On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women"

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ON THE CONTEMPORARY MEANING OF KOREMATSU:
“LIBERTY LIES IN THE HEARTS OF MEN AND WOMEN”

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ABSTRACT

In just a few years, seven decades will have passed since the U.S. Supreme Court’s decision in Korematsu v. U.S., one of the most reviled of all of the Court’s cases. Despised or not, however, similarities between the World War II era and our own have people looking at Korematsu in a new light. When the Court decided Korematsu in 1944, we were at war with the Japanese empire, and with this came considerable suspicion of anyone who shared the ethnicity of our foreign enemies. Since 2001, we have faced another external threat – from the al Qaeda terrorists – and there is, again, a fear of those on our soil who resemble them or come from the same ethnic (and in this case, religious) group. Thus the principle of law Korematsu enunciated no longer constitutes a relic of a past era; rather, it raises real questions. Since we now face a foreign threat from an identifiable group, can the government act in ways that discriminate against that particular group, as it did in Korematsu? Can the government do this with no evidence of any particular wrongdoing by identifiable persons? It would have seemed hard to believe ten years ago that such questions might arise. But that was before September 11, 2001. Now, many believe that the time to dust off Korematsu, and to put its principles to work, has come. And contrary to widespread belief, Korematsu does not require a revival; it remains alive – “good law,” in legal parlance. Nothing in American constitutional law would keep any branch of government from relying on it.

Many jurists and scholars believe that no court today would ever use Korematsu to justify another internment. Unfortunately, the law does not support this view; regardless of what we wish were so, Korematsu remains a present reality, like the “loaded weapon” Justice Jackson knew it would be. Thus if we are to avoid a repetition of this dark chapter in our history, something besides the law must come into play.

This article argues that by looking not just at the law but at how Americans view Korematsu today, we see reasons to hope that, if faced with another large-scale terrorist attack, our

† Professor of Law, University of Pittsburgh School of Law. I am grateful to the Asian Lawyers Committee for asking me to give a talk on the sixty-fifth anniversary of the Korematsu decision, which started me thinking about the ideas presented here. I would like to thank Assistant Dean for Research Mike Madison, and my colleagues, especially David Herring, for their thoughts on this paper when I presented an early version at the School of Law’s Spring Faculty Colloquium. Special thanks to staff at the Japanese American Citizens League and to Karen Narasaki of the Asian American Justice Center for their assistance in gaining access to historical materials. This project was supported by a Faculty Research Grant from the University of Pittsburgh School of Law.
In just a few years, seven decades will have passed since the U.S. Supreme Court decision in Korematsu v. United States,1 one of the Court’s most reviled cases.2 Many Americans, even lawyers,3 know little about the details of the Korematsu decision; many simply consider it not just wrong, but dead.4 Nevertheless, certain similarities between the World War II era and our own have people looking at Korematsu in a new light. When the Court decided the case in 1944, we were at war with the Japanese empire, and with this came considerable suspicion of anyone who looked like our foreign enemies. Since 2001, we have faced another external – this time, from al Qaeda terrorists – and once again, there is fear of those on our soil who resemble them or who come from the same ethnic (and in this case, religious) group. Thus, the principle of law Korematsu articulated no longer constitutes a relic of a past era; rather, it poses for us a set of live questions. Since we face a foreign threat from an identifiable group, can the government act in ways that discriminate against that particular group, as it did in Korematsu? Can it do this with no evidence of any particular wrongdoing by identifiable persons? It would have seemed hard to believe ten years ago that such questions might arise, but that was before September 11, 2001. Now, many believe that the time has come to dust off Korematsu, and to put its principles into play.5 Contrary to widespread belief, Korematsu does not require a revival; it remains alive –

1 Korematsu v. United States, 323 U.S. 214 (1944). The Supreme Court handed down its decision on December 18, 1944.

2 See, e.g., note 34 infra, and accompanying text.

3 Students entering Constitutional Law classes sometimes know something about the case – that it concerned the internment of Japanese persons in World War II – though few of them have any more information than that. Most have never read it, and even after completion of the course, many current students will still not have done so – not even in an excerpted form. For example, I examined three leading casebooks on Constitutional Law published in 2009. One contains only very limited references to Korematsu, JONATHAN D. VARAT, WILLIAM COHEN, & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 777-79 (13th ed. 2009) (two pages on “Japanese Curfew and Evacuation Cases” that include one-half of one page on Korematsu), and does not feature an excerpted version of the case. The other two contained no references to Korematsu of any kind. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (9th ed. 2009); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY (4th ed. 2009).

4 See notes 31 through 43, infra, and accompanying text.

5 See notes 70 through 100, infra, and accompanying text.
“good law,” in legal parlance. Nothing in American constitutional law would keep any branch of
government from relying on it.6

Despite this fact, many jurists and scholars believe that no court today would ever rely on
Korematsu to sustain something as outrageous as another internment. Looked at closely,
however, the law does not support this view. Korematsu remains the “loaded weapon” Justice
Jackson knew it would be. Thus, if we are to avoid a repetition of this dark chapter in our
history, something besides the law must come into play.

This article argues that by looking not just at the law, but at how Americans view Korematsu
today, we can see reasons for hope: if faced with another large-scale terrorist attack, our
institutions would not react the way they did in the early 1940s. Ironically, the basis for this
assertion comes at least in part from the very damage that Korematsu itself caused, and the
lasting impact it had.

Section I explores the meaning of Korematsu today, in the post-9/11 world, with particular
attention to the question of whether an internment could happen again. Section II explains why
the disaster of the internment now seems unlikely to recur, for reasons that do not spring
primarily from the law.

I. THE MEANING OF KOREMATSU TODAY

A. Korematsu: A Brief Synopsis

For anyone less than familiar with the Korematsu case, this brief history will summarize the
important points. (Readers who know the story may wish to move to the next section.)

In the months following the Japanese attack on Pearl Harbor, a series of executive7 and
military orders8 and a federal statute9 forced over 110,000 Japanese living in the Western U.S.

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6 See notes 44 through 69, infra, and accompanying text.

7 On February 19, 1942, President Roosevelt issued Executive Order No. 9066. 7 Fed. Reg. 1407 (1942). This
order stated that in order to protect “against espionage and against sabotage to national-defense material, national
defense premises, and national-defense utilities,” designated military commanders might “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 commander “may impose in his discretion.” Id.

8 On March 2, 1942, Lt. Gen. J.L. DeWitt, the designated Military commander of the Western Defense Command,
which included California and a large area of the American western states, issued a proclamation. Public
Proclamation No. 1, 7 Fed. Reg. 2320 (1942). It stated that because of the danger of invasion, espionage, and
sabotage, large areas of the Western Command would come within Military Areas 1 and 2. The proclamation added
that “persons or classes of persons as the situation may require” would, under subsequent orders, “be excluded from
all of Military Area No. 1” and certain parts of Military Area No. 2. Id. Fred Korematsu lived in San Leandro,
into internment camps 70,000 of them U.S. citizens. Fred Korematsu, convicted of failing to obey the internment orders, argued on appeal that his conviction violated the Constitution.

The government justified the internment as a military necessity, based on the Final Report\textsuperscript{10} of General J.L. DeWitt, the commander in charge. The Final Report became the linchpin of the Government’s argument; its assertions were repeated in the Government’s Supreme Court brief.\textsuperscript{11} With tens of thousands of Japanese on or near the West Coast, a group the Final Report called “a large, unassimilated, tightly knit racial group, bound to

\textsuperscript{9} On March 21, 1942, Congress enacted 18 U.S.C. § 97a, 56 Stat. 173, 18 U.S.C.A. § 97a (1942), which said that anyone who knowingly “shall enter, remain in, leave, or commit any act in any military area or military zone prescribed by any military commander … contrary to the restrictions applicable to any such zone or contrary to the order of … any such military commander” shall be guilty of a misdemeanor. \textit{Id.}


\textsuperscript{11} The Final Report of General DeWitt … is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. 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.
an enemy nation by strong ties of race, culture, custom, and religion.” General DeWitt asserted that a considerable danger of espionage and sabotage existed. Some Japanese, DeWitt stated, had actually used illegal radio and shore-to-ship signaling to aid the Japanese forces.

In *Korematsu v. U.S.*, the Supreme Court declared that the internment did not violate the Constitution. Justice Black, writing for the majority, said that “… all legal restrictions which curtail the civil rights of a single racial group are immediately suspect … [and courts] must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.” Nevertheless, Black said, the Court had no choice but to defer to the judgment of military authorities. Dissenting Justices Roberts and Murphy decried the government’s actions as racism. In his dissent, Justice Jackson agreed but went further, explaining that the majority’s opinion posed an even greater danger than the original mistake of the internment itself. A military commander like General DeWitt, Jackson said, “may overstep the bounds of constitutionality, and it is an incident.” The Court’s bestowal of its imprimatur, Jackson said, would invite repetition, and perhaps enlargement, of the original error. Once the Court made racial discrimination in criminal procedure and transplanting American citizens constitutional, Jackson said, “[t]he principle then

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13 *Id.*


15 *Id.* at 216.

16 This was not driven by racism, Black said, but by military necessity, because of “evidence of disloyalty on the part of some” and the need for immediate action that this created. *Id.* at 223-24.

17 Justice Roberts called the exclusion order “a clear violation of Constitutional rights” *id.* at 225, and a conviction based not on a finding of disloyalty but rather solely on ancestry, *id.* at 226. Justice Murphy’s dissent stated that the exclusion order “[fell] into the ugly abyss of racism.” *Id.* at 233. Murphy noted that there was no more evidence of disloyalties among Japanese as there had been against Germans and Italians in the U.S., yet the government excluded or relocated neither of these groups; rather, it conducted individual investigations. *Id.* at 240.

18 Jackson said that the defendant’s actions only became criminal because of the Japanese heritage of the defendant’s parents, *id.* at 243, violating a “fundamental assumption” of American law: “that guilt is personal and not inheritable.” *Id.*. Mr. Korematsu’s conviction was “an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.” *Id.* at 243.

19 *Id.* at 246.
lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

Almost forty years later, new evidence concerning the internment began to emerge. During research for his landmark book *Justice at War: The Story of the Japanese American Internment Cases,* Professor Peter Irons uncovered previously secret internal government documents. These materials proved that the government’s claim of military necessity had rested on knowing, intentional lies. Evidence in the government’s possession in 1944 and known to General DeWitt and other high officials flatly contradicted DeWitt’s assertions of Japanese disloyalty in his Final Report. The government’s Supreme Court briefs in *Korematsu* were deliberately sanitized to keep from the Justices any facts contradicting General DeWitt’s fabrications. Peter Irons calls

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20 Id. at 246.


22 *See Eric Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu, Race, Rights, and Reparation: Law and the Japanese American Internment* (2001), a comprehensive source which collects all of the original historical documents on the internment, including several pages of the original version of General DeWitt’s Final Report, referenced supra. In that document, DeWitt stated that Japanese in the U.S. sent intelligence to Japanese naval forces offshore: a statement DeWitt knew to be false. Both the FBI and the Federal Communications Commission (F.C.C.) had categorically denied that any such radio or other type of signal traffic had taken place. J. Edgar Hoover, *Memorandum to the Attorney General,* Feb. 7, 1944, in *Yamamoto et al., supra,* at 301 (reporting that FBI investigation found no basis for reports); James Lawrence Fly, Chairman, Federal Communications Commission, *Letter to Attorney General Francis Biddle,* Apr. 14, 1944, in *Yamamoto et al., supra* at 303-04 (investigation found no evidence of “illicit radio signaling”). Because of this, high-ranking Department of Justice lawyers said in their internal memoranda to their superiors that DeWitt’s Final Report contained “intentional falsehoods,” and knowing “misstatements of facts.” *Memorandum of J.L. Burling, Assistant Attorney General, War Division, Sept. 11, 1944,* in *Yamamoto et al., supra* note 22, at 310-11, making it “highly unfair to this racial minority that these lies…go uncorrected,” *Memorandum of Edward Ennis for Herbert Wechsler,* Sept. 30, 1944, in *Yamamoto et al., supra* note 22, at 312-13, 315.

23 Both the Burling and Ennis memoranda concerned a footnote in the Solicitor General’s brief in the *Korematsu* case, the first draft of which stated that General DeWitt’s statements in the Final Report concerning the allegations of radio and light signals by Japanese Americans on American soil were “in conflict with information in the possession of the Department of Justice.” *Memorandum of J.L. Burling, supra* note 22. This would have alerted the Court to the fact that General DeWitt’s Final Report could not be relied upon to support the argument that the internment was a military necessity. Instead, under pressure from the War Department, and without effective resistance to that pressure by Attorney General Biddle, the footnote in the Solicitor General’s was changed, and made no such reference. The Solicitor General presented General DeWitt’s untruths to the Supreme Court as official government intelligence with no contrary views noted, despite the vociferous internal objections of Department’s own lawyers. *Memorandum of Edward Ennis, supra* note 22, at 315 (arguing that the Department of Justice and the Attorney General bear responsibility for insuring that the Supreme Court is aware of the actual facts as opposed to the falsehoods stated by General DeWitt, stating “[i]f we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight.”) The record shows that
this “a legal scandal without precedent in the history of American law” that included “a deliberate campaign to present tainted evidence to the Supreme Court.”24 A congressional commission25 created in 1980, reported26 that the internment occurred not because of military necessity but rather because of “race prejudice, war hysteria, and a failure of political leadership.”27

With the new evidence and the work of the congressional commission as a backdrop, a federal court reviewed the case under a writ of coram nobis in 1984.28 Under the writ, the court could only review errors of fact in the case, not legal errors.29 Based on the evidence that “the government deliberately omitted relevant facts and provided misleading information in papers before the court,” the court granted the writ of coram nobis, and vacated Mr. Korematsu’s conviction.30

the eventual stripping out of the crucial information, at the behest of the War Department, was deliberate. See Memorandum of A. Fisher to John McCloy, Oct. 2, 1944, in Yamamoto, supra note 22, at 316.

24 IRONS, supra note 21, at viii.


26 Commission on Wartime Relocation and Internment of Civilians, PERSONAL JUSTICE DENIED (Washington, D.C., 1982). The Commission spent months investigating the evidence finally available almost forty years after the attack on Pearl Harbor and the forced relocation of the Japanese in the American West. It conducted hearings, and sometimes compelled witnesses to appear and produce evidence. Id. at Introduction 1.

27 Id.


29 Korematsu, 584 F. Supp. at 1420. The writ functioned, the court said, “to correct errors that result in a complete miscarriage of justice and where there are exceptional circumstances.” Id. at 1419.

30Id. at 1420.
B. Korematsu is Dead

More than sixty-five years after the Supreme Court’s Korematsu decision, and more than twenty-five years after the reversal of the original conviction, one might well ask what relevance the case has to us today. With the historical record corrected and the defendant vindicated, most commentators view Korematsu as a dead case. They see it as an historical curiosity, a relic of an era in which the country collectively lost its head to the toxic combination of war hysteria, xenophobia, and racism.

For example, the eminent constitutional scholar Lawrence Tribe of Harvard Law School says in his treatise that the dissenting opinion of Justice Jackson, not the majority opinion of Justice Black, has “carried the day in the court of history.”\(^{31}\) The Commission on Wartime Relocation and Internment of Civilians went even further, stating in its report that the Supreme Court’s Korematsu opinion “lies overruled” by history.\(^{32}\) A multitude of scholars\(^{33}\) has said that no court would rely on Korematsu today to sustain similar action by the government.

\(^{31}\) Lawrence Tribe, American Constitutional Law 237 n.118 (3d ed.).

\(^{32}\) See Personal Justice Denied, supra note 26, at 4.

More important, some members of the U.S. Supreme Court have weighed in. For example, Justice Antonin Scalia has ranked *Korematsu* among the worst decisions that the Supreme Court has ever made, comparing it to the universally despised *Dred Scott* case, which helped plunge the nation into the Civil War.\(^{34}\) With the other Justices having opined about the case either in decisions or during their confirmation hearings, all nine current Justices of the Supreme Court have said that courts could not rely on the core principle of *Korematsu* today.\(^{35}\)

If all of this ignominy heaped on *Korematsu* does not convince one that the case has no life left in it, consider also the actions of Congress and the President. In 1988, Congress enacted a bill that officially gave redress to Japanese Americans who had suffered through the internment camps.\(^{36}\) This statute officially apologized to the Japanese – both those who held American citizenship at the time and those who did not – for the suffering they endured due to their removal from their homes and businesses and their internment in camps. “For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese

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34 Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (comparing the court’s opinion in *Stenberg* to two other cases most odious in the Court’s history: *Dred Scott* and *Korematsu*).

35 See Muller, supra note 33, at 586 n.75 (citing cases showing that Justices Scalia, Kennedy, Thomas, Stevens, Ginsburg, and Breyer have all either written or joined opinions condemning *Korematsu*). There is at least some reason to wonder if Justice Thomas would actually condemn *Korematsu* today in every circumstance. See notes 88 through 93, infra, and accompanying text. Since Professor Muller’s article was published, three new justices have joined the Court: Chief Justice Roberts, and Justices Alito and Sotomayor. During his time as a judge on the U.S. Court of Appeals for the Third Circuit, Justice Alito cited *Korematsu* when he said that “[w]e have, at times, overreacted in response to perceived characteristics of groups thought to be dangerous to our security and our way of life and condemned individuals based on group membership.” Fraise v. Terhune, 283 F. 3d 506, 530 (3d Cir. 2002). Neither Chief Justice Roberts nor Justice Sotomayor cited *Korematsu* in their opinions as lower court judges, and have not done so since joining the Supreme Court. At his confirmation hearings, Chief Justice Roberts gave a glimpse of his opinion of *Korematsu* when asked by Senator Feingold whether the case had been wrongly decided. Roberts said that while *Korematsu* is not “technically … overruled yet,” the case is “widely recognized as not having precedential value,” and “it's hard for me to comprehend the argument that [Korematsu] would be acceptable these days.” Roberts also agreed with Senator Feingold’s characterization of *Korematsu* as ranking with “some of the worst decisions in the history of the Supreme Court with *Plessy v. Ferguson* and *Dred Scott* and others.” Transcript, Confirmation Hearings for Judge John Roberts, U.S. Senate, Sept. 13, 2005, accessed Feb. 2, 2010, at http://www.asksam.com/ebooks/releases.asp?doc_handle=636455&file=JGRHearing.ask&query=korematsu&search=yes. During Justice Sotomayor’s confirmation hearings, Senator Feingold also asked her whether *Korematsu* had been wrongly decided. “It is inconceivable to me today,” Justice Sotomayor answered “that a decision permitting the detention, arrest of an individual solely on the basis of their race would be considered appropriate by our government.” Transcript, Confirmation Hearings for Judge Sonia Sotomayor, U.S. Senate, July 14, 2009, accessed Feb. 2, 2010, at http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&pagewanted=42.

ancestry, the Congress apologizes on behalf of the Nation.” The statute also created a fund, out of which previously interned individuals could receive a payment of $20,000. When President Reagan signed the bill, on August 10, 1988, he “admit[ted] a wrong” and “reaffirm[ed] our commitment as a nation to equal justice under the law.”

With that kind of “reputation” – as bad as Dred Scott, as big a civil liberties mistake as the country has ever made, and as clear a consensus as one could hope for that the dissenters in the case, not the majority, got it right – one could justifiably think of Korematsu as a dead case, upon which no court today would, or could, ever rely. Professor David Cole, one of the strongest and most outspoken defenders of civil liberties in the post-9/11 era, says that Korematsu “has not proved to be the ‘loaded weapon’ that Justice Jackson feared” and he doubts that it ever will, given that such a healthy majority of the Supreme Court’s justices have repudiated it. Professor Eric Muller, who has made the study of the Japanese internment the centerpiece of his

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37 Id. at § 1989a(a).

38 Id. at § 1989b-4(a)(1).

39 Remarks of President Ronald Reagan on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians, August 10, 1988, Washington, D.C., accessed at http://www.reagan.utexas.edu/archives/speeches/1988/081088d.htm. Reagan’s comments at the signing ceremony seem less generous when read as a whole. For whatever reason, he felt compelled to add that those who perpetrated this monstrous injustice should not be blamed. “… [T]he Nation was then at war, struggling for its survival, and it's not for us today to pass judgment upon those who may have made mistakes while engaged in that great struggle.” Id. When President Bill Clinton apologized on behalf of the U.S. for the Japanese internment in 1993, he expressed no such reservations. President Bill Clinton’s Letter to Internees, Oct. 1, 1993, accessed at http://www.digitalhistory.uh.edu/learning_history/japanese_internment/clinton.cfm (“Over fifty years ago, the United States Government unjustly interned, evacuated, or relocated you and many other Japanese Americans. Today, on behalf of all your fellow Americans, I offer a sincere apology to you for the actions that unfairly denied Japanese Americans and their families fundamental liberties during World War II.”). Clinton held nothing back. Like Reagan, he says that America made a huge mistake. But he never said no one was to blame, even going so far as to repeat the Commission’s findings that put responsibility for the internment on a failure by our political leadership.

40 Professor Cole’s scholarship on the legal issues faced by the country in the aftermath of the terrorist attacks of September 11, 2001, has been substantial, deep, and excellent. One can see this just from the books he has published since September of 2001, see, e.g., DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2002); DAVID COLE, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (with Jules Lobel) (2007); DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009), to say nothing of the many law review articles and writings in the mainstream press.

41 COLE, supra note 33, at 2575.
scholarship,\textsuperscript{42} does believe that “[Korematsu] did leave a loaded weapon lying about, as Justice Jackson feared.” Even so, Muller agrees with Cole in substance, because “the passage of six decades may have emptied much of the ammunition from its chambers.”\textsuperscript{43}

\textbf{C. Not So Fast: Korematsu Is Not Dead After All}

But a closer look reveals that what Mark Twain once said of himself also goes for Korematsu: the reports of Korematsu’s death have been greatly exaggerated. To put the matter in the legal vernacular, Korematsu remains “good law” – a case that continues to stand as governing law, and which has never actually been overruled. In fact, Korematsu has continued to serve as authority for Supreme Court rulings well into the present era. It retains more vitality than most observers either realize or admit, and for that and other reasons discussed here, the case has continuing relevance in our time.

\textbf{1. Not Overruled}

The first thing to notice about Korematsu might seem the most obvious: no court has ever overruled the case. The U.S. Supreme Court never overturned its decision, and no lower federal court has ever refused to follow the case as law. Thus, to paraphrase Lawrence Tribe’s observation,\textsuperscript{44} regardless of the verdict of the court of \textit{history}, no court of \textit{law} has ever disturbed the case.\textsuperscript{45}

But surely, observers might say, this overlooks the actions and the opinion of the court that threw out Mr. Korematsu’s conviction in 1984.\textsuperscript{46} That decision cannot appear as anything but a repudiation of the Supreme Court’s \textit{Korematsu} opinion; it even points out that the Court’s 1944

\begin{itemize}
\item \textsuperscript{42}See, \textit{e.g.}, \textbf{ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II} (2007); \textbf{ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II} (2001).
\item \textsuperscript{43}Muller, \textit{supra} note 33, at 587.
\item \textsuperscript{44}TRIBE, \textit{supra} note 31.
\item \textsuperscript{45}As Eric Muller points out, there is at least some reason to be happy about this fact, in the sense that no court in the past sixty-five years has ever faced the situation in which it \textit{could not} avoid re-evaluating \textit{Korematsu}. “[T]he main reason that \textit{Korematsu} has not been overruled is that happily – and contrary to Justice Jackson’s prediction – nothing like the facts of \textit{Korematsu} have arisen” since the decision. “Thus, the Court has not overruled \textit{Korematsu} primarily because it has not needed to.” Muller, \textit{supra} note 33, at 586.
\item \textsuperscript{46}United States v. Korematsu, 584 F. Supp. 1406 (1984).
\end{itemize}
opinion rested on lies and untruths.\textsuperscript{47} Surely this undermines \textit{Korematsu}; it could not possibly withstand analysis now.

However, that reading of the 1984 opinion vacating the conviction does not really grasp the essence of what the District Court did: it reversed the conviction because of egregious \textit{errors of fact} introduced into the record by the government. Recall that the 1984 decision that overturned Mr. Korematsu’s conviction was based on a writ of \textit{coram nobis}. The writ allows the court hearing it to correct errors of fact, but nothing more. Judge Marilyn Hall Patel, who heard the petition for the writ of \textit{coram nobis} in 1984, seemed keenly aware of this fact. In her opinion, Judge Patel noted carefully that her decision reversing the conviction \textit{did not}, in any way, change or challenge the legal principles laid out by the Supreme Court in the original \textit{Korematsu} case in 1944. “This court’s decision today does not reach any errors of law,” she said.\textsuperscript{48} The writ of \textit{coram nobis}, Judge Patel said, is “not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors. Thus, the Supreme Court’s decision stands as the law of this case and for whatever precedential value it may still have.”\textsuperscript{49} Judge Patel did what the law allowed, and took the action that the facts called for: she called the government’s factual basis for the internment of Mr. Korematsu nothing but a combination of lies and racism without substance, as the new evidence showed, and she righted the monstrous wrong done to Mr. Korematsu by vacating his conviction. But, just as importantly, she did no more, because the law would not allow her to do more.

\section*{2. \textit{Korematsu} as the source of suspect class analysis under the Equal Protection Clause}

For lawyers whose careers have spanned only the last fifteen to twenty years, \textit{Korematsu} may have a different meaning than it does for those whose careers began earlier. For the post-World War II generations – attorneys who came of age professionally in the 1950s and 1960s \textit{Korematsu} embodied, and likely will always immediately bring to mind, the Japanese internment. But for those who came later, it would not be surprising if the case might have an entirely different primary importance. This is because the Supreme Court – in both majority opinions, and in concurrences and dissent – has used \textit{Korematsu} frequently to establish a centrally important principle: that government use of racial distinctions in the treatment of its

\textsuperscript{47} \textit{Id.} at 1416-19, 1420 (“… [t]here is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court.”).

\textsuperscript{48} \textit{Id.} at 1420.

\textsuperscript{49} \textit{Id.} This is consistent with the case law on the writ of \textit{coram nobis}. \textit{See} note 28, supra.
citizens is immediately suspect. *Korematsu* lives today primarily because it serves as the source of suspect class analysis and strict scrutiny.

Recall that the heart of Justice Black’s majority opinion began by declaring:

… [A]ll legal restrictions which *curtail the civil rights of a single racial group* are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that *courts must subject them to the most rigid scrutiny*. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.  

If in some sense history has overruled the majority opinion and vindicated the dissenters, as Lawrence Tribe says, 51 this does not apply to Justice Black’s analysis of discrimination under the Equal Protection Clause. The Court’s modern thinking about equal protection really begins with *Korematsu*. Every subsequent case that construes the Equal Protection Clause descends directly from *Korematsu*.

For example, in the 1967 case of *Loving v. Virginia*, 52 the Supreme Court addressed the constitutionality of Virginia’s miscegenation law. The statute at issue made it a criminal offense for a white person and a black person to leave the state to marry and then return to Virginia and live together as spouses. 53 The Supreme Court found the law unconstitutional, and its discussion of why the law violated the Equal Protection Clause put *Korematsu* in a central position. “At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny,’” the Court said, quoting Justice Black’s key phrase. 54 The statutory scheme could pass muster under the *Korematsu* standard only if the racial classifications it established proved necessary to accomplish a “permissible

50 *Korematsu v. United States*, 323 U.S. at 216 (emphasis supplied).

51 *See* note 31, *supra*.

52 388 U.S. 1 (1967).

53 *Id.* at 4. The defendants, a white man and a black woman, married in the District of Columbia, and then took up residence in Virginia. *Id.* at 2. A court convicted them of violating the law, and sentenced them to a year in prison; the judge suspended the sentence for twenty-five years, on the condition that the Lovings not return to Virginia together for twenty-five years. *Id.* at 3. The U.S. Supreme Court noted that Virginia’s own courts had interpreted the state’s miscegenation laws as necessary to assure white racial superiority. *Id.* at 7, quoting *Naim v. Naim*, 197 Va. 80 (1955) (stating the reasons in support of the miscegenation laws included Virginia’s goal of “preserv[ing] the racial integrity of its citizens,” and preventing “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride.”).

state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”

Loving’s embrace of Korematsu’s Equal Protection Clause standard did not prove an anomaly. It has, in fact, carried over into many Equal Protection cases testing various contemporary claims involving racial classifications by the government. In Adarand Constructors v. Pena, a 1995 case challenging affirmative action-based set asides, the Court invoked the key phrases of Korematsu. “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and] courts must subject them to the most rigid scrutiny.” In Missouri v. Jenkins, a school desegregation case, the Court relied on Korematsu when it declared that “we must subject all racial classifications to the strictest scrutiny,” which was almost always fatal to the government’s action. In Grutter v. Bollinger, one of the Court’s two most recent cases involving affirmative action in university admissions, the Court quoted portions of Loving v. Virginia and Adarand Constructors (both of which themselves quoted Korematsu’s equal protection standard) to declare that governments cannot treat people differently based on race without a compelling reason. In an even more recent case, Parents Involved in Community Schools v. Seattle School District No. 1, Justice Thomas amplifies the point in his concurring opinion. “We have made it unusually clear that strict scrutiny applies to

55 Loving v. Virginia, 388 U.S. at 11.

56 Loving was not the first case following Korematsu to invoke the suspect class – strict scrutiny standard, even if it is now the best-known case of the civil rights era to do so. Loving was proceeded in its use of the Korematsu equal protection standard by Bolling v. Sharpe, 347 U.S. 497 (1954), the school desegregation case based on the federal Fifth Amendment that accompanied the Supreme Court’s decision in Brown v. Board of Education, 347 U.S. 483 (1954). See Bolling, supra, at 499 (“Classifications based solely upon race must be scrutinized with particular care.”).


58 Id. at 214.


60 Id. at 121. The Court noted that Korematsu, and Hirabayashi v. United States, 320 U.S. 81 (1943), the Japanese curfew case which preceded Korematsu, were the only two exceptions to the “fatal in fact” rule.


62 The other was Gratz v. Bollinger, 539 U.S. 244 (2003), the companion case to Grutter.

63 Grutter, 539 U.S. at 326.

every racial classification, “he said, citing as authority the passage in the *Adarand Constructors* case in which the Court cited the part of *Loving* that had cited *Korematsu*. 66

Thus, even though it seems at least a bit paradoxical, *Korematsu* lives as a vital part of our modern equal protection jurisprudence. The case and its direct descendants still show up in our contemporary cases. 67 Of course, when current decisions cite *Korematsu*, they do so not to show acceptance of racial discrimination; rather, they usually undergird discussion concerning the odiousness of these practices. Thus, for current law students reading only modern cases, *Korematsu* would stand out as one of the great cases presaging, and supporting, the dawning of the civil rights era. As Professors John Nowak and Ronald Rotunda have written, “[i]f you only read the cases citing *Korematsu*, and not *Korematsu* itself, you would never know Mr. Korematsu lost.” 68

D. The Direct Rehabilitation the *Korematsu* Legal Principle

Perhaps it might seem troubling to observe the “life” of *Korematsu* as a continuing source of modern equal protection law, with very little discussion in modern cases of the actual outcome of the case and the injustice it sanctioned. But it is even more disquieting to find that the central holding of *Korematsu* – that the government may hold and intern persons of one ancestry, for the sake of security – also lives on. What’s more, these sentiments have not come from the fringe, but from several of the most influential jurists of our time. 69

Start at the very pinnacle of the judicial branch of government, with no less a figure than the late Chief Justice William Rehnquist, who served on the Court from 1971 until his death in 2005. In his 1998 book *All the Laws But One: Civil Liberties in Wartime*, 70 Rehnquist wrote two chapters concerning the Japanese internment and its aftermath. His treatment of the internment, the governmental and military actors who made it happen, and the Supreme Court’s

65 *Id.* (Thomas, J., conc., slip op. 12).

66 *Id.* at n.10. Justice Thomas cites *Adarand Constructors* in the text, and in a footnote connects the *Adarand* citation directly to *Loving*, at 388 U.S. at 11. That portion of the *Loving* opinion cited *Korematsu*, 323 U.S. at 216.

67 See Yen, *supra* note 33, at 1, 2 n.6 (1998) (noting that, as of 1998, many hundreds of judicial opinions cited *Korematsu*, but only a very tiny number of these questioned or criticized the decision).

68 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.7, at 393 (5th ed.).

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70 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Knopf 1998).

71 *Id.* at Chapters 15 and 16.
decision seemed curiously restrained. He exhibited some discomfort with certain aspects of the case, particularly that the internment included Japanese American citizens (as opposed to just resident aliens), and that similarly situated Germans and Italians did not suffer the same treatment. Yet Rehnquist did not condemn the internment, either. Rather, he called the internment “the least justified” (but justified nonetheless, it seems) infringement on civil liberties in wartime.

Rehnquist seems particularly forgiving of the officials who made the critical decisions leading to the internment. General DeWitt and his military officials “were not entrusted with the protection of anyone’s civil liberties” and were not the ones who “first recommended evacuation,” he says. Secretary of War Henry Stimson and his deputy John McCloy could have done more, but “civil liberties was not their responsibility.” Rehnquist has no criticism whatsoever for the Department of Justice. All of this seems nothing short of remarkable, since Rehnquist’s comments in the book came more than ten years after Peter Irons’ book revealed General DeWitt’s unambiguous, knowing lies, and the Department of Justice’s knowing presentation to the Supreme Court of untruths about disloyalty and treasonous behavior by Japanese. These facts became widely known not just through Irons’ book, but also through the 1984 coram nobis case, and through the work of the Congressionally-chartered Commission on Wartime Relocation and Internment of Civilians. It boggles the mind to think that a sitting Chief Justice could, in his own work on the subject, ignore evidence of false testimony given to the Supreme Court by the highest officials in the government. Yet none of this rates even a bare mention by Rehnquist. Instead, Rehnquist credits the government’s actions in Korematsu based

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72 Id. at 206-10
73 Id. at 210-11.
74 Id.
75 Id. at 204.
76 Id.
77 Id.
78 See notes 21 through 24, supra, and accompanying text.
79 See notes 28 through 30, supra.
80 See notes 25 through 27, supra.
on the proximity and concentration of Japanese population to military and other sensitive installations, and finds the Supreme Court’s decision at least partially, if not wholly, justified. Perhaps, he says, the difference in treatment between Japanese, on the one hand, and Germans and Italians, on the other, would seem troubling in peacetime. But the exigencies faced by the country in wartime “do seem legally adequate to support the difference in treatment between [them] in time of war.” Commenting on All the Laws but One, Professor Alfred Yen managed to put into words a gentle but firm rebuke. “Perhaps the Chief Justice did not intend to rehabilitate Korematsu,” said Professor Yen. “Nevertheless, his reluctance to clearly criticize the internment and those responsible for it makes its rehabilitation more likely.”

Purposeful or not, Chief Justice Rehnquist’s comments do not stand alone in terms of moving Korematsu toward wider acceptability. Among judges not sitting on the U.S. Supreme Court, few have the influence of Judge Richard Posner. President Reagan appointed Judge Posner to the U.S. Court of Appeals for the Seventh Circuit in 1986. Posner is not just a high-ranking jurist; he is in every sense a respected public intellectual. Thus it seemed appropriate to find Posner’s comments in Harper’s Magazine in May of 2001 on the then-recently-decided case of Bush v. Gore, in which the U.S. Supreme Court effectively ended the Florida vote disputes and gave George W. Bush the presidency. The article, which took the form of a transcribed debate between Judge Posner and Professor Pamela Karlan of Stanford University Law School, focused entirely on Bush v. Gore, its aftermath, and its implications. None of this had anything to do with Korematsu, until Professor Karlan said that she did not believe that Bush v. Gore would “go into the canon of disastrous law” like Korematsu. In reaction, Judge Posner defended Korematsu. Here is what he said.

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81 Rehnquist, supra note 70, at 211.

82 Yen, supra note 33, at 7.


86 Karlan & Posner, supra note 84, at 38.
Actually, I think [Bush v. Gore] is like Korematsu, but I actually think Korematsu was correctly decided. In 1942, there was a real fear of a possible Japanese invasion of the West Coast. I believe there had actually been some minor shelling of the Oregon coast by a Japanese submarine. Unquestionably, the order excluding people of Japanese ancestry from the West Coast was tainted by racial prejudice. On the other hand, many Japanese Americans had refused to swear unqualified allegiance to the United States. Good or bad, it was a military order in a frightening war. Although the majority opinion, written by Justice Hugo Black, is very poor, the decision itself is defensible. The Court could have said: We interpret the Constitution to allow racial discrimination by government when there are urgent reasons for it, and if the military in the middle of a world war says we have to do this, then we’re going to defer, because the Constitution is not a suicide pact. 87

Give Judge Posner credit for straightforwardness, especially for a sitting judge. He does not hedge his position or try to sidestep its difficult implications, and he admits to the racism in the situation that Justice Black denied. When the military and civilian powers act in an emergency during a time of war, the courts must defer to military judgment, even if those actions would clearly constitute racial discrimination that would violate the Equal Protection Clause. To Judge Posner, Korematsu’s central principle and result remains not just alive, but correct. Should similar circumstances present themselves, he says, the president and the military would have full legal authority to intern civilians again.

Last but not least, and most recently, Supreme Court Justice Clarence Thomas has also given Korematsu renewed currency. Thankfully, a situation identical to Korematsu has not presented itself to the Supreme Court. 88 Justice Thomas has, however, discussed Korematsu in a positive way that bears closely on the nation’s current security concerns. In Grutter v. Bollinger, in which the Court upheld down the University of Michigan Law School’s admissions system, 89 Justice Thomas wrote his own opinion, concurring in part and dissenting in part. 90 In the course of that opinion, Justice Thomas said that governmental discrimination offends the Equal Protection Clause under the strict scrutiny test, which originated in Korematsu. 91 He quoted the majority in Korematsu: “[p]ressing public necessity may sometimes justify the existence of


88 See note 45, supra.


90 Id. at 349-79.

91 Id. at 351.
[racial discrimination]; racial antagonism never can.”\textsuperscript{92} Justice Thomas then continued by pointing out that \textit{Korematsu} represented one of only two situations in which the Supreme Court had ever approved of racial discrimination for a pressing public necessity. Thus, to Justice Thomas, the central teaching of \textit{Korematsu} retained significance and remained in place. “[T]he lesson of \textit{Korematsu} is that national security constitutes a ‘pressing public necessity,’ though the government’s use of race to advance that objective must be narrowly tailored.”\textsuperscript{93}

\textbf{E. It Could Not Happen Again … or Could It?}

\textbf{1) The Possibility Is Real}

Justice Jackson framed his objection to the Court’s decision in \textit{Korematsu} as a dire warning that the principle enshrined in the case would henceforth “[lie] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”\textsuperscript{94} Many thoughtful commentators now discount the danger Justice Jackson saw,\textsuperscript{95} but I respectfully disagree. The question of \textit{Korematsu}’s resurrection, and even the possibility of another internment, no longer constitutes idle speculation. The post-9/11 climate has transformed the significance of \textit{Korematsu}: from something which might, in the past, have seemed a mere academic exercise, into something real, with possibly profound consequences. An incident in 2002 will help bring the point into focus.

On July 19, 2002, the U.S. Commission on Civil Rights held a hearing near Detroit, Michigan. The Commission held the hearing there in order to hear from Arab American and Muslim leaders, who had voiced complaints concerning discriminatory treatment after the attacks of September 11, 2001. Southeast Michigan, especially the Detroit suburb of Dearborn, contains one of the largest Arab American populations in the nation.\textsuperscript{96} Holding the hearing there would allow the Commission to collect evidence, facts, and impressions from the largest and

\textsuperscript{92} \textit{Id.}, quoting \textit{Korematsu}, 323 U.S. at 216.

\textsuperscript{93} \textit{Grutter}, 539 U.S. at 351.

\textsuperscript{94} 323 U.S. at 246 (Jackson, J., dissenting).

\textsuperscript{95} See notes 31 through 43, \textit{supra} and accompanying text.

\textsuperscript{96} See, e.g., U.S. Census Bureau, \textit{The Arab Population, 2000}, issued December 2003, at 10, tbl.3, accessed at \url{http://www.census.gov/prod/2003pubs/c2kbr-23.pdf}, which shows that the Arab population of Dearborn, Michigan alone – there are also substantial Arab populations in neighboring communities such as Sterling Heights and Livonia, Michigan – is larger than the Arab population of any city in the country except New York City. Dearborn, a city of 100,000, has 30,000 Arabs; New York City has an overall population of eight million, eighty times the size of Dearborn, and has roughly 70,000 Arabs.
widest array of people and organizations affected by any post-9/11 backlash. The meeting was one of the first attended by Commissioner Peter Kirsanow, an appointee of President Bush who had taken his seat only two months before.

The Commissioners and others present heard testimony from many witnesses concerning civil rights violations against Arab Americans. As the hearing neared its end, a member of the audience raised the subject of the Japanese internment: would Commissioner Kirsanow give his assurance that the government would not repeat the internment with Arab Americans? Mr. Kirsanow, who prefaced his answer by saying that he believed in the protection of civil rights even in wartime, spoke directly to the possibility of history repeating itself in the post-9/11 world. “I believe no matter how many laws we have, how many agencies we have, how many police officers we have monitoring civil rights, that if there’s another terrorist attack and it’s from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country,” Kirsanow said. “I think we will have a return to Korematsu.”

According to published accounts, Kirsanow continued this line of thought after the meeting in comments to a journalist, in which he said that “not too many people will be crying in their beer if there are more detentions, more stops, more profiling. There will be a groundswell of public opinion to banish civil rights.”

Kirsanow’s comments touched off a firestorm of criticism, accusing him of suggesting tolerance for, and consideration of, the idea of internment Arabs in the fight against terrorism. He responded by stating that his enemies had distorted his comments and that he was


“unalterably opposed” to the idea of internment camps. He had been trying, he said, to convey the idea that such approaches should be condemned, and that waging war on terrorism and upholding civil liberties “are not mutually exclusive.”

Few would dispute that Kirsanow could have chosen his words more judiciously. For a public official to even raise the possibility that some Americans would not just accept but welcome internment camps for Arabs, in a meeting at which Arab Americans had gathered to voice their objections to mistreatment, seems the height of obliviousness. Giving Kirsanow every benefit of the doubt, he might have been trying to say that he feared that another attack might build support for interning Arab Americans, an outcome he did not want to see. Whichever way one chooses to view Kirsanow’s words, the unfortunate truth is that we can no longer consider the question of whether internment could occur again as just a matter of academic curiosity. Rather, in the post-9/11 world, Kirsanow’s comments reveal a genuinely frightening and dark fact. In the aftermath of another serious attack by extremists based in Arab or Muslim countries, or worse yet an attack that originates with or involves persons of Arab ancestry or Muslim religious background who live in the U.S., some will argue that the internment of Arabs and Muslims as a necessary measure that national security demands. I believe this possibility is real enough that, in a seminar called Criminal Justice and Homeland Security, I have given my students a hypothetical problem to brief and argue. The problem assumes a large-scale truck bombing targeting a federal courthouse, killing hundreds and wounding thousands. Investigation reveals that two U.S.-based al Qaeda sleeper cells, consisting of both foreign-born and native-born Muslims, carried out the attack. In the aftermath, the president orders “all persons of Arab descent” and all Muslims to report to security centers, where they will stay under military guard until cleared to leave. The question presented concerns the president’s order: would he or she have the constitutional authority to order internment of Arab Americans and Muslims under these facts? Half the class acts as lawyers for the government and argues for internment; the other half, representing a potential internee, argues against it.

Could something resembling the facts in the problem actually happen? If I say that I fervently hope not, I have not answered the question. In the event of another attack under the circumstances described, a presidential response like the one outlined in the problem is not beyond the realm of possibility. The problem forces students to come to grips with this

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100 Clemetson, supra note 98; Chow, supra note 97.

101 Clemetson, supra note 98 (quoting leader of the Midwest Director of the American-Arab Anti-Discrimination Committee as saying that “[For] someone in his position to even entertain the idea of detention camps … it is like he is making it an acceptable debate.”)

102 Appendix A contains the full text of the problem.
uncomfortable – and for most, unimaginable – reality. I see two related points in their responses. First, when they dig into the law – Korematsu from 1944, the 1984 opinion granting the writ of coram nobis, and other cases and materials – they readily come to the conclusion that the core principle of Korematsu remains very much alive. Second, the briefs they write reveal that they readily grasp how the facts in the problem – parallel in many ways to the facts of the 9/11 attacks – could persuade a court to defer to the executive.

None of my students say they would want to see an internment in these circumstances. But when cast in the role of a lawyer for the government, they can and do formulate legally and factually persuasive arguments for it, both legally and factually. I do not believe my students to be unusual. If they can understand and make these arguments on behalf of a hypothetical president, so could lawyers from the U.S. Department of Justice. In The Emergency Constitution, Professor Bruce Ackerman says that while Korematsu may constitute “very, very bad law,” this does not answer the question of whether this chapter of our history might, under some circumstances, repeat itself. “[W]hat will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of Korematsu will not be extended to the ‘war on terrorism’?”

103 Ackerman, supra note 33.

104 Id. at 1043 (emphasis in original).

105 Id. When one moves from the thought and opinions in the legal community to popular culture, one sees commentators with very large followings arguing that Korematsu’s central principle is now a necessary government tool, in the war against terrorists based in the Middle East. Michelle Malkin surely ranks first among these people. Malkin, a television commentator for the Fox News Channel and a nationally syndicated newspaper columnist, who describes herself as “a mother, wife, blogger, conservative syndicated columnist, author, and Fox News Channel contributor.” http://michellemalkin.com/about/, published a book in 2004 called In Defense of Internment: The Case for Racial Profiling in World War II and the War Against Terror (Regnery 2004). Malkin was refreshingly candid about her aims. With the book, she said, she offered “a defense of the most reviled wartime policy in American history: the evacuation, relocation, and internment of people of Japanese descent during World War II.” Id. at xiii. According to Malkin, she did this because of the direct connection between how Americans view the Japanese internment, and current national security concerns. The U.S. must have the option, Malkin believes, of using internment and related policies like racial profiling to secure itself against Middle Eastern terrorists. Id. For Malkin, it is unfortunate that the revulsion most Americans feel for the internment of the Japanese “has become the warped yardstick against which all War on Terror measures today are judged.” Id. at xvii. This endangers the country, she says, because if ethnic targeting or even an internment became necessary in the judgment of our leaders, soft-headed and tender-hearted Americans would object. They would oppose these actions because they have been duped into believing that the Japanese internment was unjustified, racist, and just plain wrong – a mistake we should never repeat. Id. The aim of her book was thus to correct the misinformation that millions of Americans have been fed about the internment, and in so doing to persuade us that we need to be ready to lock groups in camps if our leaders tell us we must do this for our safety. In case we miss her point, the cover of her book pairs an image of a Japanese man arrested in Hawai’i after the bombing of Pearl Harbor with one of Mohammed Atta, the leader of the 9/11 hijackers, whose picture became ubiquitous after the terrorist attacks. Although her book was widely pilloried by
2) Would a Mature Equal Protection Doctrine Prevent a Repeat of Korematsu?

Some will object to my analysis, on the grounds that the Supreme Court’s Equal Protection cases decided after Korematsu have added an extra layer of protection against government burdens allocated by race. After all, the years after Korematsu, especially the 1960s and 1970s, became the era of the full flowering of the Equal Protection Clause. In these cases, the strict scrutiny standard became more fully fleshed out. Courts interpreted strict scrutiny of government racial classifications to mean that such classifications could only survive if they served a compelling governmental need, and were narrowly tailored to serve that purpose. This usually set a standard that the government could not meet. Gerald Gunther, one of the leading constitutional scholars of the twentieth century, famously captured the essence of strict scrutiny by describing it as strict in theory, but fatal in fact. Given these developments, some say, an attempt by the government to create an internment in the event of another terrorist attack simply could not survive judicial scrutiny. The late Chief Justice Rehnquist makes this very argument in his book All the Laws But One. The Supreme Court could not validate an internment now as it did in the 1940s, Rehnquist said, because Equal Protection law has become so much stronger and

mainstream historians for its irresponsible use of discredited evidence without presenting any contrasting point of view, see, e.g., Historians’ Committee for Fairness, Letter Signed by Historians Regarding In Defense of Internment, History News Network, Aug. 31, 2004, accessed at http://hnn.us/readcomment.php?id=40982. Malkin’s argument – that internment may be a reasonable response to a national security threat that we must remain prepared to use – has found a wide audience (the book appeared on the New York Times Best Seller list) as well as mainstream public acceptance. Writing in U.S. News and World Report, John Leo, one of the magazine’s editors, wrote that “Malkin’s point is that if the threat to the survival of America is severe enough, some civil liberties must yield …. It is always reasonable to look in the direction from which the gravest danger is coming. It’s also reasonable and important to open an honest discussion of internment, past and present.” John Leo, The Internment Taboo, U.S. NEWS & WORLD REPORT, Sept. 19, 2004, accessed at http://www.usnews.com/usnews/opinion/articles/040927/27john.htm. Nationally syndicated columnist Thomas Sowell called Malkin’s book “sober and thoughtful,” and approvingly characterized its argument: “what is called ‘racial profiling’ was valid then, with the country in grave danger, and is valid again today when it comes to people from the Middle East living in the United States.” Thomas Sowell, Michelle Malkin’s “In Defense of Internment,” CAPITALISM MAGAZINE, Sept. 21, 2004, accessed at http://www.capmag.com/article.asp?ID=3941.

106 See notes 50 through 68, supra and accompanying text.


108 See Rehnquist, supra note 70.
well developed. Thus we should think of the modern Equal Protection Clause itself as a bulwark against this kind of thing ever happening again.

This is a powerful argument, but it also overlooks the actual language of the *Korematsu* opinion. Recall that Justice Black begins his opinion by addressing when, if ever, the Equal Protection Clause might allow the government to treat Americans in a racially discriminatory fashion. He may not have used the phrases “compelling state interest” and “narrowly tailored” that came into use in the succeeding decades, but surely those principles appear, in a very real sense.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. 

Only by stressing word choice over meaning and phraseology over principle can we find much difference “compelling state interest” and “pressing public necessity.”

Black then went on to stress that national security clearly qualifies as among those dire public necessities that may justify upholding a government racial classification. Justice Frankfurter’s concurring opinion, stressing the importance of judicial deference to the judgment of the military and the executive, underscored the point. At least one of the current members of the Supreme Court has not forgotten this. It was just six years ago that Justice Thomas went out of his way to note that national security could, in fact, justify explicit racial discrimination by the government. His comment drew no disagreement from other members of the Court.

Modern lawyers tend to think of the Equal Protection Clause and the prohibitions on government racial discrimination of the last fifty or so years as sacred, echoing Gunther’s “strict in theory, but fatal in fact” idea. But at least in the arena of national security, this is not so. The Fifth and Fourteenth Amendments may say that all shall enjoy the equal protection of the law,

109 Id. at 207 (to the question of whether the internment might pass muster under the law today, Rehnquist answers, “[u]nder today’s constitutional law, quite certainly not: any sort of ‘racial’ classification by government is viewed as ‘suspect,’ and an extraordinarily strong reason is required to justify it.”).

110 323 U.S. at 216.

111 Id. at 218.

112 Id. at 224-25 (Frankfurter, J., concurring).

113 See notes 88 through 93, supra, and accompanying text.
but the glaring example of *Korematsu* tells us that this is not true without exception. Some circumstances may allow for even the worst kinds of discrimination.

Recall that Judge Richard Posner has said that in *Korematsu*, the Court reached the correct result with a terrible opinion; the Court, Posner said, “could have said: ‘We interpret the Constitution to allow racial discrimination by government when there are urgent reasons for it, and if the military in the middle of a world war says we have to do this, then we’re going to defer, because the Constitution is not a suicide pact.’”114 The inescapable fact that *Korematsu* remains good law means that Posner’s view cannot be dismissed out of hand. In matters of national security, the reach of equal protection law is a question of how much we value equality, as compared to the value we put on national security in a given factual context. Put another way, vis-à-vis national security, the Equal Protection Clause contains no real anchor that will always make equality the superior value. Instead, it becomes a question of what the courts care about most.

A plausible objection to this thesis is that today’s Supreme Court would not validate a *Korematsu*-like internment again, even in the event of another attack. The Supreme Court has, critics would say, faced four cases in which the executive branch of the U.S. government asserted unprecedented powers to detain people in the pursuit of post-9/11 terrorism: *Rasul v. Bush*, 115 *Hamdi v. Rumsfeld*, 116 *Hamdan v. Rumsfeld*, 117 and *Boumediene v. Bush*. 118 The government argued that the executive’s power under the Constitution allowed the president to take extraordinary actions against “enemy combatants” in U.S. custody in order to secure the nation. Critics of my position would surely point out that the Supreme Court rebuffed the government in all four cases, often in sweeping language that at the very least suggests hostility to assertions of the power to incarcerate persons in the name of national security. In *Rasul*, the Court denied the government’s claim that the U.S. Naval Base at Guantanamo Bay amounted to a zone free from any judicial oversight. On the contrary, the Court said, federal courts had jurisdiction to test the assertion of presidential power over individuals incarcerated there.119 In *Hamdi*, Justice O’Connor, writing for a plurality, said that Guantanamo detainees did have the right to due process.120 “[A] state of war,” said Justice O’Connor, “is not a blank check for the

114 Karlan & Posner, *supra* note 84.


119 *Rasul*, 542 U.S. at 480-84.

120 *Hamdi*, 542 U.S. at 533-35.
president.” In Hamdan, the Court dismissed the idea that enemy combatants enjoyed no protections under the Geneva Convention when tried in military commissions. In Boumediene, the Court preserved the availability of habeas corpus for those incarcerated at Guantanamo. Thus critics might argue that these cases show that, whatever the legal status of Korematsu in the abstract, a majority of today’s Supreme Court would not accept a Korematsu-style internment in the event of an attack.

I understand these criticisms, but I do not believe that we could depend on these cases to tell us what a court would do if faced with another attack and a plan for internment. None of them relied upon, or even expressed any relation to, the law of equal protection; doctrinally, they rested on the president’s executive and wartime powers. Perhaps more important than what these cases struck down, we must notice what these cases did allow. The best example is Hamdi, in which Justice O’Connor famously refused to grant the executive a constitutional blank check in wartime. Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants. While some minimal degree of process is due, the bottom line is that the Court conceded this power to the president, with very little in the way of checks or balances. Similarly, in Hamdan, the Court ruled that only Common Article Three of the Geneva Conventions, the most basic set of protections available, applied to enemy combatants at Guantanamo. Hamdan also goes on to say that military commissions could try these prisoners if modified to be procedurally adequate. If there is a relationship between the enemy combatants cases and what the Court might do if faced with a Korematsu decision again, it is that the Court in these cases largely – even if not entirely – deferred to the power of the executive. One can see the enemy combatant cases as a counterweight to Korematsu only by blinding oneself to the fact that the enemy combatant cases allowed indefinite detention of American citizens in the name of national security, with only minimal due process available. Thus, rather than signaling that the Court would stand in the way of another internment, at least

121 Id. at 536.
122 Hamdan, 548 U.S. at 629-630.
123 553 U.S. at ___, 128 S. Ct. at 2262.
124 Hamdi, 542 U.S. at 519-20 (the government may hold enemy combatants, even if they are American citizens, until the end of hostilities).
125 Id. at 524-25, 533-36 (enemy combatants may be detained without trial, but must be accorded basic aspects of due process, such as notice of charges and opportunity to be heard).
126 Hamdan, 548 U.S. at 629-30.
127 Id. at 613-22.
as plausible a reading of these cases indicates that the Court has, at the very least, left the door open for it.

3) Post-9/11 Actions by the Government: Fear with a Real Basis

Perhaps it may seem that those Americans worried about whether an internment might take place in the event of another attack have fallen into the grip of irrational fear. After all, almost seventy years have passed since *Korematsu*. If we did not repeat the colossal mistake of internment in the immediate aftermath of the September 11, 2001, attacks, with their graphic images and thousands of civilian deaths, we likely never will.

It is important to be clear: in terms of damage to people by government action, nothing has happened after September 11, 2001, that even remotely approaches the catastrophe of the internment. While some have clearly experienced harm, the Japanese internment dwarfs anything that has happened since 9/11 in terms of the number of people affected, as well as the amount and type of damage done to them. Nevertheless, we cannot ignore the many parallels between the internment and the treatment of Muslims from the Middle East, South Asia and elsewhere since 9/11, as a result of the shadow of suspicion thrown upon a whole group of people because of ethnicity and religion. A brief catalogue of some of the government’s post-9/11 actions shows not a wholesale internment, but in light of our history at least a large enough number of gathering storm clouds to make anyone in the crosshairs of these government actions feel quite uneasy. By these indicators, it is not at all implausible to say that we had begun drifting back toward *Korematsu* in the immediate aftermath of 9/11.

In the days and weeks following the 9/11 attacks, the federal government began to round up Muslim men. The government incarcerated these men in jails and prisons, or sometimes in immigration holding facilities. They often endured poor conditions and harsh treatment. They were held for an average of 80 days, some for considerably longer, and a quarter of them were held for longer than three months. The government detained them under a “hold until cleared” policy: that is, their lack of involvement in the attacks had to be proven before they


129 *Id.* at 2, 17.

130 *Id.* at 111-84.

131 *Id.* at 51-52.
might be released, inverting the presumption of innocence.\textsuperscript{132} They were held in custody under conditions that severely limited their access to attorneys\textsuperscript{133} and family members.\textsuperscript{134} None of those arrested had connections to terrorism.\textsuperscript{135}

Since most of the men the government incarcerated in the aftermath of the attacks were immigrants from the Middle East and South Asia, the government accomplished the round up through a systematic use of immigration law. Not a single one of the detainees faced terrorism-related criminal charges; except in a few cases, the FBI filed no criminal charges of any kind. Filing criminal charges would have forced the government to provide evidence of wrongdoing, and to play by the rules of our criminal justice system. Instead, the government made a conscious decision to avoid the due process requirements of the criminal justice system. Attorney General John Ashcroft did not shy away from his use of immigration law and other indirect methods to detain these suspects.\textsuperscript{136} He asserted that he would use every tool at his disposal to get at terrorists, and he likened his methods to Robert Kennedy’s famous statement that, in order to take down the Mafia, he would see to it that gangsters faced arrest for “spitting on the sidewalk” if necessary.\textsuperscript{137} Ashcroft argued that rounding people and holding them without due process in the name of combating terrorism were exactly the same.\textsuperscript{138}

Similar actions followed in the Fall of 2001 and Spring of 2002, when the Department of Justice launched a program to interview five thousand young men from Middle Eastern and

\textsuperscript{132} Id. at 37-43.
\textsuperscript{133} Id. at 130-38.
\textsuperscript{134} Id. at 138-40.
\textsuperscript{135} Federal News Service, U.S. Senate Judiciary Committee, Oversight Hearing on Counterterrorism, June 6, 2002 (Senator Kennedy: “Is it true that none of the 1,200 or more Arab and Muslim detainees, that after September 11 were held, were charged with any terrorist crimes or even certified under the Patriot Act as persons suspected of involvement in terrorist activity?” FBI Director Robert Mueller: “Well, specific terrorist charge of somebody who was going to or had committed a terrorist act, no.” Director Mueller attempted to explain that a number of those detained had some association with terrorists, but he was contradicted by other officials. See also Eric Boehlert, The Dragnet Comes Up Empty, Salon, June 19, 2002 (quoting a Department of Justice official as saying that, among all the charges against post-9/11 detainees, “none … have been for terrorist activities.”).
\textsuperscript{136} Remarks of Attorney General John Ashcroft to the U.S. Conference of Mayors, October 25, 2001 (“Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute.”).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
Muslim nations. The Department of Justice said that it did not suspect the men of terrorism, and the authorities had no reason to believe they might have committed any crimes. Rather, the Department wanted to interview them just in case they might know something. Some law enforcement agencies asked by the federal government to participate in the interviewing program refused to do so because the program would destroy the relationships that they had worked hard to build with these communities. A number of former FBI officials publicly opposed and even ridiculed the program. Nevertheless, the Department of Justice pressed forward and conducted the interviews, and then extended the interview program to another three thousand people. When the General Accountability Office studied the program at the order of Congress, the Department of Justice asserted the program had been a success, creating relationships and gathering important information; however, spokespersons admitted that the Department had performed no systematic study or investigation of its efforts or results that would justify such a view. What the interview program undoubtedly did do, however, was generate a list of suspects, their personal information, and contacts that the FBI could use later against persons on the list.

During the twelve months after the attacks, the Administration began using a tactic that upped the ante further: they declared three individuals to be “enemy combatants.” While the

139 Deputy Attorney General of the U.S., Memorandum for All United States Attorneys, All Members of Anti-Terrorism Task Forces, Nov. 9, 2001 (copy on file with the author).

140 Id.


142 Jim McGee, Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, WASH. POST, Nov. 28, 2001 (deriding the interview program as an ineffective and damaging effort likely to come up with nothing more incriminating than “the recipe to Mom’s chicken soup.”).


145 In actuality, the GAO reported that internal law enforcement views of the program were more mixed, “with some law enforcement officials indicating that the project helped build ties between law enforcement and the Arab community, while others indicated that the project had a negative effect on such relations.” Id. at 17.

146 Id. (the Department of Justice “had no specific plans for conducting a comprehensive assessment of lessons learned from the project.”).

147 See the GAO Report’s Appendix I, id. at 21-27.

term was not new, its use and context were. The government had detained all three individuals, Yasser Hamdi, Jose Padilla, and Ali al Marri, as terrorism suspects. Hamdi, an American citizen, was taken into custody on the battlefield in Afghanistan; Padilla, also an American, was arrested in the U.S.; al Marri, a citizen of Qatar, was arrested in Peoria, Illinois. All three were designated enemy combatants by order of the President, based on his power as commander in chief. These presidential orders were factually grounded in short affidavits by mid-level officials of the Defense Department. Once designated as enemy combatants, the men were put in military custody, held in isolation, and not allowed to have counsel or other visitors. They faced — and could defend against — no charges, and there would be no trials. The government contended that their detention could effectively be indefinite, with no access to the court system to challenge their confinement. The Supreme Court eventually reined in some of the Government’s power over enemy combatants in *Hamdi v. Rumsfeld*, mandating that the enemy combatants receive at least some semblance of due process. Nevertheless, no court has ever overruled the presidential power to declare someone an enemy combatant by fiat.

With all of this as background, truly disturbing reports surfaced in August 2002. Attorney General Ashcroft had reportedly begun to consider the use of internment camps for all of those who might be designated enemy combatants in the future. An article in the *Los Angeles Times* said that the Attorney General wanted a plan in place “for camps for U.S. citizens he deems to be ‘enemy combatants’” and that the plan “would allow him to order the indefinite incarceration of U.S. citizens and summarily strip them of their constitutional rights and access to the courts…. An article appearing on CNN’s web site, just a few weeks later, said that “Attorney General Ashcroft and the White House are considering creating a military detention camps (sic)

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149 *Hamdi v. Rumsfeld*, *supra*, 547 U.S. at 510.


155 *Id.* at 524-25, 533-36 (enemy combatants may be detained without trial, but must be accorded basic aspects of due process, such as notice of charges and opportunity to be heard).

for all U.S. citizens deemed by the Administration to be enemy combatants.” The Department of Justice neither confirmed nor denied these reports; the Wall Street Journal was able to get “a senior administration official” to confirm that a plan was in the works to make the facility holding Jose Padilla ready for as many as twenty enemy combatants. Some thought there was little to this story, and no official policy for establishing camps ever emerged. Perhaps the true measure of its importance was that it could be plausibly reported, and raise hackles.

Were any of these actions – the round up of Muslim men, the interviews of thousands of “non-suspects,” the designation of enemy combatants, or the rumored planning of detention camps – either individually or together the equivalent of the internment of the Japanese? Certainly not. Thankfully, nothing on that scale has occurred. But, looked at together, one could be forgiven for seeing a pattern – one that is not very hard to discern. It was not outrageous at all to think that the Administration might, indeed, be reaching for the “loaded weapon” that was Korematsu.

Therefore, the question remains open. Are we, in fact, doomed to repeat the mistake of Korematsu in the event of another attack?

II. THE WAY TO AVOID A REPEITION OF KOREMATSU: “LIBERTY LIES IN THE HEARTS OF MEN AND WOMEN…”

Despite the continuing vitality of the legal principle of Korematsu, the desire of some to see it used (or at least available) as a security measure for the post-9/11 world, and some of the frightening measures taken by the government after 9/11, we need not think that we are doomed to repeat the mistake of Korematsu in the event of another attack. This not because of the Constitution generally, the Equal Protection Clause specifically, or even the pronouncements by the Court’s current members on Korematsu. If we avoid the colossal blunder of Korematsu in our time, it will be for a different reason. To understand why, we must look back to 1944, the year the Supreme Court decided Korematsu.

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158 WALL STREET JOURNAL, Aug. 8. 2002 (“the Goose Creek, South Carolina, facility that houses [Jose] Padilla—mostly empty since it was designated in January to hold foreigners captured in the U.S. and facing military tribunals—now has a special wing that could be used to jail about 20 U.S. citizens if the government were to deem them enemy combatants, a senior administration official said.”).

In that year, on May 21, thousands of people came to New York City’s Central Park for a ceremony called “I am an American Day.” The crowd contained a number of people just becoming citizens, mixed in with native-born Americans. Judge Learned Hand, one of the most revered and important judges in America in the twentieth century, addressed the throng that day. His brief remarks became almost instantly famous. Judge Hand talked about what had brought people to America, and what immigrants to the country had all, in one form or another, sought: liberty. He tried to explain what liberty meant. Perhaps surprisingly for a well-known judge, Hand said that his idea of liberty did not stand first and foremost upon the law. “I often wonder,” he said, “whether we do not rest our hopes too much upon constitutions, upon laws and upon courts,” calling these “false hopes.” Something else, Judge Hand said, something ephemeral but more important, was worthy of our confidence. “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.”

The negative side of Hand’s words – that constitutions, laws, and cannot always save us from our worst instincts – foretold exactly what happened just a little more than six months later, when the Supreme Court upheld the internment in the Korematsu case. Judge Hand’s essential idea – that freedom and liberty survive not through the intervention of courts, but through what the people demand – found expression in Justice Jackson’s Korematsu dissent. “If the people ever let command of the war power fall into irresponsible and unscrupulous hands,” Jackson wrote, “the courts wield no power equal to its restraint. The chief restraint … must be their responsibility to the political judgments of their contemporaries and the moral judgments of history.” This majority opinion in Korematsu cemented into our constitutional law the principle that the government could incarcerate a whole race of people, tens of thousands of whom held American citizenship, without any process, in the name of national security during wartime. With the threat from the Japanese Empire, neither the Constitution’s Equal Protection Clause nor the courts interpreting it kept the government from imprisoning tens of thousands of its people. Liberty did not stir in the hearts of America’s leaders, with President Roosevelt,

160 To get a sense of the scope, depth, and scale of Hand’s judicial career and his profound impact on the law, see generally GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (Knopf 1994).


162 Id.

163 Id. at 189-90.

164 Id. at 190.

165 Korematsu, 323 U.S. at 248 (Jackson, J., dissenting).
numerous high-ranking government officials, and military officers supporting the internment.¹⁶⁶ Neither did liberty awake in the hearts of the people themselves. The American Civil Liberties Union, then as now a pre-eminent proponent of constitutional rights, did not stand up for the Japanese. In an internal referendum, the organization’s national leadership decided not to criticize the internment or the presidential order upon which it was based.¹⁶⁷ Even the Japanese American Citizens League (JACL), the most prominent civic organization representing Japanese people at the time, did not take a position opposing the internment.¹⁶⁸

Fast forward fifty-seven years, to the terrorist attacks of September of 2001. The nation was wounded, shocked, terrified, grief stricken – similar in many ways to the nation of December 7, 1941. It was a time of great fear and terrible anger directed toward attackers who came from one ethnic group, and with that came a desire to act, to do anything in order to secure ourselves from another attack. But even as the government began, almost immediately, to round up and imprison young Arab and Muslim men,¹⁶⁹ what happened following the attacks in 2001 was different in at least one crucial respect from the events that followed the Japanese attack in 1941. Liberty, it seemed, had taken root in the hearts of Americans, exactly as Judge Learned Hand had said that it must. This time, amidst the calls for revenge, some Americans and their civic organizations immediately urged caution, in order to avoid repeating the mistakes we had made in the past. And these efforts made a difference. As Professor Eric Muller has noted, the government’s responses to the 9/11 attacks might have been much more extreme, but for the fact that at “key moments, articulate voices have challenged the government’s plans.”¹⁷⁰ This willingness to speak up in order to temper the tendency to take repressive actions transformed the words of Learned Hand in 1944 into reality. And among those urging restraint in response to 9/11 most strongly were Japanese Americans – former internees, their descendants, and their organizations. Given what they and their kinsmen had lived through in the not-so-distant past, they took it as their mission to prevent anything remotely like the Japanese internment from happening again.

¹⁶⁶ See notes 7-9, 10-13, and 22-23 supra, and accompanying text.

¹⁶⁷ IRONS, supra note 21, at 128-34 (detailing the struggle on the ACLU’s national board on these question, in which those favoring support for the President and the war effort eventually triumphed, resulting in withdrawal of ACLU support from any contrary effort). One ACLU affiliate branch – the Northern California affiliate, located in San Francisco, refused to abide by this policy, having undertaken cases challenging the internment orders before the “no challenge” policy went into effect. IRONS, supra note 21, at 130-32.

¹⁶⁸ This happened, in no small measure, because of the Japanese American Citizens League’s entanglement with the military and intelligence authorities; some in the JACL had begun to inform for the government, giving it the names of persons who might have sympathies for the Japanese Empire. IRONS, supra note 21, at 79-81.

¹⁶⁹ See notes 128 through 138, supra, and accompanying text.

¹⁷⁰ Muller, supra note 33, at 592.
It is important not to oversell either the efficacy of what Japanese Americans did after the 9/11 attacks. I certainly make no claim here that the actions of Japanese Americans and their organizations caused the government to hold back on something that it would have done, if not for the objections of the Japanese. At the very least, it is not possible to know whether this is true; more ambiguously, it seems doubtful that any one set of actions caused anything else in this fast-moving situation. Similarly, and fortunately, the Japanese were not alone in responding to 9/11 with calls for restraint. Among those organizations that took immediate public positions and actions against extreme responses were the ACLU, the Center for Constitutional Rights, and Human Rights Watch. What made the Japanese response worth noting was its speed, its unambiguous nature, and perhaps most importantly, the fact that it springs from, and draws its moral authority from, Korematsu and the Japanese internment itself.

The primary vehicle for the expression of post-9/11 positions of the Japanese American community was JACL – the same organization that did nothing to stand up for the interests of Japanese people in 1942. In 2001, the JACL showed an immediate grasp of the risks of overreaction to the terrorist attacks. In a situation in which rage, fear, and calls for vengeance seemed the order of the day, standing against the tide of national feeling took no small amount of fortitude. Yet the JACL and groups allied with it spoke up, quickly and without equivocation, and reminded our government of the terrible mistake made in Korematsu.

The first example came almost at once. On September 12, 2001, the day following the attacks, the JACL issued a statement reflecting, first, the terrible sense of loss many Americans felt, but also cautioning against blaming people from the same ethnic and religious groups as

\[\text{171} \quad \text{The ACLU has been one of the leading organizations in every aspect of opposing the government’s assertions of power in the aftermath of 9/11. The organization has been especially active in prying information out of the government regarding all manner of misdeeds, especially regarding allegations of torture. E.g., [CONSIDERABLE MATERIAL ON FILE WITH AUTHOR TO ADD, IN CONSULTATION WITH EDITORS.]}\]

\[\text{172} \quad \text{The Center for Constitutional Rights was central in bringing the four cases on the rights of enemy combatants that went to the Supreme Court. See notes 115-23 and 148-55, supra, and accompanying text. [CONSIDERABLE MATERIAL ON FILE WITH AUTHOR TO ADD, IN CONSULTATION WITH EDITORS.]}\]

\[\text{173} \quad \text{[CONSIDERABLE MATERIAL ON FILE WITH AUTHOR TO ADD, IN CONSULTATION WITH EDITORS.]}\]

\[\text{174} \quad \text{Other organizations joined the JACL in this discussion, such as the National Asian Pacific American Legal Consortium. See, e.g., testimony of Karen Narasaki, President and Executive Director of the National Asian and Pacific American Legal Consortium, before the U.S. Commission on Civil Rights, The Boundaries of Justice: Immigration Policies Post September 11, Oct. 5, 2001 (copy on file with the author).}\]

\[\text{175} \quad \text{JACL News Release, JACL Urges Caution in the aftermath of Terrorist Attack, Sept. 12, 2001 (copy on file with the author) (“In the aftermath of yesterday’s horrific and deliberate acts of terrorism, all Americans are reeling in disbelief and sorrow, and are united in a sense of outrage at those who committed these heinous acts. The Japanese}\]

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Recalling the experiences of Japanese Americans, JACL National President Floyd Mori called for calm, making a direct comparison between what had happened to the Japanese during the early 1940s, and what could happen to Arab Americans or Muslims in the aftermath of the September 11 attacks:

We urge citizens not to release their anger on innocent American citizens simply because of their ethnic origin, in this case Americans of Arab ancestry. While we deplore yesterday’s acts, we must also protect the rights of citizens. Let us not make the same mistakes as a nation that were made in the hysteria of WWII following the attack at Pearl Harbor.\(^\text{177}\)

Given the mass death and great devastation witnessed in real time by millions of Americans, and the outpouring of national grief and anger that hung in the air like debris from the attacks, the JACL’s September 12 statement was, in every way, an act of courage. The organization saw immediately, as few did, what the situation could become: an occasion that might move the nation toward repeating the mistake of Korematsu, and they stood up and said so – perhaps before many Americans and their leaders were ready to hear it.

By August of 2002, the government’s reactions to the attacks had taken shape. By that point, federal agents had rounded up hundreds of young Arab and Muslim young men, incarcerated them, and deported them.\(^\text{178}\) The President had declared the first individuals “enemy combatants” without rights and the military had begun holding them in military brigs, without even the thinnest excuses for due process.\(^\text{179}\) The FBI had interviewed thousands of Arab and Muslim male “non-suspects.”\(^\text{180}\) Attorney General Ashcroft had testified in the U.S. Senate that critics of the Administration’s anti-terrorism policies gave aid and comfort to the terrorists,

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\(^\text{176}\) Id. (“[T]he JACL is deeply alarmed over reports that some Arab Americans and Muslims have already been targeted and mistreated by their fellow Americans as perpetrators of yesterday’s tragedy. The organization expressed grave concerns that yesterday’s terrorism not lead to further tragedy with Arab Americans and Muslims being collectively blamed or specifically pursued as scapegoats through unsubstantiated accusations or biased treatment by investigative agencies or the public.”).

\(^\text{177}\) Id. (emphasis supplied).

\(^\text{178}\) See notes 128 through 138, supra, and accompanying text.

\(^\text{179}\) See notes 148 through 155, supra, and accompanying text.

\(^\text{180}\) See notes 140 through 147, supra, and accompanying text.
calling them traitors.\footnote{Testimony of John Ashcroft, Attorney General, at U.S. Senate Judiciary Committee, Dec. 6, 2001, accessed at http://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm (“To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists – for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.”).} It was in this atmosphere that reports surfaced that Attorney General Ashcroft had reportedly begun to consider the creation of detention camps in the United States.\footnote{See notes 156 through 159, supra, and accompanying text.} The JACL confronted Attorney General Ashcroft immediately and publicly over the plan. “The JACL believes that the attorney general plays dangerously with the individual protections guaranteed by the Constitution,” the organization said.\footnote{Statement of the Japanese American Citizens League (JACL) on the Detention Camp Proposal by A.G. John Ashcroft, Aug. 16, 2002 (copy on file with the author).} While the JACL understood the need to promote national security and to “aggressively pursue” those who had attacked the U.S., the security of the nation also depended on “a strong adherence to the spirit and intent of our constitutional protections.”\footnote{Id.} Just as it had on the day after the September 11 attacks, the organization directly invoked the experiences of Japanese Americans during the internment in opposition to the idea of camps for all declared enemy combatants in the war on terror. “Japanese Americans were interned in concentration camps during World War II. In 1942, government authorities knew full well that Japanese Americans posed no risk to the security of the United States. Yet, without charges of wrongdoing, without benefit of legal system, Japanese Americans were summarily rounded up and incarcerated. Furthermore, when legal cases challenging this action were heard by the Supreme Court, government authorities suppressed evidence about the true nature of the threat posed by our community.”\footnote{Id.}

The JACL carried this theme forward again on September 11, 2002, the first anniversary of the attacks. Like almost all Americans and their public advocacy organizations, the JACL expressed its sorrow over the terrible losses caused by the attacks.\footnote{John Tateishi, JACL Statement on September 11th Anniversary, Sept. 11, 2002 (copy on file with the author).} But once again, the JACL did not stop with an expression of grief. Instead, they took it as their particular obligation to caution the government and their fellow citizens against letting the mistake of Korematsu repeat itself. “In expressing our grief over the tragic and horrific events that irrevocably changed the lives of every American a year ago, the JACL also renews our appeal to our government and our fellow citizens to remember the lessons of history when 60 years ago the Japanese American
community was presumed guilty by reason of ethnicity and was incarcerated en masse. America was built on values of democracy and fairness and recognizes today that scapegoating in 1942 was a mistake – and that we cannot allow such a fundamental injustice to be repeated ever again.”

To be sure, other organizations cautioned against government overreach in the wake of the September 11 attacks; the JACL surely did not stand alone. Nevertheless, what we should note is that the JACL and other Japanese American groups saw the danger immediately, and understood how the experiences of their own community formed the essential historical context for government actions against Arabs and Muslims. Because of this, they reacted immediately, aligning themselves with a suddenly unpopular minority without any hesitation. Having had the experience of internment themselves, their unambiguous opposition carried a moral authority that others groups could not match.

As for individuals one person stands out in the events of the immediate post-9/11 world to merit particular mention: Norman Mineta. Mineta, the former mayor of San Jose, California, won election to the U.S. House of Representatives as a Democrat in 1975. During his twenty years of service in Congress, he developed an expertise in transportation issues. He left Congress for the private sector in 1995 but returned to government as the Clinton Administration’s Secretary of Commerce in 2000 and 2001. President George W. Bush appointed Mineta Secretary of Transportation in 2001, a position in which he served until he resigned in 2006. As Transportation Secretary, Mineta had charge of the nation’s aviation system during the September 2001 terrorist attacks. On that day, from a bunker underneath the White House, Mineta ordered every civil aircraft in the sky over the United States to land

187 Id.

188 Also note that the JACL has remained active on these issues well beyond the examples I have quoted. E.g., Japanese Americans Citizens League, Press Release, Habeas Corpus Comments by Attorney General Gonzales Are Criticized by JACL, Feb. 2, 2007 (copy on file with the author) (objecting to Gonzales’ congressional testimony in which he said that the Constitution does not assure every American the right to a writ of habeas corpus, pointing out that Gonzales’ statement was directly contradicted just three years before by the U.S. Supreme Court, and explaining that “[t]he right to habeas corpus was at the core of the World War II incarceration of 120,000 individuals of Japanese Ancestry….”).


190 Id.

191 Id.

immediately, shutting down the system to prevent any further attacks. Mineta’s department moved quickly to increase airline security. Airplane security was enhanced; airport screening was tightened; airliners underwent physical modifications to guard against attacks.

In the months after the attack, many Americans called for the use of profiling against Arabs and Muslims. Many argued that it just made sense to give increased and detailed scrutiny to Arab or Muslim men (like those who had attacked us on 9/11) instead of any other person or group. In contrast to the do-anything-to-secure-the-nation thinking at the time, Mineta publically espoused a different view. In a speech in April of 2002, acknowledging an avalanche of sharp criticism and attacks on him for refusing to allow profiling by Department of Transportation employees at airports, Mineta explained his position. The Department of Transportation Statement of Secretary of Transportation Norman Y. Mineta Before The National Commission on Terrorist Attacks Upon the United States, May 23, 2003, accessed at http://govinfo.library.unt.edu/911/hearings/hearing2/witness_mineta.pdf, at 6.

See, e.g., id. at 10-11 (detailing changes, including modifications to screening, cockpit doors, and flight deck access).

See, e.g., Stuart Taylor Jr., Politically Incorrect Profiling: A Matter of Life and Death, NATIONAL JOURNAL, Nov. 3, 2001 (“What would happen if another 19 well-trained Al Qaeda terrorists, this time with 19 bombs in their bags, tried to board 19 airliners over the next 19 months? Many would probably succeed, blowing up lots of planes and thousands of people, if the forces of head-in-the-sand political correctness prevail— as they did before September 11—in blocking use of national origin as a factor in deciding which passengers’ bags to search with extra care.”); Stanley Crouch, Wake Up: Arabs Should Be Profiled, ST. LOUIS POST-DISPATCH, Mar. 19, 2002 (“So if pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation.”); [add polling data from Profiles here]


Id. at 2 (“As you are so very well aware, some commentators have been critical that the Administration has not engaged in large-scale profiling at airports in the wake of September 11.”) Among the sharpest critics Mineta had was Michelle Malkin, the author of IN DEFENSE OF INTERNMENT, see note 105, supra, who called repeatedly for Mineta’s firing because he would not allow profiling; his own experience with internment had clouded his judgment (“And then there’s, if the Bush administration wants to do one single concrete thing, it could get rid of Norm Mineta, who embodies this problem. He is somebody who experienced the evacuation during World War II. He was evacuated to a camp in Heart Mountain, Wyoming. And it has clouded, it has absolutely clouded his view of what needs to be done now. [Scarborough Country, Aug. 9, 2004]. But many others were equally strident. Rich Lowry, Mineta’s Folly, NATIONAL REVIEW ONLINE, January 10, 2002, accessed at http://www.nationalreview.com/lowry/lowry011002.shtml (“Transportation Secretary Norman Mineta may not necessarily be the least impressive Bush cabinet secretary — there’s competition there — but he is certainly the most dangerous…. On the issue of profiling, Mineta’s ignorance appears to be nearly invincible.”); Peggy Noonan, The Other Shoe, THE WALL STREET JOURNAL, June 7 2002, accessed at http://www.opinionjournal.com/columnists/pnoonan/?id=110001808 (“Mr. Mineta has received many awards for his sensitivity to ethnic profiling. Good for him, but I’d personally give him an award if he’d begin to act like a
Transportation would do much – had already done much – to improve aviation security, but it would not, under Mineta’s watch, engage in racial or ethnic profiling of Arabs or Muslims. Using race or ethnic appearance when law enforcement or security forces have information about a planned crime and the racial identity of those involved would work fine, he said, but “there is a firm distinction between that situation, and one where a law enforcement officer is willing to assume, based on no other reason than race alone, that a particular person is likely to be a criminal – or a terrorist.”198 The former constituted good police or security work; the latter does not. Mineta explained that using race or ethnic appearance to screen for possible terrorists actually damaged security, instead of increasing it.

[R]outinely pulling passengers out of line and subjecting them to searches need not, and should not, be done on the basis of race. Establishing such a policy would be counterproductive to our efforts to build a solid basis for aviation security…. [W]e cannot, we must not, and we will not assume that all future terrorists will fit that particular profile. Without more information, we simply cannot tell – and it certainly has not been true in the past.199

In case anyone wondered where Mineta obtained his understanding of the issue, Mineta made it clear. First, he cited examples of terrorists using profiles to beat security systems by doing the opposite of what the profile is calibrated to find. But second, for Mineta, the question of profiling – of group guilt based on racial or ethnic background – was deeply personal, and he said so. As a child, Mineta had been an internee himself. Along with his family, the young Mineta – then a baseball-crazy Boy Scout – had spent the war years imprisoned at the Hart Mountain internment camp in Wyoming. This experience had clearly left its mark on him. His refusal to use large-scale racial profiling represented a determination that, unlike in the 1940s, he would not allow the present crisis to divide the country by race. “From my own life,” Mineta said in his speech, “I can tell you – it has not always been this way.”200

Based on speeches like this one, and comments he made in media outlets like the television program 60 Minutes, in which Mineta said that his refusal to allow racial profiling in airports grownup and recognize that his childhood trauma shouldn’t determine modern American security policy.”); Anne Coulter, Mineta’s Bataan Death March, Feb. 28, 2002, accessed at http://www.jewishworldreview.com/cols/coulter022802.asp (“Secretary Mineta is burning with hatred for America. He has taken the occasion of the most devastating attack on U.S. soil to drone on about how his baseball bat was taken from him as a child headed to one of Franklin Roosevelt’s Japanese internment camps.”)

198 Id.

199 Id. at 3.

200 Id. at 7.
was his proudest achievement, critics kept up their vicious attacks on Mineta. Nevertheless, he proceeded as he had said he would, refusing to yield to calls for profiling throughout his tenure as Secretary of Transportation.

CONCLUSION

This article has examined a decision of the U.S. Supreme Court thought by many to be dead and buried: the legal validation of the Japanese internment in the Korematsu case. As a close look at the case and its subsequent history shows, the common perception that Korematsu is dead is just not correct. In fact, Korematsu remains very much alive, and in the post-9/11 world, there are many who want it fully rehabilitated and ready for use. They want the central principle in the case – what Justice Jackson called a “loaded weapon” readily available, in this new era in which we face an external threat.

This forces us to ask whether something like the Japanese internment could ever happen again. Given what we know now, the question has two answers. Yes, the law and the Constitution could permit this to happen again; put differently, the Constitution would not stop it. But the other answer comes from Learned Hand’s instruction to us that in the end, we need more than the Constitution to make us free. Real freedom – liberty itself – must come from us, he said – from our hearts.

The reaction to the government’s actions in the wake of the terrorist attacks of September 11, 2001, tell us that, unlike in 1944, we can see that liberty does indeed live in the hearts of Americans. The actions of Japanese Americans, first among those to caution against the potential for government excesses, tell us much about how we have taken Judge Hand’s ideas to heart, and internalized them. It appears we have learned something from Korematsu – at least enough of us have, that when the specter of internment arises, some Americans speak up and say no. And the lesson of history is that when some people stand up against injustice, others, gathering courage from them, may follow. And that is what will prevent another internment, even though Korematsu remains alive on the pages of the law books. What Judge Learned Hand said was true: When liberty is alive in the hearts of men and women, it is bigger and more important than the law.

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On February 15, 20__, a large truck bomb exploded outside the federal courthouse in New York City. Despite very tight security, the suicide bomber/driver was able to get the bomb inside the first ring of security, close enough to do major damage on the scale of the bombing of the Murrah Federal Building in Oklahoma City by Timothy McVeigh. Almost four hundred people were killed in the building as a major section of the structure collapsed; one hundred others were killed outside the building, in Foley Square. The dead include a number of federal judges, federal officials, and law enforcement officers.

Investigation after the attack substantiated a claim of responsibility that came to news media just hours after the bombing: the attack was the work of two al Queda “sleeper cells,” one in New Jersey and one in Southeastern Michigan. The cells consisted of Muslim immigrants from Middle Eastern countries, and a handful of American U.S. citizens who have converted to Islam.

In the wake of the bombing, the President issued the following declaration and order.

Feb 29, 2009

The President of the United States
The White House
Washington, D.C.

As President of the United States, I am sworn to protect and defend the Constitution, which confers upon me the power of Commander in Chief. Consistent with that power and the duties it confers upon me, I am obliged to keep every American safe from attacks of any origin, whether
conducted by other nation-states or by terrorist organizations. I shall do everything necessary to carry out these responsibilities.

On February 15, 2009, our nation was attacked by the al Qaeda terrorist network and its allies on the ground in the United States. Regrettably, the attackers included American citizens of the Muslim faith and of Arab descent. We know the identities of some of the attackers, and have apprehended some of them. Our intelligence experts say that at least three more sleeper cells are poised to carry out further attacks on our country and our citizens. The identities of these potential attackers are not yet known. We are doing everything possible at this moment to track these persons down and head off any danger they may pose, and I am confident that our security and police forces will be able to do this quickly enough to avert any further damage. However, in the short term, it is simply not possible to sort through the millions of possible suspects quickly enough to find the perpetrators and their allies who are still poised to strike. We must take decisive action to assure that no potential terrorist has the opportunity to strike again. In consultation with my military, national security, and intelligence advisors, I have determined that it is an absolute military necessity that any population likely to pose a threat to the safety of the American people by removed.

As Commander in Chief, it is my solemn duty to make every effort to assure that those who have declared themselves at war with us, and who have in fact carried out acts of war against us in our country this very month, are stopped. I will take every reasonable measure to assure that our enemies do not succeed.

Therefore, today, February 29, 2009, based on my power as Commander in Chief and the power the Congress has bestowed upon me in the Authority to Use Military Force (AUMF) of September 18, 2001, Pub. L. 107-40 (S.J. Res. 23), I hereby order that the following actions take place.

1) All persons of Arab descent (defined as those who are native to Arabic speaking countries and the first generation of their descendants, whether or not they are American citizens) and all Muslims are hereby required on or before April 31, 2009, to report to security centers (closed military bases, designated on an attached list\textsuperscript{202}) where they will be housed until further notice. These security centers will be under military protection, and all persons restricted to them will be considered to be in the custody of the Secretary of Defense. They will not be allowed to leave these security centers until the President, upon consultation with the Attorney General and the Secretary of Defense, determines that it is safe for them to do so. Each individual will be held at least until that person has been cleared of any terrorist ties or involvement by the FBI; some may be released on this basis while the government continues to hold others, at my discretion or the discretion of my designee.

\textsuperscript{202} For purposes of this problem, the list is not attached.
2) All mosques, and all Arab and Muslim social clubs and social service centers and other similar institutions are hereby closed until further notice.

Signed by me this 29th day of February, 2009

/s/

President of the United States

Plaintiff Zalman Ahmad, a twenty-seven year old U.S. citizen of Turkish descent (his parents emigrated from Turkey in 1978 and are naturalized Americans), is a student at the University of Pittsburgh Katz Graduate Business School. Ahmad is in the second year of his studies to attain a Masters of Business Administration degree. Ahmad is an observant Muslim, and heads the Muslim Business Students Association at Katz. Intelligence indicates that he has voiced support during the organization’s meetings for “Muslim dignity against aggressive American foreign policy.” If he discontinues school to go to the relocation camp, Ahmad will lose his financial aid, and in addition will forfeit all tuition and fees paid to the business school for his studies this spring semester. Ahmad has sued, arguing that the President’s order violates the Constitution and must be overturned by the courts, and has asked the court for an injunction blocking the enforcement of the President’s order. The court has asked for briefing and argument on the following question:

Is the president’s order constitutional under the commander in chief power and/or the AUMF?

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