction guide to the president. The Supreme Court validated the executive branch's ability to use national security concerns as a mask for racial and religious animus against Muslims and people from Muslim-majority nations.[12]

In conjunction with the travel ban, anti-immigrant policies have proliferated. Despite the fact that Japanese internment camps are ghost towns, new internment camps are utilized for undocumented refugees attempting to find safe shelter in the United States.[13] Furthermore, the travel ban affects over 135 million people all over the world.[14] People from Libya, Iran, Somalia, Syria, Yemen, North Korea, and Venezuela are categorically blocked from seeking asylum no matter how dangerous their living conditions are.[15]

The importance of neutralizing *Korematsu* and *Trump v. Hawaii* cannot be overstated. Their precedents are dangerous to keep alive for all vulnerable and minority communities. The United States houses one-fifth of the world's

8. Trump v. Hawaii, No. 17–965, 585 U.S. 38 (2018).

9. Rick Gladstone & Satoshi Sugiyama, *Trump's Travel Ban: How It Works and Who Is Affected,* N.Y. TIMES (July 1, 2018) https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html.

10. Ashley Dejean and Kanyakrit Vongkiatkajorn, *I Feel Like a Prisoner in the Most Free Country in the World*, Mother Jones (Mar. 7, 2018) https://www.motherjones.com/politics/2018/03/we-asked-how-the-travel-ban-changed-peoples-lives-heres-what-they-told-us.

11. Korematsu v. United States, 323 U.S. 214, 246 (1944).

12. *See generally*, Amy D. Sorkin, *What Does Trump's New Travel Ban Mean For The Supreme Court?*, The New Yorker (Sept. 25, 2017), https://www.newyorker.com/news/amy-davidson-sorkin/what-does-trumps-new-travel-ban-mean-for-the-supreme-court ("Indeed, it is not that much of a stretch to imagine a second Trump Administration, or another future Administration like it, with a different lineup of Justices, *citing* Korematsu to justify the denial of rights to immigrants, or to any Americans.").

13. Alexa Ura, *Japanese-Americans Imprisoned at Texas Internment Camp in 1940s Watch Border Crisis Unfold with Heavy Hearts*, THE TEXAS TRIBUNE (June 22, 2018), https://www.texastribune.org/2018/06/22/texas-immigration-japanese-americans-crystal-city.

14. Gladstone & Sugiyama, *supra* note 9.

15. *Id.*

migrants.[16] With President Trump's vitriolic rhetoric against immigrants, particularly Muslims and Muslim Americans, he draws an eerie parallel between himself and former President Franklin Delano Roosevelt, who sanctioned the Japanese American internment camps in the name of national security.

This Note illustrates that the Supreme Court made a mistake in upholding Proclamation 9645. The Court should have nullified the *Korematsu* precedent and the travel ban. It is implausible for a *Trump v. Hawaii* precedent to survive in the context of *Hamdi v. Rumsfeld17*, the Non-Detention Act[18], and the myriad of Congressional and Presidential declarations[19] officially apologizing for their actions in establishing internment camps during World War II.

This Note proceeds in four parts. Part I begins with a detailed history of the *Korematsu* case to provide context for the connections between the Court's ruling in *Korematsu* and *Trump v. Hawaii*. Part II reviews the *Trump v. Hawaii* litigation and its parallels with *Korematsu*. Part III focuses on how the Supreme Court conducted an incorrect analysis of *Korematsu* and how the spirit of *Korematsu* should have remained in the anticanon of constitutional history. Part IV examines *Hamdi v. Rumsfeld*, *Hedges v. Obama*, and *Ziglar v. Abassi* to mitigate the *Trump v. Hawaii* precedent. Finally, Part V presents legislative recommendations on how to prevent racialized detention camps from being reinstituted during times of war. The Note concludes by reiterating that measures can be made by Congress to prevent the atrocity of unlawful detention of United States citizens, such as the immigration detention centers, from reoccurring.

I. History and Context for *Korematsu v. United States*

A. *Pearl Harbor and Executive Order 9066*

In the midst of World War II, Japan was severely unhappy with the United States' presence in Asia.[20] Despite attempts to work out their differences, the United States and Japan were unable to find a peaceful settlement.[21] On December 7, 1941, in the midst of World War II, Japan launched an attack on the United States Naval Base in Pearl Harbor, Hawaii.[22] As a result, the

16. Jie Zong, Jeanne Batalova, & Jeffrey Hallock, *Frequently Requested Statistics on Immigration in the United States*, MigrationPolicy (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested- statistics-immigrants-and-immigration-united-states.

17. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

18. The Non-Detention Act, 18 U.S.C. § 4001(a) (1971).

19. *See, e.g.*, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, The U.S. Department of Justice Archives (May 20, 2011), http://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

20. Karen Alonso, Korematsu v. United States: Japanese-American Internment Camps 18 (1998).

21. *Id.*

22. *Id.*

United States lost eight battleships and two hundred airplanes.[23] Over 2,400 American servicemen and civilians were killed or deemed missing, and 1,300 people were wounded.[24]

The next day, President Franklin Roosevelt sought a Congressional declaration of war against Japan with the well-known speech: "Yesterday, December 7, 1941—a date which will live in infamy—the United States of America was suddenly and deliberately attacked by . . . the Empire of Japan."[25] President Roosevelt pressed forward to convince the United States public that Japan had deliberately deceived the United States.[26] Americans felt tricked because Japan did not make a formal declaration of war against the United States before the Pearl Harbor attack.[27]

Sensing the country's fear, vulnerability, and readiness for war, President Roosevelt issued Executive Order 9066 on February 19, 1942.[28] The order authorized the Secretary of War and other military commanders to "prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War . . . may impose in his discretion."[29] President Roosevelt justified this executive order because "successful prosecution of the war requires every possible protection against espionage and against sabotage."[30] Congress responded to Executive Order 9066 by enacting Section 97a of Title 18 of the United States Code.[31] In this legislation, Congress enforced the exclusions under the Executive Order and made it a misdemeanor for anyone to enter or remain in any restricted military zone contrary to the order of a military commander.[32]

Despite General John L. DeWitt's initial stance that opposed evacuating Japanese Americans from the West Coast, he experienced enormous public pressure to make bold moves in the name of national security. Consequently, he issued Public Proclamation No. 1.[33] The proclamation stated, "the entire Pacific Coast . . . is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish the safeguards against such enemy operations."[34] On March 21, 1942, President Roosevelt

23. *Id.*
24. *Id.* at 18–19.
25. Franklin Delano Roosevelt: Pearl Harbor Address to the Nation, American Rhetoric: Top 100 Speeches (Dec. 8, 1941) http://www.americanrhetoric.com/speeches/fdrpearlharbor.htm.
26. Nathan P. Eberline, *The Strength of a Story*, 85 J. Kan. B. Ass'n 7 (2016).
27. Alonso, *supra* note 20, at 19.
28. Korematsu v. United States, 584 F. Supp. 1406, 1409 (1984).
29. Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942), https://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript.
30. *Id.*
31. Korematsu, 584 F. Supp. at 1409.
32. *Id.*
33. *See* Alonso, *supra* note 20, at 24; Korematsu, 584 F. Supp. at 1409.
34. Korematsu, 584 F. Supp. at 1409.

signed into effect Public Law 503, which made it a federal crime to disobey any of the public proclamations that General DeWitt issued.[35]

Six days later, General DeWitt ordered that all people who were of Japanese ancestry could not leave designated military areas without permission.[36] General DeWitt determined that government-issued evacuation was mandatory for all Japanese Americans on the West Coast and established that internment camps were necessary for national security reasons.[37] As a result of all the proclamations, people could not leave the zones in which they resided, but also could not remain in the zones unless they went to an "Assembly Center."[38] These "assembly centers" were internment camps.[39]

B. *Korematsu's Case and the Supreme Court*

When the evacuations began, Fred Korematsu stayed at his home while his family went to an internment camp.[40] He was later reported to authorities by a shop clerk in his neighborhood and sent to the same internment camp as his family.[41] The government charged Fred Korematsu with breaking Public Law 503, which made it a crime for him to stay in the military area after the evacuation was issued.[42] There was no inquiry as to whether Fred Korematsu was actually disloyal, treasonous, or involved with espionage. Fred Korematsu was a United States citizen who was born on American soil.[43] Nonetheless, Fred Korematsu was sentenced to a five-year probationary term and taken into custody in the courthouse.[44]

Prior to *Korematsu*, in *Kiyoshi Hirabayashi v. United States*, the Supreme Court affirmed the Ninth Circuit opinion holding: (1) the curfew order and other military orders were not necessarily beyond the war power of Congress and the Executive branch, (2) exclusion from a threatened area has a definite and close relationship to the prevention of espionage and sabotage, and (3) Congress approved military authority to declare who should remain in the threatened areas.[45]

In Fred Korematsu's petition for certiorari, he challenged the Court's conclusions in the *Hirabayashi* case.[46] Korematsu contended that "all danger of Japanese invasion of the West Coast had disappeared" by the time General

35. *See* Alonso, *supra* note 20, at 31; Korematsu, 584 F. Supp. at 1409.
36. *See* Alonso, *supra* note 20, at 32; Korematsu, 584 F. Supp. at 1409.
37. Alonso, *supra* note 20, at 32.
38. Korematsu, 584 F. Supp. at 1409.
39. Konrad Linke, *Assembly Centers*, Densho Encyclopedia (Jul. 15, 2015), http://encyclopedia.densho.org/Assembly_centers.
40. *See* Larson, *supra* note 1.
41. *Id.*
42. Korematsu, 584 F. Supp. at 1409.
43. *See* Alonso, *supra* note 20, at 15 ("Prior to the 1950s, the only way a person of Japanese ancestry could become a citizen of the United States was to be born in the United States.").
44. *See id.* at 46.
45. *See* Hirabayashi v. United States, 320 U.S. 81 (1943).
46. Korematsu, 323 U.S. at 218.

Dewitt issued Order No. 34.[47] In the government's brief to the Supreme Court, General DeWitt submitted a report to justify his orders: There were incidents of signaling from shore to enemy ships at sea, the Japanese Americans lived near military areas where they could be encouraged to have loyalty to Japan and cause the most damage on American soil, and the military could not separate the loyal from the disloyal American citizens quickly enough.[48]

The Supreme Court ruled against Fred Korematsu. The Court relied on its judicial deference in *Hirabayashi* to military authority and upheld the exclusion order that was created through Executive Order 9066.[49] Through Fred Korematsu's case, the Supreme Court established that "under conditions of modern warfare . . . the power to protect must be commensurate with the threatened danger."[50] In addition, the Court determined that the orders that prohibited Fred Korematsu from leaving or staying in his residence were not in conflict because the military provided detention in assembly or relocation centers and the first order that prohibited Japanese Americans from leaving their homes was in effect "until and to the extent that a future proclamation or order should so permit."[51] Ultimately, the Supreme Court noted that Fred Korematsu was not detained based on his ancestry. The Supreme Court hinted that internment based on race would have been treated differently:

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures . . . because Congress . . . determined that they should have the power to do just this.[52]

However, the Court refused to recognize that the internment camps were built for and used only by one ethnic group: Japanese Americans.

C. *Post–World War II Remedies*

On February 19, 1976, President Gerald Ford issued Proclamation 4417, which formally terminated the authority of Executive Order No. 9066.[53] In his proclamation, President Gerald Ford stated "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

47. *Id.*
48. *See* Alonso, *supra* note 20, at 56.
49. Korematsu, 323 U.S. at 219–20.
50. *Id.* at 220.
51. *Id.*
52. *Id.* at 223.
53. Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

never again be repeated."[54] Consequently, Congress established the Commission on Wartime Relocation and Internment of Civilians in 1980.[55] The Commission's purpose was to review the facts and circumstances regarding Executive Order 9066, its impact on American citizens and permanent resident aliens, and the directives of the military forces.[56] After its investigation, the Commission would recommend appropriate remedies in a written report to Congress.[57]

Forty years after the Japanese American internment camps were built, the Commission on Wartime Relocation and Internment of Civilians discredited General DeWitt's report.[58] The Commission also discovered that military necessity did not warrant the exclusion and detention of all Americans with Japanese ancestry.[59] With new evidence that several agencies of the government either withheld facts or reported wrongfully, Fred Korematsu was eligible for a petition of *coram nobis*.[60] To win relief, the petitioner must prove that the court would have prevented the conviction "had the correct facts been known to the court at the time of the trial."[61]

On January 19, 1983, Fred Korematsu filed a motion in the U.S. District Court for the Northern District of California in San Francisco.[62] In the relitigation of the case, Fred Korematsu's legal team presented new evidence of government misconduct, showing that the government's legal team had intentionally suppressed information from government intelligence agencies that reported that Japanese Americans posed no military threat to the United States.[63] Judge Marilyn Patel determined that Fred Korematsu's case met all the requirements for *coram nobis* relief and set aside his conviction. Though Judge Patel had no jurisdictional authority to overrule the Supreme Court decision, she emphasized the government's agreement with the Commission's report that "*Korematsu* lies overruled in the court of history."[64]

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54. *Id.*

55. Korematsu, 584 F. Supp. at 1416 (1984).

56. *Id.*

57. *Id.*

58. *See id.* ("there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal.").

59. *Id.*

60. *See* Alonso, *supra* note 20, at 85. A writ of *coram nobis* is a procedure that grants relief to the petitioner that has been criminally convicted and no other remedy exists for the convicted. *See* William G. Wheatley, *Coram Nobis Practice in Criminal Cases*, 18 Am. Jur. Trials 1 § 2 (1971 & Supp. 2018).

61. William G. Wheatley, *Coram Nobis Practice in Criminal Cases*, 18 Am. Jur. Trials 1 § 2 (1971 & Supp. 2018).

62. *See* Korematsu, 584 F. Supp. at 1411 (1984) ("a writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available.").

63. *See* Alonso, *supra* note 20, at 90.

64. Korematsu, 584 F. Supp. at 1420.

In 1998, President Bill Clinton awarded Fred Korematsu the Presidential Medal of Freedom, the nation's highest civilian honor, for his "extraordinary stand" for civil rights.[65] In 2011, Solicitor General Neal Katyal issued a confession of error recognizing the mistakes of the former Solicitor General, Charles Fahy, in the case of Japanese American internment.[66] Katyal revealed that the Office of the Solicitor General had received a key intelligence report that undermined the rationale supporting internment. However, Solicitor General Fahy did not inform the Supreme Court of this new information. Katyal noted that in retrospect, "the court thought it unlikely that the Supreme Court would have ruled the same way had the Solicitor General exhibited complete candor."[67]

II. The Travel Ban and its Parallels to *Korematsu*

Despite Judge Patel's statement that *Korematsu* is no longer a strong precedent, the spirit of *Korematsu* lives on in *Trump v. Hawaii*.

A. *The History of the Ban*

Trump's travel ban went through three iterations before it entered the Supreme Court's jurisdiction.[68] The first travel ban, Executive Order 13769, was issued days after Trump was inaugurated.[69] In this first ban, travel was suspended from Iran, Iraq, Libya, Somalia, Sudan and Yemen for ninety days, refugees were blocked for 120 days, and travel from Syria was indefinitely suspended.[70] There was chaos in airports across the United States with thousands of protesters rallying against the ban.[71] Within twenty-four hours, a New York federal judge, Judge Ann Donnelly, stayed the travel ban on the basis that the irreparable harm suffered by immigrants outweighed the administrative burdens and national security concerns of the government, since the immigrants were already vetted and approved to enter the country.[72]

65. *Honoring a Japanese-American Who Fought Against Internment Camps*, NPR (Jan. 30, 2014) https://www.npr.org/sections/codeswitch/2014/01/30/268917800/honoring-a-japanese-american-who-fought-against-internment-camps.

66. Office of Public Affairs, Dep't of Justice, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (2017), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

67. *Id.*

68. Amber Phillips, *A Brief Rundown of the Long Legal History of Trump's Travel Ban*, Wash. Post (June 26, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/26/a-brief-rundown-of-the-long-legal-history-of-trumps-travel-ban/?utm_term=.07463c989468.

69. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

70. *See* Phillips, *supra* note 68.

71. James Doubek, *PHOTOS: Thousands Protest At Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017), https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order (last visited Nov. 20, 2018).

72. *See* Phillips, *supra* note 68. *See also* Seung Min Kim et al., *Judge Blocks Deportations as Trump Order Sparks Global Outrage*, Politico (Jan. 28, 2017), https://www.

Other judges refused to reinstate the ban and ruled that the government incorrectly claimed that "national security concerns are unreviewable, even if those actions potentially contravene constitutional rights and protections."[73]

A couple months later, the Trump Administration tried again. On March 6, 2017, Trump voluntarily withdrew the previous executive order and signed Executive Order 13780 into effect.[74] This order took Iraq off the original list of countries on the Travel Ban and eliminated the permanent ban on Syrian refugees.[75] However, Executive Order 13780 continued the 120-day suspension of all refugee admissions into the United States.[76] Nine days later, federal judges from Hawaii and Maryland issued nationwide temporary restraining orders against the travel ban. The Hawaii federal judge relied on President Trump's public statements and decided "a reasonable, objective observer . . . would conclude that the Executive Order was issued with a purpose to disfavor a particular religion[.]"[77] When the Trump Administration appealed to the Fourth Circuit Court of Appeals, the Fourth Circuit blocked the travel restrictions but allowed the 120-day refugee ban.[78] The Fourth Circuit noted that the second travel ban "drips with religious intolerance, animus, and discrimination" based on President Trump's public statements about implementing a Muslim Ban.[79] The Trump Administration then appealed to the Supreme Court.

The Supreme Court complicated the travel ban. They allowed the ninety-day ban to be implemented, but the Court provided an exception for individuals who could prove a "bona fide" relationship to a person or entity in the United States.[80] On September 24, the second travel ban expired and the Supreme Court dismissed the case because there was no longer a live case or controversy.[81]

With two failed executive orders, the Trump Administration issued a third travel ban. This time, the travel ban took the form of a proclamation instead of an executive order, Proclamation 9645 known as the "Presidential

politico.com/story/2017/01/trump-refugees-lawsuit-iraq-visas-234305.

73. Adam Liptak, *Court Refuses to Reinstate Travel Ban, Dealing Trump Another Legal Loss*, N.Y. Times (Feb. 9, 2017), https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html.

74. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

75. Conor Finnegan, *A Timeline of Trump's Battle with the Courts to Keep His Travel Ban Alive*, ABC News (Oct. 19, 2017), https://abcnews.go.com/Politics/timeline-trumps-battle-courts-travel-ban- alive/story?id=50559798.

76. *Id.*

77. Richard Gonzales et al., *Trump Travel Ban Blocked Nationwide By Federal Judges in Hawaii, Maryland*, NPR (Mar. 15, 2017), https://www.npr.org/sections/thetwo-way/2017/03/15/520171478/trump-travel-ban-faces-court-hearings-by-challengers-today.

78. *See* Finnegan, *supra* note 75.

79. *Id.*

80. *Id.* The Supreme Court eventually ruled that a bona fide person included grandparents, grandchildren, aunts and uncles, cousins, parents, spouses, fiancées, children, and in-laws.

81. *Id.*

Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[82] This third attempt broadened the travel ban to include Chad, Iran, Libya, North Korea, Somalia, Syria, Yemen, and Venezuela.[83] Months later, the Supreme Court upheld Proclamation 9645 and claimed that the President lawfully exercised the broad discretion granted to him under § 1182(f) of the Immigration and Nationality Act to suspend the entry of aliens into the United States.[84]

The effects of Proclamation 9645, the September 24, 2017 travel ban, have yet to be fully determined, but they are vast and incalculable. As a result of the travel ban, the United States has admitted the lowest number of refugees in decades.[85] In 1980, the number of admitted refugees exceeded 200,000.[86] In the first nine months of the 2018 fiscal year, the number of admitted refugees was only 15,788.[87] The separation of families as well as the burden on immigrant students who feel trapped in the United States could be deleterious and damaging to the American psyche and the overall health of its people.[88]

B. *The Parallels Between* Korematsu *and* Trump v. Hawaii

There are countless similarities between *Korematsu* and *Trump v. Hawaii.* Perhaps the most notable similarity is that both cases took place in the midst of war. *Korematsu* was heard during World War II and *Trump v. Hawaii* occurred during America's long-fought War on Terror. During wartime, the country tends to feel vulnerable, so its citizens may be more willing to support unnecessary military action and forgive their "ingroup" also known as the American government, for committing atrocious harms against those not considered a part of the "ingroup."[89] For example, General DeWitt claimed that there was a "military necessity" to evacuate Japanese Americans.[90] President Trump said, "We [Americans] need to be smart, vigilant,

82. Proclamation No. 9645 (2017).

83. *See id. See also* Dept. of Homeland Security, Fact Sheet: The President's Proclamation on Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Dept. of Human Serv. (2018), https://www.dhs.gov/news/2017/09/24/fact-sheet-president-s-proclamation- enhancing-vetting-capabilities-and-processes.

84. Trump v. Hawaii, 138 S.Ct. 2392, 2400 (2018).

85. Alicia Parlapiano, *The Travel Ban Has Been Upheld. Here Are Some of Its Effects So Far*, N.Y. Times (June 27, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/trump-travel-ban-effects.html.

86. *Id.*

87. *Id.*

88. *See* Lanise Shortell, *Trump's Travel Ban is Keeping Dying Children From Their Families*, Huffington Post (Oct. 17, 2018), https://www.huffingtonpost.com/entry/opinion-travel-ban-hospice-pediatric_us_5bc60583e4b055bc947a9b08.

89. *See* Michael J. A. Wohl and Nyla R. Branscombe, *Group Threat, Collective Angst, and Ingroup Forgiveness for the War in Iraq*, 30 Political Psychology 193–217 (Apr. 2009).

90. *See* A Brief History of Japanese American Relocation During World War II, Nat'l. Park Serv., https://www.nps.gov/articles/historyinternment.htm (last visited Feb. 22,

and tough. We need the courts to give us back our rights. We need the Travel Ban as an extra level of safety." In another tweet, President Trump tweeted, "When a country is no longer able to say who can, and who cannot, come in & out, especially for reasons of safety & security—big trouble!"[91] Both governments fed off the public's obsession over safety.

Feeding off of the public's obsession over safety, the government in both cases used fear tactics, harmful rhetoric, and racebaiting hysteria in order to energize their political bases to promote the racist exclusionary orders. During World War II, fearful rhetoric such as "Once a Jap, always a Jap," and "You cannot . . . make him the same as a white man any more than you can reverse the laws of nature" trickled into the American vernacular.[92] Moreover, newspapers reported that Japanese Americans were "treacherous and barbarous by nature."[93] Thus, heightened anti-Japanese sentiments emerged throughout the country, drowning any wishes to remain isolated from World War II. The country's sole focus was on war. Calls for Japanese removal were popular, even Earl Warren—then-attorney general of California—wrote that "the Japanese situation" would jeopardize the entire defense effort.[94]

Similar to Earl Warren's written statement, President Trump's campaign speeches and presidential tweets demonstrated his true beliefs and views of Muslims and Muslim Americans. For example, while campaigning in South Carolina, Trump read a statement, "calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[95] While serving as president, Trump tweeted "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[96]

The hateful rhetoric utilized in both cases was successfully disguised in the majority opinions of both *Korematsu* and *Trump v. Hawaii*. In both cases, the Court failed to address the racial animus that guided the executive branch, hiding behind the rationale of national security to defend the orders. For example, the *Korematsu* majority opinion does not include General DeWitt's testimony before a House subcommittee in April 1943 where he stated, "[W]e must worry about the Japanese all the time until he is wiped off the map."[97] Similarly, in *Trump v. Hawaii*, the court held that a reasonable observer would not conclude that the primary purpose of the Proclamation

2019).

91. Donald Trump (@realDonaldTrump). Twitter (Feb. 4, 2017, 8:59 am), https://twitter.com/realdonaldtrump/status/827864176043376640?lang=en.

92. *Id.*

93. *Id.*

94. *Id.*

95. Amrit Cheng, *Trump's Lawyers Say the Muslim Ban Has No Bias, But His Tweets Show Otherwise*, ACLU (Nov. 30, 2017), https://www.aclu.org/blog/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise.

96. Donald Trump (@realDonaldTrump). Twitter (Jun 5, 2017, 6:20 pm), https://twitter.com/realdonaldtrump/status/871674214356484096?lang=en.

97. Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 387 (2011).

is to disfavor Islam and its adherents by excluding them from the country—despite the laundry list of pointed and racist tweets that the White House considers "official statements."

Not only did the Court uphold the orders under the guise of national security, but the Courts in *Korematsu* and *Trump v. Hawaii* relied on false information and flawed data. In *Korematsu*, General DeWitt's report to the Supreme Court referring to incidents of Japanese Americans committing espionage by signaling enemy ships from shore was ultimately proven false.[98] The curfew that General DeWitt established was based on assumptions that the Japanese were attempting to contact Japanese Americans rather than the actual reality that the curfew had no effect on the safety of others and was not considered a military necessity.[99]

Similarly, to justify Proclamation 9645 the Trump Administration argued that the countries serve as havens for terrorist and the system of vetting immigrants is "faulty."[100] However, Justice Sotomayor countered that the only part that is "faulty" is the government's argument. In her dissenting opinion in *Trump v. Hawaii*, Sotomayor details the process of gaining admission into the United States as a foreigner.[101] To simply obtain a visa, a person must produce documents that prove her identity, background, and criminal history.[102] Then, a consular with the State Department interviews the individual to determine whether the person is a threat to the United States.[103] Any person who has been engaged or associated with terrorist activity is ineligible to receive a visa.[104] These intensive vetting procedures fulfill the "putative national-security interests" that Trump relied on to justify Proclamation 9645.[105]

Both cases are categorical exclusionary orders on the basis of race and religion. In *Korematsu*, the United States government was unable to conjure up real and substantive evidence that all Japanese Americans posed a national security threat during World War II. There were no verified stories of espionage or treason against Japanese Americans on American soil. However, there were proven stories of German spies such as the Duquesne Spy Ring that collected information on American shipping patterns and military intelligence.[106] Furthermore, there was "Operation Pastorius," which was a group of eight Nazi saboteurs who were assigned to create acts of terrorism on American soil in an effort to create chaos.[107] Based on its faulty ratio-

98. *See* Alonso, *supra* note 20, at 67.
99. Greene, *supra* note 97, at 423.
100. *Id.*
101. Trump v. Hawaii, 138 S.Ct. 2392, 2433–48 (2018).
102. *Id.* at 2443–4 (quoting Justice Sotomayor's dissenting opinion).
103. *Id.* at 2444.
104. *Id.*
105. *Id.*
106. Evan Andrews, *5 Attacks on U.S. Soil During World War II*, History Channel (Oct. 23, 2012), https://www.history.com/news/5-attacks-on-u-s-soil-during-world-war-ii.
107. *Id.*

nale for Japanese American internment camps, the United States targeted the wrong group. This misplaced targeting further proves that ordering Japanese American internment camps was based on racial animus rather than actual military intelligence.

Comparably, in *Trump v. Hawaii*, the United States is unable to explain how the travel ban actually prevents terrorism. In fact, there have been more acts of terrorism by white American males than Muslims on American soil.[108] Between the years 2008 to 2016, "there were almost twice as many terrorist incidents by right-wing extremists as by Islamist extremists in the United States."[109] If the United States wants to prevent domestic terrorism, it is targeting the wrong group. Additionally, as discussed earlier, the United States already has strict vetting procedures for those seeking asylum or refugee assistance. Therefore, as Justice Sotomayor points out, the "[g]overnment remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation."[110]

Moreover, those seeking asylum, primarily from Central and South America have faced conditions similar to internment camps. Children have been violently separated from their parents and thrown into cages without any future plans from President Trump to reunite them.[111] The rhetoric surrounding these refugees are eerily similar to the propaganda used against Japanese Americans during World War II. President Trump tweeted "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order."[112] Trump's lack of respect for an individual's access to justice, regardless of citizenship, along with the racist undertones of stating "our Country" draw intense parallels to the treatment of Japanese Americans. Therefore, it is imperative to remember the wrongful acts of the presidents' executive orders, the Court's actions, and the misinformed propaganda to prevent the continuance of malicious detention of individuals.

In a *60 Minutes* interview, a spokesperson for pro–Trump Great American PAC, argued that an immigrant registry for specifically Muslim countries would be constitutional based on Japanese American internment.[113] With the

108. Sarah Ruiz-Grossman, *Most of America's Terrorists Are White, and Not Muslim*, Huffington Post (Aug. 23, 2017), https://www.huffingtonpost.com/entry/domestic-terrorism-white-supremacists-islamist-extremists_us_594c46e4e4b0da2c731a84df.

109. *Id.*

110. Trump, *supra* note 101, at 2444 (quoting J. Sotomayor's dissenting opinion).

111. *See* Niraj Warikoo, *Michigan Congresswoman: I Saw Immigrant Kids Held in a Cage, Crying Moms*, Detroit Free Press (June 23, 2018), https://www.freep.com/story/news/nation/2018/06/23/migrant-children-detention-centers-mcallen-texas-brenda-lawrence/724553002.

112. Donald Trump (@realDonaldTrump), Twitter (Jun. 24, 2018, 8:02 AM), https://twitter.com/realdonaldtrump/status/1010900865602019329.

113. Margaret Hartmann, *Trump Supporter Cites Japanese Internment Camps as 'Precedent' for Muslim Registry*, N.Y. Mag.: Intelligencer (Nov. 17, 2016), http://nymag.com/intelligencer/2016/11/trump-supporter-muslim-registry-internment-camps.html.

revitalization of national security in *Trump v. Hawaii* as a sufficient means to discriminate on a racial, ethnic, and religious basis, a Muslim registry could theoretically be possible.

Several lawsuits were filed against the travel bans such as *International Refugee Assistance Project v. Trump*.[114] During oral arguments at the Ninth Circuit, Judge Richard Paez inquired about *Korematsu* and the government adamantly stated "This case is not *Korematsu*, and if it were I would not be standing here, and the United States would not be defending it."[115] Those words have yet to quell the fears that a Muslim registry could still be implemented in the near future.[116]

III. How The Court got *Korematsu* and *Trump v. Hawaii* Wrong

A. *The Dissenting Opinions*

Korematsu was decided by a 6–3 vote.[117] With three dissents, one concurring opinion, and five justices joining the majority, the difference in opinions exposes the severe contradictions in the majority's reasoning to uphold the exclusionary acts.

Justice Roberts' dissent stressed that the internment camps were indeed based on ancestry and that Fred Korematsu was detained "without evidence or inquiry concerning his loyalty and good disposition towards the United States."[118] Moreover, Roberts was highly concerned about Fred Korematsu's impossible choice due to the fact that Military Orders prohibited him from remaining in the zone in which he resided and also prevented him from leaving the zone, thus forcing him to go to an Assembly Center. Roberts called this "a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp."[119]

114. *Trump v. Int'l Refugee Assistance Project*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/trump-v-international-refugee-assistance-project (last visited Oct. 22, 2017).

115. *See* Sorkin, *supra* note 12.

116. *See* Noah Feldman, *Why Korematsu is Not a Precedent*, The N.Y. Times (Nov. 18, 2016), http://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html. There are several prominent people who have cited the Japanese American internment camps as a means of "protecting America first." Kat Chow, *Renewed Support for Muslim Registry Called "Abhorrent"*, NPR (Nov. 17, 2016) https://www.npr.org/sections/codeswitch/2016/11/17/502442853/renewed-support-for-muslim-registry-called-abhorrent. For example, a popular conservative writer and known "Trump surrogate", Carl Higbie, stated in an interview with Megyn in support of *Korematsu* that "the president needs to protect America first, and if that means having people that are not protected under our Constitution have some sort of registry so we can understand, until we can identify the true threat and where it's coming from, I support it." *Id.*

117. Korematsu, *supra* note 3, at 214.

118. *Id.* at 226.

119. *Id.* at 232.

Justice Murphy dissented on the grounds that the exclusion "falls into the ugly abyss of racism."[120] Murphy asserted that judicial deference must be used towards the military, but there must be definite limits to military discretion.[121] In his opinion, Murphy believed that there was a test that the Court should have used to determine whether the government could properly take away a person's constitutional rights.[122] The Court should have inquired whether an action is reasonably related to public danger.[123] The Government never had to prove their claim that there was no time to interview individual Japanese Americans and that it was necessary to deprive them all of their right to due process under the Fourteenth Amendment.[124]

Perhaps the most notable of the dissents was the final one: Justice Jackson's. In his dissenting opinion, he reiterated that Fred Korematsu was a United States citizen and that his conviction rested solely on his presence in the state he resided.[125] Jackson created a hypothetical in which he compared Fred Korematsu to a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors.[126] If all the people he listed violated the exclusion order, only Fred Korematsu would be convicted "not from anything he did, said, or thought, different than they, but only in that he was born of a different racial stock."[127] The Court did not rely on evidence, but rather assumptions premised on racialized fears from World War II.

Jackson conceded that military orders do not all have to abide by the Constitution, but those orders are temporary and only last as long as the war.[128] However, he warned that the Court's interpretation of the Due Process Clause was a "far more subtle blow to liberty than the promulgation of the order itself."[129] Jackson referred to the Court's decision as a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[130] He feared that war powers could be unchecked and fall into "irresponsible and unscrupulous hands" because "the courts wield no power equal to its restraint."

120. *Id.* at 233.

121. *Id.* at 234.

122. *Id.* at 234 ("Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.").

123. *See* Alonso, *supra* note 20, at 79.

124. *See* U.S. Const. amend. XIV, § 1 ("nor shall any state any person of life, liberty, or property, without due process of law"); *see also* Korematsu, *supra* note 3, at 241 ("No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.").

125. Korematsu, *supra* note 3, at 243.

126. *Id.*

127. *Id.*

128. *Id.* at 244.

129. *Id.* at 245.

130. *Id.* at 246.

Justice Sotomayor's sharp dissent dismantles the majority's opinion that the Proclamation is facially neutral and advances the interest of national security. She points to President Trump's many tweets that call for a Muslim Ban.[131] Trump told the media that under his first executive order, "Christians would be given priority for entry as refugees into the United States."[132] Trump was the one who invoked religion when it came to the executive orders and proclamation. Relying on "openly available data," such as Trump's public statements and tweets, Sotomayor concludes that a "reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus" and that the plaintiffs' claim regarding the Establishment Clause should have succeeded.[133] Though the plaintiffs argue the Establishment Clause, whereas Korematsu argued for the Fifth and Fourteenth Amendments, both plaintiffs relied on the fact that national security should not override their constitutional rights. Justice Sotomayor agreed and harkens back to *Ziglar v. Abbasi*, stating that national security cannot be invoked as a "talisman" that can be used to "ward off inconvenient claims."[134] Finally, Sotomayor concludes by drawing a parallel between *Korematsu* and *Trump v. Hawaii*. She refers to both cases as being "rooted in dangerous stereotypes about . . . a particular group's supposed inability to assimilate and desire to harm the United States."[135] Because of this, the "Court redeploys the same dangerous logic underlying Korematsu and merely replaces one 'gravely wrong' decision with another."[136]

B. *The Nonapplication of Strict Scrutiny in* Korematsu

At the beginning of the *Korematsu* majority opinion, Justice Black immediately stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[137] However, by the end of his opinion, he arrives at a conflicting conclusion that the internment camps were not created on the basis of race, but rather because the United States was at war with Japan. Because of this argument, Justice Black was able to sidestep the application of strict scrutiny for the military action.

Nowhere in the opinion does Justice Black explicitly state that strict scrutiny cannot be applied when national security is at risk. Justice Black approved the exclusion order as a military power without acknowledging that strict scrutiny must apply to all aspects of governmental action when dealing with suspect classes. Had Justice Black appropriately considered his opening statement, he would have recognized that Fred Korematsu would

131. Trump, *supra* note 101, at 2437–8 (quoting J. Sotomayor's dissenting opinion).
132. *Id.* at 2436.
133. *Id.* at 2438.
134. *Id.* at 2446.
135. *Id.* at 2447.
136. *Id.* at 2448.
137. Korematsu, *supra* note 3, at 216.

not have been imprisoned "but for" his Japanese appearance, ethnicity, and last name. For strict scrutiny to apply in Fred Korematsu's case, the Court would have had to examine whether his incarceration was a form of "racial antagonism" that Justice Black asserted would never justify restrictions on civil rights or if it was a form of "public necessity" that allowed certain restrictions. Because the Court only focused on the military exclusion order, the interpretation of the relationship between strict scrutiny and military orders remains ambiguous.

Korematsu is considered anticanon because the Court approved bad racial profiling. The anticanon consists of "the set of cases whose central propositions all legitimate decisions must refute."[138] While testifying before a House subcommittee in April 1943, General DeWitt explained "we must worry about the Japanese all the time until he is wiped off the map."[139] General DeWitt believed that a person of Japanese ancestry would always be loyal to Japan over the United States even if the person had always lived in the United States and was a citizen.[140] Justice Murphy exposed the Court's use of faulty evidence when he pointed to the fact that there was not a single convicted case of a person with Japanese heritage conducting espionage or sabotage against the United States.[141] If the Court was truly concerned with the loyalty of all persons with Japanese heritage, they should have looked to their actions (or their *in*actions).

Furthermore, the timing of the case could have made the case ineffective. Ruling in Fred Korematsu's favor would not have harmed the United States' war efforts since an Allied victory was guaranteed in the Pacific at the time.[142] Because Fred Korematsu's case dealt with a criminal conviction, the Court could have focused on his treatment as a citizen and vacated his conviction for lack of due process.[143]

The *Korematsu* Court did not have to abide by the *Hirabayashi* precedent. The Supreme Court has often rejected precedent because the case serves "simply as a moment in historical time in which particular justices applied the law to specific facts."[144] Subsequent Supreme Court opinions could also ignore any surviving *Korematsu* precedent if they determine that one exists. In the landmark gay rights case, *Lawrence v. Texas*, Justice Kennedy concluded: "*Bowers* was not correct when it was decided, and it is not

138. Greene, *supra* note 97, at 379. Other cases such as *Dred Scott v. Sanford, Plessy v. Ferguson*, and *Lochner v. New York* fall into the anticanon as well. *Id.*

139. *Id.* at 423.

140. *See* Alonso, *supra* note 20, at 68.

141. Korematsu, *supra* note 3, at 241 ("Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils.").

142. *See* Alonso, *supra* note 20, at 68.

143. *Id.*

144. Feldman, *supra* note 116.

correct today."[145] The majority opinion of *Lawrence* tackles the idea of *stare decisis* as being all-too determinative. While the doctrine of *stare decisis* must be recognized and respected, the Court emphasized that it is not "an inexorable command."[146]

One of the most widely recognized cases, *Brown v. Board*, explicitly overturned *Plessy v. Ferguson* by striking down the "separate but equal" doctrine that perpetuated legal segregation.[147] The Court disregarded *stare decisis* and instead relied on consequential reasoning.[148] The Court used psychological studies, historical data, and institutional knowledge to determine that segregation harms a student's educational opportunities to such a degree that it infringed on his equal protection of the law guaranteed by the Fourteenth Amendment.[149] *Plessy v. Ferguson* is rooted in the anticanon and can no longer be cited as valid law.

Furthermore, Congress can move a landmark case into the anticanon through legislation. For example, with the enactment of the Fourteenth Amendment, the *Dred Scott v. Sandford* case lost its power of precedent. In *Dred Scott*, the Court concluded that black people were not considered United States citizens.[150] After the Civil War, Congress passed the Fourteenth Amendment which granted citizenship to every person who was born in the United States regardless of race, color, or ethnicity.[151] Upon the passage of the Fourteenth Amendment, Congress nullified the *Dred Scott* ruling permanently.[152]

However, with respect to *Korematsu*, a formal repudiation by the Supreme Court or Congress may never occur in the future because the case facts are so specific to war time, exclusionary acts, executive orders, and detention on American soil: "the more obviously wrong a decision, the fewer the reasonable opportunities for citation. The most obvious constitutional errors are the least likely to be replicated."[153]

IV. Subsequent Cases that Eroded *Korematsu* and *Trump v. Hawaii*

A. Hamdi v. Rumsfeld*'s Destruction of Korematsu*

Pearl Harbor and the September 11 attacks elicited similar responses from the American public.[154] After the attack on Pearl Harbor, Americans

145. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

146. *Id.* at 577.

147. *See* Brown v. Board of Education, 347 U.S. 483, 495 (1954) ("Any language in Plessy v. Ferguson contrary to this finding is rejected.").

148. Norman Redlich et al., Understanding Constitutional Law 18 (3d ed. 2005).

149. *Id.* at 492–95.

150. Dred Scott v. Sandford, 60 U.S. 393, 396 (1857).

151. U.S. Const. amend. XIV, § 1.

152. Greene, *supra* note 97, at 406.

153. Greene, *supra* note 97, at 462.

154. *See* Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in*

feared the Japanese; after the attacks on the Twin Towers, Americans were afraid of Muslims and Muslim Americans. Within one week of the 9/11 attacks, Congress issued the Authorization for Use of Military Force (hereinafter "AUMF"), which allowed the President to "use all necessary and appropriate force against those nations . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States."[155] This language echoed similar sentiments to President Franklin Roosevelt's Executive Order 9066, which gave the Secretary of War deferential powers as a response to an attack on the United States soil.[156] Moreover, two weeks after 9/11, "over 500 individuals were arrested or detained, and thousands of resident aliens were asked to submit to 'random questioning,' almost all whom were Arabic or Middle Eastern."[157]

Two years after the AUMF's enactment, *Hamdi v. Rumsfeld* appeared in front of the Supreme Court with the question of whether an individual could contest his or her status as an enemy combatant.[158] Yaser Hamdi was born in the United States and captured in Afghanistan by a military group that opposed the Taliban government.[159] He was then turned over to the United States government. During his detention in Charleston, South Carolina, the Government asserted that Hamdi was an "enemy combatant" which allowed them to hold Hamdi in the United States indefinitely without formal charges.[160] Hamdi's father filed a petition for a writ of *habeas corpus* and argued that Hamdi's detention was not legally authorized under the Non-Detention Act.[161]

The Supreme Court concluded that Congress had authorized detention through the AUMF.[162] However, the AUMF does not grant indefinite detention for the purpose of interrogation.[163] A citizen-detainee may challenge his classification as an enemy combatant and must receive notice of the factual basis for the classification and an opportunity to rebut the assertions before

Wartime, 2003 Wis. L. Rev. 273, 296 (2003) ("The administration's present position seems indistinguishable from the position taken by the Roosevelt administration and endorsed by the Supreme Court in Korematsu").

155. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001).

156. Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942).

157. Liam Braber, Comment, *Korematsu's Ghost: A Post–September 11th Analysis of Race and National Security*, 47 Vill. L. Rev. 451, 452–53 (2002).

158. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

159. *Id.* at 510.

160. *Id.* An enemy combatant is a person who supports "forces hostile to the United States" or "engaged in an armed conflict against the United States." *Id.* at 516.

161. *Id.* at 511.

162. *Id.* at 517.

163. *Id.* at 521.

a neutral decision maker.[164] The citizen-detainee also has the right to access to counsel.[165]

Justice David Souter and Justice Ruth Bader Ginsburg dissented in the plurality opinion.[166] They delineated the history of the Non-Detention Act and its purpose with respect to *Korematsu*. The Justices argued that the Non-Detention Act requires clear congressional authorization before any citizen can be imprisoned and that the AUMF is not enough to trigger action.[167]

Several constitutional law experts have also drawn parallels between *Korematsu* and *Hamdi*: "like *Korematsu*, the *Hamdi* decision is deeply entrenched in political value judgments and assumptions, but comes clothed in the rhetoric of military necessity and cloaked in the legitimacy and 'objectivity' of law."[168] Similar to how Fred Korematsu's case at the lower court justified the government's abuse of constitutional powers, the Fourth Circuit agreed with the government's action to label Hamdi an enemy combatant without *habeas corpus*.[169] By declaring Hamdi an enemy combatant, he was no longer entitled to constitutional rights afforded to American citizens.[170] Almost sixty years before *Hamdi*, Fred Korematsu was not permitted to contest the laws that forced him into detention.

Neither case has solid statistical data to support the racial profiling perpetuated by the government. During World War II, the Japanese Americans were swept into internment camps out of the false fear that they were cooperating with the Japanese government. After 9/11, the government has legitimized the racial targeting of Arabs and Muslims through the following means:

> (1) the sweep of 1200 noncitizens—primarily from Arab or Muslim countries—for "investigation" to prevent terrorist attacks, although no one detained has been identified as engaged in terrorist activity; (2) five thousand investigatory interviews of male non-citizens from Middle Eastern or Islamic countries on non-immigrant visas; (3) the selective enforcement for those non-citizens from countries with "Al Qaeda terrorist presence"; (4) airline racial profiling of passengers; (5) anti-Arab violence and hate crimes . . . [that are] misdirected sense of patriotism.[171]

164. *Id.* at 533.

165. *Id.* at 539.

166. *Id.* at 540.

167. *Id.* at 543.

168. Chris K. Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 Syracuse L. Rev. 109, 115 (2004).

169. Braber, *supra* note 157, at 467.

170. Iijima, *supra* note 168, at 130 ("The designation of Hamdi as an enemy combatant was not merely a technical classification, but one which stripped Hamdi of practically every constitutional right afforded an American citizen deprived of his or her liberty interest, including ones such as the right to counsel, knowledge or the specific charges, and access to a judicial tribunal.").

171. *Id.*

> Finally, the *Hamdi* case offers a solution to the Korematsu's decision. The *Hamdi* court, though only a plurality, overtly stated that a citizen has the right to be free from involuntary confinement by his own government without due process of law.[172] In effect, this nullifies the government's ability to recreate internment camps based on race and without *habeas corpus*. Citizens on American soil have the guaranteed right to *habeas corpus* in order to contest the assumption that they are enemy combatants.

B. Hedges v. Obama

The President does not have the power to detain American citizens without habeas corpus. Prior to the *Hedges v. Obama* decision in 2013, reporters and activists feared that their work covering the Taliban could be construed as supporting the Taliban or al-Qaeda. If their work was construed as support for these groups, reporters and activists would be detained despite their status as an American citizen.[173] On December 31, 2011, President Obama signed the National Defense Authorization Act for Fiscal Year 2012 (hereinafter called "NDAA").[174] Section 1021 of the NDAA reaffirmed the powers granted to the Executive branch through the AUMF to detain any individual who was "part of, or has substantially supported, al-Qaeda, the Taliban, or associated forces."[175] Quickly after the enactment of Section 1021 of the NDAA, a group of writers, reporters, and activists argued that Section 1021 did not merely reaffirm the AUMF, but rather expanded the President's powers to detain American citizens on American soil.

The Second Circuit determined that the plaintiffs did not have Article III standing because Section 1021 did not explicitly state the government's authority to detain citizens.[176] The *Hedges* court looked at the plain meaning of Section 1021 and held that it did not mention the President's authority to detain American citizens. Though the Second Circuit could have cited *Korematsu* as anticanon for detaining American citizens on American soil, the court did not mention it at all. Perhaps, the court acknowledged that even the facts of wartime did not align with the plaintiff's allegations against Section 1021 because their case lacked the racial profiling that was central in *Korematsu*. There are no laws that indicate the President has the power to detain American citizens without habeas corpus.

C. Ziglar v. Abbasi *and the Need for Legislation*

While *Hamdi* dealt with habeas corpus to contest enemy combatant status, the recently decided case, *Ziglar v. Abbasi*[177] questioned whether individuals who were detained post–9/11 as terrorism suspects were allowed to

172. Hamdi, 542 U.S. at 531.
173. Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013).
174. *Id.* at 173.
175. *Id.*
176. *Id.* at 204.
177. Ziglar v. Abbasi, 137 S. Ct. 615 (2017).

sue high-ranking government officials for violating their constitutional rights through a *Bivens* action, ultimately receiving money damages.[178]

In *Ziglar v. Abbasi*, the respondents were six men of Arab or South Asian descent who were present in the United States without documentation, arrested, and then detained in the Administrative Maximum Special Housing Unit.[179] These individuals were subject to extreme conditions such as beatings, humiliating searches, solitary confinement and other abuses for several months.[180]

Respondents asserted that the Government had no reason to suspect them of any connection to terrorism and illegitimately detained them, subjecting them to harsh conditions.[181] The Supreme Court denies the respondents' arguments, holding that the individuals could not seek money damages from the officials through the *Bivens* action.[182]

In his dissent, Justice Breyer points out that there is a particular need for *Bivens* monetary damages under a *Bivens* action when security-related Government actions are at issue.[183] Justice Breyer discusses how the Executive and Legislative Branch have historically taken action during different wars that "unnecessarily and unreasonably" infringed on American constitutional rights.[184] For example, Breyer explains how "thousands of civilians [were] imprisoned during the Civil War" because of the Alien and Sedition Acts.[185] *Korematsu* is cited as another example of an action that officials knew at the time was unnecessary.[186] Justice Breyer emphasizes that the courts do have a powerful role to play in protecting individual's fundamental constitutional rights even while national security is at stake.[187] His dissent sheds light on the Court's ability to intervene during times of national crises to protect fundamental constitutional rights.

If an individual is not allowed to sue high-ranking government officials for money damages under a *Bivens* claim, the Supreme Court could be hinting at a more deferential approach to the Executive and Legislative branches to enact proper legislation to expand recovery under a *Bivens* claim.

178. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (holding that a person whose constitutional rights had been violated by a federal agent could sue the federal agent despite the lack of a statute).

179. Ziglar v. Abbasi, 137 S. Ct. 1843, 1853 (2017).

180. *See* Adam Liptak, *Supreme Court Rules for Bush Officials in Post–9/11 Suit*, N.Y. Times (June 19, 2017), https://www.nytimes.com/2017/06/19/us/politics/supreme-court-9-11-bush-ashcroft-mueller.html; *see also* Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 Fordham L.R. 2167, 2169 (2018).

181. Ziglar, 137 S. Ct. 1843 at 1853.

182. *Id.* at 1863.

183. *Id.* at 1872. (Breyer, J., dissenting) (rejecting the Court's narrow interpretation of the *Bivens* action).

184. *Id.* at 1884.

185. *Id.*

186. *Id.*

187. *Id.* ("We have applied the Constitution to actions taken during periods of war and national-security emergency.").

Codifying an expansion of the *Bivens* claim may be necessary in the future to ensure some type of monetary remedy for wrongful detention from federal officials based on race.

V. Recommendations for Legislation and Congressional Action

Though courts have every constitutional and interpretative tool to assert that *Korematsu* is no longer precedent, legislation remains essential to ensure the protection of civil rights and liberties in times of national distress. Despite the immediate pushback from the *Korematsu* decision by legal experts,[188] no legislative measure has been taken to permanently guard against mass incarceration based on race. While the Non-Detention Act requires Congressional approval prior to detention, the AUMF and the NDAA have created murky waters for the judiciary to wade through in the event of detaining American citizens. Though a constitutional amendment would be the best practical solution, practically, a constitutional amendment would likely not be able to be ratified in this political climate. Accordingly, legislation is necessary and practical to substantiate the assertion that civil rights and liberties do not, and should not, die in the face of war.

A. *Amending the Non-Detention Act*

The Non-Detention Act was enacted to repeal parts of the Internal Security Act of 1950, specifically the "Emergency Detention Act."[189] The Emergency Detention Act authorized the federal government to detain any person suspected of espionage or sabotage when there was a declared state of emergency.[190] Two years after the bill was passed, Attorney General Howard McGrath selected six potential detainment camps on United States soil.[191] The camps were never used.[192] Five years later, the Government defunded the camps; however, the Emergency Detention Act remained valid for twenty years until the Non-Detention Act was signed into law by President Richard Nixon in 1971.[193]

In response to the looming effects of the Emergency Detention Act, President Nixon signed the Non-Detention Act to relieve the American public's panic that internment camps would be utilized to detain other ethnic

188. *See generally*, Eugene v. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489 (1945) (asserting only a few years after the *Korematsu* decision that the Supreme Court's treatment of Japanese aliens was "hasty, unnecessary, and mistaken.").

189. Non-Detention Act, 18 U.S.C. § 4001(a) (1971).

190. Brian Niiya, *Emergency Detention Act, Title II of the Internal Security Act of 1950*, Densho Encyclopedia, http://encyclopedia.densho.org/Emergency_Detention_Act%2C_Title_II_of_the_Internal_Security_Act_of_1950 (last visited Oct. 30, 2017).

191. *Id.*

192. *Id.*

193. Masumi Izumi, *Repeal of Title II of the Internal Security Act of 1950 ("Emergency Detention Act")*, Densho Encyclopedia, http://encyclopedia.densho.org/Repeal_of_Title_II_of_the_Internal_Security_Act_of_1950_%28%22Emergency_Detention_Act%22%29 (last visited Oct. 30, 2017).

groups and those who held unpopular beliefs.[194] The Non-Detention Act states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[195]

Prior to promulgating the effects of the Non-Detention Act, during World War II, the Government frequently argued that national security was so urgent that there was not enough time to properly screen the disloyal Japanese Americans from the loyal ones.[196] However, Justice Jackson pointed out in *Korematsu* that the Government conducted individual screenings for German Americans and Italian Americans prior to detention.[197] This further proves that the American government had the means to conduct individual screenings instead of issuing categorical racial exclusionary orders. In support of Justice Jackson's statement, the Commission's Report noted that the Government misled the Court about the military necessity of detention without due process. Despite Justice Jackson's argument and the contents of the Commission's Report, Congress approved of President Roosevelt's Executive Order, EO 9066, and reaffirmed it with federal law, specifically Public Law 503. This is proof that Congressional authorization through screening individuals in the midst of war does not necessarily prohibit constitutional violations. Instead, a proactive amendment would prohibit this from reoccurring.

A proactive amendment codifying the Supreme Court's plurality holding in *Hamdi* would clarify the Non-Detention Act. Under the current statute, citizens may not be detained without Congressional authorization; however, it would be vastly beneficial to amend the Non-Detention Act to include: "All citizens are entitled to contest their status in front of a neutral decision maker." *Hamdi*'s ruling only received a plurality vote; thus, a complementary statute strengthening the protection of habeas corpus is necessary. By amending the Non-Detention Act to include the right for a person to contest the status as an enemy combatant, or a terrorist, or other similar labels, Congress guarantees that some type of hearing with representation will at least occur before detention, rather than an indefinite detention without representation. However, including language that guarantees access to counsel may be superfluous since it does not appear to be controversial whether a person, once determined to be a citizen, will be given access to counsel as guaranteed by the Sixth Amendment.

At the time of publication, Senator Tammy Duckworth, Senator Mazie Hirono, and Representative Mark Takano introduced *The Korematsu-Takai Civil Liberties Protection Act of 2019* which codifies this amendment into the Non-Detention Act.[198] The legislation acknowledges the horrors of Japanese

194. Louis Fisher, *Detention of U.S. Citizens*, CRS Report for Congress (2005), https://fas.org/sgp/crs/natsec/RS22130.pdf (last visited Oct. 30, 2017).

195. Non-Detention Act, 18 U.S.C. § 4001(a) (1971).

196. *See* Korematsu v. U.S., 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

197. *Id.* at 243.

198. Michelle Lou & Brandon Griggs, *Three Asian-American Lawmakers Introduce a Bill to Prohibit Internment Like That of Japanese Americans During World War II*, CNN (Feb. 20, 2019), https://www.cnn.com/2019/02/20/politics/japanese-internment-law-trnd/index.html.

American internment camps and prevents Americans form being incarcerated based on their race or religion.[199] This bill was originally introduced in 2017, but it died in committee.[200]

B. *Defunding Executive Orders*

Congress may pass legislation to defund any executive order that the president issues that would lead to mass internment based on race. Article I of the Constitution grants Congress full power over the collection and expenditure of public funds.[201] For instance, in the case of *Korematsu*, Congress could have voted to defund the military budget necessary for a "military area."

This type of pushback has happened more recently during President Barack Obama's term. At the beginning of his presidency, President Obama attempted to close the Guantanamo Detention Facility in Cuba through an executive order.[202] In response, Congress stripped away the funds essential to effectuating the executive order happen.[203] Guantanamo Bay remains open at the time of publication.[204]

With respect to immigration policies, President Obama signed an executive order that allowed five million undocumented persons to remain in the United States without the threat of deportation. The majority in the House of Representatives were unhappy with this executive order and counteracted it by passing an appropriation bill that decreased funding for the Transportation Security Administration, the Coast Guard, and research and development while increasing funding for the Customs and Border Protection, U.S. Citizenship and Immigration Services, and the Secret Service.[205]

Similar to the efforts to stop President Obama's executive orders, defunding Executive Order 9066 would have blocked the Japanese American internment camps from being built. Moreover, defunding Proclamation 9645 could have had an impact on the immigration courts. Thus, future Congressional action could aim at defunding any presidential action that favored zoning areas for detention centers.

199. *Id.*

200. *Id.*

201. Kevin Kosar, *Six Ways Congress Can Curb a Runaway President*, Politico (Jan. 21, 2017, 7:59 AM), https://www.politico.com/agenda/story/2017/01/six-ways-congress-can-curb-a-runaway-president-000284.

202. David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. Times (May 20, 2009), http://www.nytimes.com/2009/05/21/us/politics/21detain.html.

203. *Id.*

204. *See* Julian Borger, *Donald Trump Signs Executive Order to Keep Guantanamo Bay Open*, The Guardian (Jan. 30, 2018) https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open.

205. Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama's Immigration Orders*, The Hill (Jan. 14, 2015), https://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders.

C. *Congressional Declaration Against Internment*

A Congressional proclamation or resolution against American citizen internment, detention, or racialized exclusionary orders would be very powerful in future judicial interpretations. According to the *Youngstown* doctrine, the Presidential power is weakest when it contradicts Congressional directions.[206] When Congress is silent, then the President has more leeway to use "his own independent powers" and the law may be too uncertain for judicial interpretation.[207]

Each branch has issued a statement or passed legislation rebuking the governmental actions taken during World War II against the Japanese Americans. In 1976, President Gerald Ford issued an executive order that overturned Executive Order 9066.[208] President Ronald Reagan signed the Civil Liberties Act in 1988 that provided compensation to more than 100,000 Japanese American people who suffered in internment camps during World War II.[209] Then-Solicitor General Neal Katyal issued the Confession of Error on behalf of the Department of Justice.[210] However, these actions were all retroactive and apologetic rather than proactive and protective of future constitutional violations in the midst of war. Congress must unequivocally declare its stance against American citizen internment without due process, binding the president to the will of Congress in all future cases. As a result, the judiciary will have no choice but to deem detention based on race illegal and unconstitutional.

Conclusion

Seventy-three years later, *Korematsu* has reentered the political dialogue in the wake of President Trump's Executive Order calling for a travel ban on predominantly Muslim countries and the immigration detention camps on the Texas border. Generally, legal experts have considered *Korematsu* all but dead due to its anticanonicity. However, *Korematsu* left a loaded weapon for this Supreme Court to use: the mask of national security to hide racial and religious animus. Not only did the Supreme Court reload this weapon, but Chief Justice Roberts attempted to confuse the American public by overruling *Korematsu* in his majority opinion dicta. Chief Justice Roberts' failed attempt ultimately "replaced one gravely wrong decision with another."[211]

206. Redlich, *supra* note 148, at 233.

207. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

208. Proclamation No. 4417, 41 F.R. 35 (Feb. 20, 1976).

209. Civil Liberties Act of 1988, 50a U.S.C. § 1989(b) (1988).

210. *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, The United States Department of Justice Archives (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases(last visited Oct. 30, 2017).

211. Trump, 585 U.S. at 21 (2018) (quoting J. Sotomayor's dissenting opinion). Trump v. Hawaii, 138 S.Ct. 2392, 2448 (2018).

The *Korematsu* Court had severe gaps in reasoning at the time the case was decided and should have applied strict scrutiny to the military orders. The dissenting opinions expose the fragile narrative shaped by the majority to protect the exclusionary orders. Consequently, *Korematsu* has entered the anticanon for its poor legal reasoning that is supported by racial and ethnic profiling. Perhaps one day, another seventy years from now, the Supreme Court will expose *Trump v. Hawaii* for its poor reasoning and the mental gymnastics the Trump Administration went through to pass his third version of the travel ban.

Moreover, *Korematsu*'s precedent has no binding authority due to the subsequent cases like *Hamdi* that have eroded it. *Hamdi* demands that all persons are guaranteed a hearing in front of a neutral decision maker to contest their status as an enemy combatant. Additionally, no other case has enforced *Korematsu* as good law. Recent cases such as *Ziglar* and *Hedges* focus on different issues, but the Court affirmed that no law permits the detention of American citizens without Congressional authorization.

Therefore, Congressional action is required to prohibit history from repeating itself, which Congress has proven ready to do. Even though the Supreme Court referenced *Korematsu* as invalid, Congress should continue to recognize the national mistake of internment of American citizens and permanently disarm the loaded weapon Justice Jackson so aptly warned us about by refusing to hide behind the "talisman" of national security.