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Ending The Korematsu Era: A Modern Approach

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This Article seeks to transform how readers think of Korematsu v. United States, thereby offering a more accurate view of the past and stronger barriers against presidential abuse. Korematsu is conventionally listed among the worst cases in American law, but its wrongness is understood far too narrowly. If Korematsu were just a case about racist internments, it would be a truly unique blot in Supreme Court history: powerfully mistaken but almost completely irrelevant to modern legal disputes.

Despite Korematsu’s extraordinary facts, the case stands in a thematic cluster of cases from World War II that I will call the “Korematsu era.” Some of these cases involve race, but most do not. Instead, what they share is a commitment to broad presidential power and limited judicial oversight, particularly in the fields of executive detention and trial by military commission.

This historical/doctrinal reinterpretation has two consequences. First, it highlights the Bush Administration’s reliance on Korematsu-era principles in the War on Terror, and a corresponding rejection of such principles by the Supreme Court. Comparisons between old and recent war-power cases ones reveal that the Court has taken several astonishing steps, which lie almost hidden beneath its technical, “minimalist” style of reasoning. Legal-historical parallels between the distant and recent past may help readers gauge whether the modern Court’s dynamism should count as jurisprudential progress.

Second, my approach raises deeper questions about how the meaning of “iconic cases” like Korematsu is determined, and how that meaning can change. Because war-power cases arise only sporadically and under conditions of great political pressure, there is a peculiar urgency for the legal community to discuss the significance of Korematsu and its modern applications. The Article concludes by questioning whether “lessons from the past” can ever be realistically applied to limit future Presidents’ power.
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Ending the Korematsu Era: A Modern Approach

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When President George W. Bush started the Global War on Terror (GWOT) in response to the 9/11 attacks, the United States legal community was as unprepared as the country. Bush immediately asserted presidential wartime prerogatives and drew analogies to the last great war, World War II. Yet even as the Bush Administration began to implement policies of “executive detention” and “military commissions,” most civilian lawyers had never encountered those terms, much less analyzed their constitutional limits. In this instance, unfamiliarity bred power, as

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1 THE 9/11 COMMISSION REPORT, at xv-xvi (2004); see JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 81 (2004) (“It was not just the Twin Towers that collapsed on the morning of September 11, 2001: so too did some of [America’s] most fundamental assumptions about international, national, and personal security.”); JANE MAYER, THE DARK SIDE 34 (2009) ("[T]o say we’re in a state of war with al Qaeda . . . set us on a course not only for our international response, but also in our domestic constitutional relations. . . . But there was little or no detailed deliberation about long-term consequences."); NICHOLAS B FEDORO, ENDING THE KOREMATSU ERA: A MODERN APPROACH (2009) (“The discussion at the September 13 National Security Council meeting suggested that the President’s advisers agreed that we were at war. Still, we all had a way to go to understand what kind of war we were in and how the United States should fight it.”).

2 E.g., President George W. Bush, Address before a Joint Session of Congress, in 2 PUB. PAPERS 1140-44 (Sept. 20, 2001) (“Americans have known wars — but for the past 136 years, there have been wars on foreign soil, except for one Sunday in 1941. . . . Americans have known surprise attacks — but never before on thousands of civilians. . . . This is the world’s fight. This is civilization’s fight.”); President George W. Bush, Remarks Commemorating the 60th Anniversary of Pearl Harbor, in 2 PUB. PAPERS 1492-94 (Dec. 07, 2001); see also President George W. Bush, Speech at Air Force Academy Graduation (June 2, 2004) (declaring that “like the Second World War, our present conflict began with a ruthless surprise attack on the United States”) (available at www.whitehouse.gov/news/releases/2004/06/print/20040602.html).

3 It is hard to convey the prevailing inattention to war powers that existed before 2001, but I have collected two sets of materials to corroborate my experience (and ignorance) as a governmental lawyer during part of this period. First, I surveyed four leading casebooks’ treatment of executive detention and military commissions from 1990-2010. See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (4th ed. 2001); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2001); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3d ed. 2001). These casebooks were authored by agenda-setting scholars, and their widespread use offers some insight about topics that were taught to a broad swath of law students. In 2001, none of these casebooks contained any major excerpt or discussion concerning military commissions or executive detention aside from Korematsu v United States, 323 U.S. 214 (1944), and even Korematsu appeared in each book’s discussion of equal protection instead of war powers. See Appendix A
executive lawyers seized political initiative and created unforeseen opportunities for abuse.4

A main element of the Bush legal strategy was reliance on cases from what I call the “Korematsu Era.”5 Every American lawyer knows Korematsu as a discredited precedent, and Bush’s executive advisers were no exception.6 Yet conventional wisdom has viewed Korematsu too narrowly, as a unique blot on Supreme Court history concerning the racist internment of United States citizens.7 That portrayal

(tabulating results). Second, I compared law review articles from 1991-2001 to those from 2001-2010. Combinations of search terms and case names revealed that articles about executive detention and military commissions were approximately ten times more common in the decade after 9/11 than in the decade before. See Appendix B.

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allowed Bush’s advisers to implicitly sideline Korematsu’s “negative precedent” as categorically separate from twenty-first century events, while simultaneously citing other World War II decisions as “good law” supporting unrestrained executive power.8 Unlike the facts of Korematsu, modern detention policies do not typically involve United States citizens, explicit racial classifications, wholesale detention, or restraint within the American homeland. For lawyers who focus on those differences, any comparison between modern detention and Korematsu must seem exaggerated.9

This Article offers a very different view of Korematsu, with correspondingly different modern implications. By revisiting Korematsu’s historical context, I will show that the decision extends well beyond its racist facts and embodies a general view of presidential war power. Stressing commonalities among Korematsu and other rulings about executive detention and military commissions during World War II to provide any check on political excesses, particularly those jointly endorsed by the executive and legislature”); Fallon & Meltzer, supra note 6, at 2077.


9 Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, C.J., concurring in denial of rehearing en banc) (finding “not the slightest resemblance of a foreign battlefield detention to the roundly and properly disbursed mass arrest and detention of Japanese-Americans in California in Korematsu”); ibid., supra note 6, at 551 (“President Bush deserves credit for his response to the risk of hostile public reactions against Muslims and Muslim Americans. The contrast with . . . Roosevelt’s treatment of Japanese Americans is striking. This is a good example of lessons learned.”).
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War II, I propose to identify a synthetic “era” of cases that implemented Korematsu’s approach to executive authority. My goal in recognizing this “Korematsu era” parallels debates over the “Lochner era’s” approach to economic liberty or the “civil-rights era’s” approach to legal equality. Conceptualizing an era in this way can make a real difference for legal culture and judicial results, augmenting lawyers’ litigative vocabulary and offering distinct perspectives on past and future problems. This Article explores what a full historical and doctrinal understanding of the Korematsu era might mean for presidential war powers today.

One result of my revisionist perspective is to confirm the Korematsu era’s importance for President Bush’s legal strategy in the GWOT. Because few

10 Cf. Gadridge, supra note 7, at 1934 (“Korematsu is an infernal baseline. Like Lochner, Dred Scott, and Plessy, it marks what we hope not to repeat . . . .”). For general discussion of the “Lochner Era,” see Howard Gillman, The Rise and Demise of the Lochner Era Police Powers Jurisprudence 196-97, 205 (1993); Randy Barnett, Restoring the Lost Constitution 222-23 (2003); Cass R. Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873, 875 (1987) (“Almost eighty years since the case was decided, the lesson of the Lochner period has yet to be settled.”). Compare Richard A. Epstein, Private Property and the Power of Eminent Domain 274-82 (1989) (advocating Lochner-style review for eminent domain), with William M. Weicke, Liberty Under Law, 123-25 (1988) (“Lochner has become in modern times a . . . negative touchstone. Along with Dred Scott, it is our foremost reference case for describing the Court’s malfunctioning . . . . We speak of ‘lochnerizing’ when we wish to imply that judges substitute their policy preferences for those of the legislature.”), and David A. Strauss, Why Was Lochner Wrong?, 70 U. Chi. L. Rev. 373, 374-75 (2003).


Although my use of the term “era” depends primarily on the force of analogies to the Lochner and Civil Rights Eras, I should be explicit that the term “Korematsu era” does not identify a group of cases that was self-consciously or precisely identified as such at the time. Instead, my goal is to collect an open set of decisions that present-day observers can usefully recognize by reference to a cluster of important legal principles. See infra Sections I.A-I.B (detailing the Korematsu era’s thematically organizing principles).

See Jack M. Balkin, Wrong the Day it was Decided: Lochner and Constitutional Historicism, 85 B.U. L. Rev. 677, 682-712 (2005) (discussing how Lochner came to symbolize the entire jurisprudential period between 1897 and 1937 and is an established element of the constitutional canon; “legal materials and legal conventions, and particularly those that apply in constitutional cases, offer sufficient flexibility to allow constitutional argument to be a site for political and social struggle. Through these struggles, the internal conventions of constitutional argument and the constitutional common sense of a particular historical period are shaped.”).

modern lawyers would defend the result in Korematsu itself, presidential advisers relied instead on Korematsu’s contemporary cases, which reflect a similar stance toward presidential power. A late-century preoccupation with Korematsu’s racism helped presidential lawyers argue more effectively for broad executive power, as they extracted forgotten Korematsu-era precedents from their unfavorable original context.13

Analyzing the Korematsu era also illuminates recent Supreme Court precedent. Starting in 2004, the Court has issued a historically unmatched number of rulings that limit executive war power.14 Each of these cases was decided narrowly, on very specific legal grounds, with little explicit effort to contradict Korematsu-era precedents or upset the constitutional status quo.15 Nevertheless, I propose that the Court’s War on Terror cases are antithetical to an essential principle of Korematsu era: that courts are institutionally unable to second-guess presidential claims of military necessity. Hidden among the recent cases’ technicalities, we shall see that the modern Court has repeatedly set aside presidential claims about what the military needs to keep our country safe. My approach suggests that these rulings mark an important repudiation of what the Korematsu era stands for, and that they likewise offer safeguards against future executive abuse if they can be understood more deeply.

This Article proceeds in three steps. Part I offers historical arguments for identifying “the Korematsu era” as a category of Supreme Court cases, and for rejecting the narrow conventional wisdom about what Korematsu means. Analysis of the Justices’ votes, the Court’s language, and contemporary context shows that the dominant feature of Korematsu and its peers was not racism, but a permissive approach to asserted military necessity and unsupervised presidential activity. Sixty-five years ago, the clear bigotry that offends modern morals was secondary to the Court’s judgments about war powers and executive deference.

13 To be clear, I do not argue that Bush Administration lawyers would have changed their substantive arguments if Korematsu-era precedents had been more fully understood. Cf. Jack Goldsmith, The Terror Presidency 212 (2007) (“[The Bush] administration’s conception of presidential power had a kind of theological significance that often trumped political consequences.”). At most, such lawyers might have had to make their arguments to a better informed audience with better fortified resistance.


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Working in a rich literature about specific World War II precedents, this Article synthesizes several cases into a historical “era” that embodies remarkable deference to alleged military necessity. Part I also uses post-War history to suggest that the Korematsu era has — apart from issues of racism — earned its eponymous place in the legal hall of shame. With each passing decade, Korematsu-era case law has become less defensible and authoritative. And even as Korematsu’s significance has waned as a precedent concerning race and equal protection, we shall see that the Korematsu era remains very relevant to one category of war-powers case: where Congress has approved presidential policies.

Part II applies this historical analysis to the recent past, documenting how Bush Administration lawyers used Korematsu-era precedents to bolster theories of Article II and the “unitary executive.” Expansive theories of executive power have sometimes been derided as lawless or even arrogant. Yet I suggest that some of the Bush Administration’s supporting precedents were facially plausible, even though they proved unstable. For twenty-first-century lawyers, Korematsu-era precedents were a time capsule from the distant and forgotten constitutional past. When Bush Administration advisers finally had occasion to rely on such authorities, they had become antiquated and ineffective.

From my unorthodox viewpoint, the diminution of Korematsu-era precedent is a major theme in modern jurisprudence. Throughout the twenty-first century,


assertions of executive war powers have been less successful than presidential lawyers hoped. Yet these modern decisions’ full significance has remained hidden, in part by the Court’s own choice. Part II explains that a crucial but often unnoticed step in each GWOT case has been to reject the President’s assertions of military necessity. Such rulings have occurred in various statutory and constitutional contexts, yet the Court’s pattern of substantive second-guessing charts a strong departure from the Korematsu era, once the era itself is understood.

Part III explores how rejecting the Korematsu era could affect modern legal culture. The Korematsu era’s deference to asserted military necessity enabled World War II’s overt racism and mass internment. But other risks of recent vintage include unfair trials, detention, torture, and worse. Abusive executive policies — with or without racial classifications — require more than shame and regret. They need vigilance against repetition, and attorneys have an important role to play. During this century, governmental lawyers have designed and approved policies concerning presidential war power, while other lawyers litigated to overturn such policies, and a third group of lawyers decided who should prevail. Future war-power controversies will probably follow a similarly law-intensive pattern.

The recent cases’ rejection of Korematsu-era attitudes might offer a defense against future executive excess, but the Court’s subtle language illustrates that “[n]ot every epochal case comes in epochal trappings.” It is often hard to draw broad lessons from war-power cases because — compared to other constitutional topics — such issues arise in sporadic clusters and under great political pressure. Each war-power crisis seems very different from the last, and responsive Presidents will use all available means to undermine limits on their authority.

19 KAREN GREENBERG, THE LEAST WORST PLACE 44 (2009) (“The legal cloud hanging over the Guantanamo mission in the early days was not due to a deficit of lawyers or legal analysis. . . . Arguably, U.S. government lawyers had never had as much impact on policy as they did during the first two or three years of the war on terror.”); GOLDSMITH, supra note 13, at 69 (“[The Bush] administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it had no choice.”); id. at 81 (“The post-Watergate hyper-legalization of warfare . . . had become so ingrained . . . that the very idea of acting extralegally was simply off the table, even in times of crisis. The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal.”).


21 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”); cf. PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 30-53 (2004) (discussing the concept of “political time” in analyzing presidential conduct); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: PRESIDENTIAL LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 17-32 (1993).
With a new President and several new Justices, the next decade could alter how future generations of lawyers and judges comprehend separation of powers and wartime prerogatives. The GWOT precedents’ meaning may be up for grabs, and now is the time to grab it. *Korematsu’s* own shift from being a war-powers case to a case about racism shows how the fade of memory can outpace historicized analysis. If today we cannot understand the GWOT cases as rejecting *Korematsu*’s essence, that only boosts the probability that future presidential lawyers will dismiss twenty-first century precedents as idiosyncrasies, and will argue that limiting precedents are inapplicable to future crises that — given their infrequency — may involve different facts. On the other hand, if the United States suffers an attack in the short run, the last decade’s jurisprudence might be our only chance to avoid repeating past mistakes. Thus, it is not too early to discuss modern steps to reject the *Korematsu* era, but it may someday be too late.

In American law, nothing is more common than for great judicial decisions to signify more than their holding. Jurisprudential icons like *Korematsu*, *Marbury*, *Dred Scott*, *Lochner*, *Erie*, and *Brown* are unquestionably important, but their interpretation prompts vigorous debate and struggle. In part, these icons’ meaning is determined by other judicial decisions, and future courts might either endorse or reject my substantive thesis. Yet there is also a role for legal academics and commentators who educate and train each new crop of judges and presidential lawyers, even as these advisors and jurists will one day determine the operative meaning of *Korematsu* and the GWOT as well. This Article’s historical perspective aspires to help other generations and our own in confronting recurrent debates about how judicial and presidential powers interact during wartime.

I. THE *KOREMATSU* ERA

My first step is to introduce “the *Korematsu* Era” and analyze how the period as a whole earned its disfavored status. My terminological model is the “*Lochner* Era,” which uses a single case name to represent a group of decisions that in turn embody distinct principles of judicial activity. For *Lochner*, the “era’s” discredited ideas are extreme solicitude for private property and the failure of judges to respect

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other governmental entities’ policy judgments. This Part identifies comparably thematic principles for Korematsu-era cases. Section A seeks to challenge the conventional account of Korematsu as principally concerning governmental racism and mass internments. Although Korematsu of course involved indefensible discrimination, its context and its precursor Hirabayashi clarify that Korematsu was not simply a referendum on unconstitutional racism; instead, it was more concerned with executive power and military necessity. Section B supports this revisionist interpretation by collecting other cases from the 1940s and 1950s that were not racially focused, though they do reflect Korematsu’s high deference to executive power. Section C suggests that the doctrinal authority of Korematsu-era precedents has been undermined by later events, and that these cases qualify as disreputable “negative precedents” regardless of Korematsu’s racism.

A. A Revisionist History of Korematsu v. United States

In American law schools, Korematsu has been taught for decades as a case principally about race, and it is easy to see why. As with slavery and Jim Crow, the decision to intern more than 100,000 citizens based on Japanese ancestry burns at the modern conscience and illustrates the evils of racial discrimination. On their surface, Korematsu’s memorable dissents channel present-day outrage. And the majority’s dicta concerning racial discrimination have led some modern courts to cite Korematsu as a precursor of “strict scrutiny” in equal protection — even though only Justice Murphy’s dissent even mentioned the words “equal protection.”

23 From Lochner through 1937, the Court struck down approximately two hundred economic regulations. STONE, supra note 3, at 829; see Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal child labor law); Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (minimum wage law for women); see also supra notes 10-11 (collecting sources that analyze Lochner’s meaning).

24 See supra note 7 (collecting sources).

25 MULLER, supra note 7, at 2.

26 The three Korematsu dissents state current orthodoxy: “[Korematsu] is not a case of keeping people off the streets at night as was [Hirabayashi] . . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community. . . . On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty . . . .” Korematsu, 323 U.S. at 225-26 (Roberts, J., dissenting). “The exclusion of all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast area on a plea of military necessity . . . . goes over the very brink of constitutional power and falls into the ugly abyss of racism.” Id. at 233 (Murphy, J., dissenting). “[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is 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 243-44 (Jackson, J., dissenting).

27 Korematsu, 323 U.S. at 235 (Murphy, J., dissenting); cf. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (applying equal protection to the federal government for the first time); infra notes 58-62 and accompanying text (discussing Korematsu’s marginal relevance as an equal protection case).
This Section claims that the conventional race-focused picture of Korematsu has overshadowed the decision’s relevance to presidential power and military necessity. I do not suggest that Korematsu must be either a race case or a war powers case; of course it is both. Yet I propose an important shift in emphasis, stressing an aspect of Korematsu that is often unnoticed.

1. Korematsu’s Original History

Despite Korematsu’s notoriety, some of its history is known only by experts.²⁸ My first project is to show that the Justices who decided Korematsu perceived that case differently than many modern observers. In the 1940s, although race was important for some members of the Court, claims of military necessity overwhelmed the majority’s hesitation, and even the dissenting Justices were less committed to modern equal protection than is commonly recognized. This specific contextual evidence about Korematsu itself is an important start for reinterpreting the Korematsu era as a whole.

After the devastation of Pearl Harbor in December 1941, fears spread about other attacks, with possible support from spies and saboteurs within the United States.²⁹ President Roosevelt responded in February 1942 by authorizing the creation of military areas “from which any or all persons may be excluded,” and in which “the right of any person to enter, remain in, or leave shall be subject to whatever restrictions [designated officials] . . . may impose.”³⁰ To implement this order, Lieutenant General DeWitt split the entire Pacific Coast into military areas.³¹ Congress then criminalized violations of any military-area regulations with a maximum punishment of $5000 and one year in prison.³²

Beginning on March 27, 1942, DeWitt ordered a “curfew” for alien Germans and Italians, and for all persons of Japanese ancestry through much of Arizona, California, Washington, and Oregon.³³ This was no ordinary curfew. DeWitt’s order was closer to house arrest, as it required regulated persons to be home from

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³² Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (1942); PETER IRONS, JUSTICE AT WAR 38-39 (1983) (collecting ample evidence that Congress knew racist military policies were likely to follow such legislation).
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8:00 p.m. to 6:00 a.m., and at all other times to be in their workplace, within five
miles of home, or traveling between work and home.34

Not six months after Pearl Harbor, DeWitt began ordering persons of Japanese
ancestry to “evacuate” military zones, though that word was a euphemism as
well.35 Every family of Japanese ancestry had to report to Civil Control Stations or
Assembly Centers, and appearance at such facilities was typically followed by
indefinite confinement at Relocation Centers in Idaho, Utah, Arkansas, Wyoming,
Arizona, Colorado, and remote parts of California.36 For the large population of
Japanese-Americans on the Pacific Coast, DeWitt’s orders seemed more like
racially targeted imprisonment than “evacuation.”

In 1943, the Supreme Court in Hirabayashi upheld a defendant’s conviction for
violating DeWitt’s “curfew,” and Korematsu in 1944 upheld a defendant’s
conviction for violating DeWitt’s “reporting” requirement.37 Both cases involved
exactly the same claims of military necessity and exactly the same legal
authorities.38 Indeed, the government’s brief in Korematsu incorporated by
reference much of the factual evidence that had been presented the year before.39

The President’s core claim in Hirabayashi and Korematsu was that a racially
homogenous wartime enemy was supported by a set of aliens and citizens in the
United States who could not be individually identified.40 To meet such dire

34 Id.
35 DeWitt issued 108 such orders. BONS, supra note 32, at 70.
36 Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (“[T]he only
way Korematsu could avoid violation was to give himself up to the military authority. This meant
submission to custody, examination, and transportation out of the territory, to be followed by
indeterminate confinement in detention camps.”); id. at 230 (“[A]n Assembly Center was a euphemism
for a prison. No person within such a center was permitted to leave except by Military Order.”). As a
technical matter, the Korematsu majority limited its holding to DeWitt’s “reporting” requirement, and
avoiding passing judgment on the broader “relocation” program. Id. at 221-23.
37 Id. at 223-24; Hirabayashi v. United States, 320 U.S. 81, 105 (1943).
38 See Korematsu, 323 U.S. at 218-19 (“In the light of the principles we announced in the
Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the
Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.
True, exclusion from the area in which one’s home is located is a far greater deprivation than constant
confinement to the home from 8 p.m. to 6 a.m. . . . . But exclusion from a threatened area, no less than
curfew, has a definite and close relationship to the prevention of espionage and sabotage.”);
Hirabayashi, 320 U.S. at 92-99.
39 Brief for the United States at 11, Korematsu v. United States, 523 U.S. 214 (1944) (No. 22)
(“The situation leading to the determination to exclude all persons of Japanese ancestry from Military Area
No. 1 and the California portion of Military Area No. 2 was stated in detail in the Government’s brief in this
Court in Hirabayashi v. United States . . . . That statement need not be repeated here.” (emphasis added)).
40 Brief for the United States at 35, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870)
(“[T]he group as a whole contained an unknown number of persons who could not readily be singled out and
who were a threat to the security of the nation; and in order to impose effective restraints upon them it was
asserted threats, the military claimed it was necessary to subject a racially
determined mass of potential suspects to “curfews,” “reporting,” and “evacuation.”
The Court upheld these executive decisions, which were ex ante approved by
Congress, by a unanimous vote in Hirabayashi and a six-vote majority in
Korematsu.41

For modern observers, Hirabayashi and Korematsu are astonishingly misguided.
Both involved explicit racial discrimination, and the government had no credible
argument that discrimination was necessary to secure the homeland.42 Twenty-
first-century doctrine and legal culture typically require very strong justifications
to support racial classifications.43 Because Hirabayashi and Korematsu lacked
such support, the Court’s decisions approved now-unconstitutional racism, and
some modern analysts have not looked much further.44

A race-based interpretation of Korematsu may seem familiar if not comfortable,
because it links World War II internment with other extreme examples of pre-
modern racism such as lynchings, peonage, and explicitly racist exclusions of

41 Hirabayashi, 320 U.S. at 81. In Korematsu, Justices Black, Stone, Reed, Douglas, Rutledge,
and Frankfurter made up the majority, while Justices Roberts, Murphy, and Jackson wrote dissents. 323
U.S. at 214.
42 Rostow, supra note 6, at 136-39; Eric L. Muller, Hirabayashi: The Biggest Lie of the Greatest
records now make clear that all of this talk of a threatened Japanese invasion was a massive distortion of the
actual military situation in the eastern Pacific in early 1942. There was no danger of a Japanese invasion of
the West Coast . . . . [A]rchival records show that top military officials shared [this information] with
members of Congress in early February of 1942.”); Craig Green, Wiley Rutledge, Executive Detention, and
misguided nature of the government’s arguments about military necessity).  See generally ROGER K.
“I would do precisely the same thing today, in any part of the country . . . . [The Japanese] all look alike to a
person not a Jap . . . . I saw nothing wrong in moving them away from the danger area.”).  See Adarand
551 U.S. 701, 720 (2007); see also REHNQUIST, supra note 29, at 207 (“Under today’s constitutional law, . . .
any sort of ‘racial’ classification by the government is viewed as ‘suspect,’ and an extraordinarily strong reason is required to justify it. But the law was by no means so clear in 1943 and 1944 . . . .”).  See Masaru Hashimoto, The Legacy of Korematsu v. United States, 4 ASIAN PAC. AM. L.J. 72, 88
(1996); UNITED STATES COMM’N ON WARTIME RELLOCATION & INTERNMENT OF CIVILIANS, PERSONAL
JUSTICE DENIED 239 (1997) (“Korematsu has not been overruled — we have not been so unfortunate that a
repetition of the facts has occurred to give the Court that opportunity — but each part of the decision,
questions of both factual review and legal principles, has been discredited or abandoned.”).
voters and jurors—all of which are now shelved in the dusty past. Yet this racial focus risks an anachronism that misrepresents the past and diserves present understanding as well. As we shall see, this is a field where reinterpreting Korematsu as the Court experienced it in 1944 may also improve constitutional analysis today.

With respect to Korematsu’s original history, even simple vote-counting shows that the Court did not view the case as straightforward racial discrimination. Several Justices who were sensitive to racial issues in other cases—including Douglas, Rutledge, Black, and Stone—were majority votes for the government in Korematsu. And two Justices with less progressive records on race—Roberts and Jackson—were among Korematsu’s dissents.

Modern scholars have largely ignored the difficult and decisive issue confronting the Court at the time, namely, what to do with the Court’s year-old decision in Hirabayashi, which had relied on identical claims of military need to uphold an identically racist “curfew.” In Hirabayashi, all nine Justices agreed with the

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48 Hirabayashi was vital during Korematsu’s conference vote. FERREN, supra note 32, at 338; conference notes of Justice Murphy, “No. 20, O.T. 1944,” reel 129, Murphy Papers; FERREN, supra note 28, at 249. Initially Stone, Black, Frankfurter, and Reed voted to affirm Korematsu’s conviction; Roberts, Murphy, Jackson, and Douglas voted to reverse. Because Justices speak at conference in order of seniority—and eight members of the Court were evenly divided—the final decision fell to Wiley Rutledge. Id. Stone gently prodded: “if you can do it for curfew you can do it for exclusion.” Rutledge told his colleagues: “I had to swallow Hirabayashi. I didn’t like it. At the time I knew if I went along with that [curfew] order I had to
broad holding that the military should be able to adopt public safety measures “in the crisis of war and . . . threatened invasion, . . . based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others,” despite the fact that “in other and in most circumstances racial distinctions are irrelevant.” This simple proposition established that presidential claims of wartime necessity could displace ordinary norms against racism. And the World War II Court might have fairly asked whether distant east-coast judges could ever know what kind of military response would be necessary to counter Japanese threats, or how much racism might be appropriate or excessive.

No Justice in Korematsu argued that Hirabayashi should be overruled. On the contrary, Korematsu’s majority claimed that the two cases could not be distinguished, and the dissenters did not offer any adequate basis for doing so. The majority in Hirabayashi and Korematsu viewed these cases not as concerning how racial groups should be treated, but about whether Presidents could keep America safe by whatever means necessary.

This focus on military need explains the majority opinion in Korematsu, and it explains the dissents as well. For the three dissenting Justices, something had dramatically changed from 1943 to 1944, from Hirabayashi to Korematsu. Whatever drove that change, it certainly was not the Justices’ constitutional stance on race. Instead, what the passing months had made clearer was the true scope of American security threats and the government’s ebbing credibility in litigating such issues. Threats of invasion and sabotage dissipated in 1944, and a military report released in January had embarrassed DeWitt’s justification for his actions.

go along with detention for [a] reasonably necessary time. Nothing but necessity would justify it.” Rutledge voted to affirm, and Douglas later switched to join the majority. Id.

49 320 U.S. 81, 101 (1943).
51 Hirabayashi, 320 U.S. at 101 (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”); Korematsu, 323 U.S. at 223 (“Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . .” (emphasis added)); accord FERREN, supra note 48, at 249.
52 LT. GEN. J. L. DEWITT FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST, 1942, dated June 5, 1943; see also IBONS, supra note 32, at 278-84.
That report was so disgraceful that Justice Murphy’s dissent quoted it extensively, alongside a journalist’s book-length attack on the government’s factual claims.\textsuperscript{53}

By 1944, the government’s detainment of Japanese-Americans was revealed as unjustifiably wholesale, as the government itself admitted that some prisoners were entirely loyal.\textsuperscript{54} Such detention was also distressingly long, having lasted for two years with no sign of stopping. From the perspective of military necessity, the government’s drastic and unending policy of mass internment was much harder to defend in 1944 than its seemingly temporary house arrest in 1943.

The decisive question in \textit{Hirabayashi} and \textit{Korematsu} alike was how much the Court should defer to the President’s assertions of military necessity, assertions that had been approved by Congress and were hard to falsify but also hard to believe. The government’s arguments in both cases relied on President Roosevelt’s perceived credibility and competence, which may have led some Justices to uphold constitutionally troublesome policies in deference to urgent presidential claims about national security.\textsuperscript{55}

Notwithstanding \textit{Hirabayashi}’s force under stare decisis — a year-old precedent with no change in the Court’s membership — the conference vote in \textit{Korematsu} was still only five to four.\textsuperscript{56} If the two cases had somehow both been decided in 1944, with an extra year of information and skepticism, one cannot guess what would have happened.\textsuperscript{57} What is quite clear, however, is that \textit{Korematsu}’s majority saw the case as concerning wartime necessities, not general principles of racial discrimination. Even the \textit{Korematsu} dissenters’ choice to discard \textit{Hirabayashi} is more understandable from a war-focused perspective than a race-focused one.

\textsuperscript{53} Korematsu, 323 U.S at 235-40 (Murphy, J., dissenting).
\textsuperscript{54} Ex parte Endo, 323 U.S. 283, 294 (1944); \textit{see also} Gudridge, supra note 7, at 1947.
\textsuperscript{55} When \textit{Korematsu} was decided in 1944, Roosevelt had just earned an unprecedented fourth presidential term, was en route to winning our largest foreign war, and had picked seven of the nine Justices. \textit{See} G. EDWARD WHITE, \textit{THE CONSTITUTION AND THE NEW DEAL} 85 (2001); L.A. Powe, Jr., \textit{The Not-So-Brave New Constitutional Order}, 117 HARV. L. REV. 647, 678, 681 (2003) (book review).
\textsuperscript{56} IRONS, supra note 32, at 338; FERREN, supra note 28, at 249; conference notes of Justice Murphy, “No. 20, O.T. 1944,” reel 129, Murphy Papers.
\textsuperscript{57} CI. REHNQUIST, supra note 29, at 222 (questioning whether the Court in \textit{Duncan} v. \textit{Kahanamoku}, 327 U.S. 304 (1946), might have upheld Hawaii’s martial law if that case had been decided in 1943 rather than 1946); \textit{infra} Subsection II.B.5 (discussing the significance of delayed adjudication in modern GWOT cases).
2. **Korematsu**’s Modern Relevance

This Article’s revisionism not only uncovers **Korematsu**’s original meaning, it also explains the decision’s continued significance. Even as **Korematsu**’s salience to issues of racial equality has declined, the decision remains important as a war powers precedent. If **Korematsu** is to be studied by modern commentators — as I think it should — its interpretation as a judicial icon should shift to reflect such present-day developments.

Conventional interpreters sometimes cite **Hirabayashi** and **Korematsu** as a matter of ordinary “positive” precedent to prove (i) that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,” or (ii) that anti-racist principles of equality constrain the federal government, not just the states.\(^58\)

Regardless of these citations’ anachronism,\(^59\) **Brown** and its progeny have now fully supplanted the World War II cases’ doctrinal importance on such topics.\(^60\) There were decisions even before **Korematsu** holding that equal protection prohibits racist denials of civil rights.\(^61\) But **Brown** and its successors made these premodern precedents doctrinally unimportant. Likewise, the question of whether equal protection should be “reverse incorporated” against the federal government was once provocative, but that issue was not even implicitly addressed in **Korematsu**; instead, it was resolved a decade later in **Brown**’s companion, **Bolling** v. **Sharpe**.\(^62\)

Most often, **Korematsu** is studied as a “negative” precedent, to show how doctrine can be abused in the service of racial prejudice.\(^63\) Yet even as an illustration of how racial issues should not be treated under the Constitution, **Korematsu** deserves secondary prominence. The Court’s decisions in **Dred Scott**, the **Civil Rights**


\(^59\) See supra Subsection I.A.1.


\(^61\) E.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880); 347 U.S. 497, 500 (1954). For strong doctrinal suggestions that **Korematsu** and **Hirabayashi** were not understood at the time as adopting the doctrine of “reverse incorporation,” consider cases between 1944 and 1954 that cited **Korematsu** and **Hirabayashi**, yet nevertheless declined to indicate that equal protection principles were binding against the federal government. E.g., Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 34 (1948); Hurd v. Hodge, 334 U.S. 24, 28-36 (1948); Takahashi v. Fish and Game Com’n, 334 U.S. 410, 418 (1948).

\(^62\) See supra notes 3, 7 (collecting examples from casebooks and commentary); see also Adarand, 515 U.S. at 236; id. at 244 n.2 (Stevens, J., dissenting); id. at 275 (Ginsburg, J., dissenting).
Cases, and Plessy all incorporate governmental racism more directly, and of course the most robust evidence of racial oppression lies altogether outside federal courts, amidst lynchings, de facto segregation, voter intimidation, employment abuse, and suchlike. Thus, although the “internment cases” are a horrible instance of American racism, their segment of that narrative is incomplete and unrepresentative. Korematsu also sheds little light on current debates over racial profiling, affirmative action, disparate impact, and the treatment of non-racial groups like homosexuals. In simplest terms, if Korematsu were studied today simply for its contribution to equal protection jurisprudence, its doctrinal importance would be mild indeed.

Despite Hirabayashi’s and Korematsu’s limited importance under equal protection doctrine, they have persistent weight in the field of war powers and military necessity, where post-War events have only expanded such cases’ significance. Today, the dominant framework for executive power is Jackson’s concurrence in Youngstown, whose three-category framework classified executive action based on its relationship to legislative authority. Under what could be called “the Youngstown principle,” Presidents must ordinarily seek congressional authorization to support their wartime activities. When Presidents act consistently with “express or implied authorization,” their constitutional power is “at its maximum.” When a President acts without congressional support or opposition, “there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” And when a President acts contrary to congressional instructions, “his power is at its lowest ebb.”

More than any other case, Korematsu exemplifies the constitutional problems that arise when Congress and the President act together, i.e., when presidential authority is “at its maximum.” As we shall see, the Court’s latest GWOT case, Boumediene v. Bush, has raised precisely this “Korematsu problem” of how much courts should trust legislatively approved claims of military necessity in evaluating presidential conduct that might otherwise be unlawful.

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64 Plessy v. Ferguson, 163 U.S. 537 (1896); Civil Rights Cases, 109 U.S. 3 (1883); Dred Scott v. Sandford, 60 U.S. 393 (1856).
65 See supra note 45 (collecting sources).
68 Id. at 638.
69 Id.
70 Id.
71 Id. at 635-36.
72 28 S. Ct. 2229 (2008); see infra Subsection II.B.4.
If Korematsu merits widespread study and cultural currency, a change in emphasis seems necessary. The Court’s incidental language about “most rigid scrutiny” and “legal restrictions . . . [upon] a single racial group” should not distract modern readers from Korematsu’s original and still essential holding about military power.73

To be sure, some readers may doubt whether Korematsu can ever be understood apart from its searing racism — the pull of conventional wisdom may just be too strong. In Part III, however, I propose that iconic precedents’ meaning is not always static. And even the foregoing study of Korematsu and Hirabayashi has shown that the cases have already changed from “good law” to “bad,” and also from cases about wartime to cases about racial discrimination.74 Reorienting Korematsu toward its original roots may thus be much more feasible than ahistorical conventionalism would generally suppose.

B. Korematsu’s Companions: Identifying the Korematsu Era

Armed with a revised view of Korematsu’s and Hirabayashi’s doctrinal core, this Section identifies three roughly contemporary decisions that also apply strong deference to presidential assertions of military necessity in wartime.75 Although my list is not exhaustive, these three illustrate a distinctive judicial approach to presidential war powers that merits discussion as an aggregated “era.”76

1. Ex Parte Quirin

Ex parte Quirin concerned the trial by military commission of eight men who were accused of spying and conspiring to spy in violation of the laws of war and federal statutes.77 The defendants were seven German citizens and an American, who traveled to the United States on Nazi submarines in June 1942.78 One team landed on a beach on Long Island, New York; the other landed on a beach near Jacksonville, Florida. Both groups carried explosive materials and uniforms from the German Marine Infantry — which were promptly discarded and buried under

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74 See supra Subsection I.A.1.
75 Ex Parte Quirin, 317 U.S. 1 (1944); In Re Yamashita, 327 U.S. 1 (1946); Eisentrager v. Johnson, 339 U.S. 763 (1950).
76 For analogies to other doctrinal “eras,” see supra note 10.
77 Ex Parte Quirin, 317 U.S. at 20-21.
the sand. Within a week, two defendants had voluntarily surrendered to the FBI; one week later, all eight had confessed and were in United States custody.

Roosevelt chose not to prosecute the Quirin defendants in a civilian court because of the small penalties for their unrealized conspiracy, and he did not prosecute in a court martial because of applicable burdens of proof and strict evidentiary rules. Instead, the President signed an order naming particular officials who would adjudicate the defendants’ case, and also naming the prosecutors and defense counsel who would participate.

The defendants challenged the legality of this military commission process, and on July 29-30, the Supreme Court heard nine hours of oral argument in their case. On July 31, the Court announced a unanimous per curiam judgment supporting the government, with full opinions to issue at a later date. On August 3, the military commission convicted the defendants and sentenced them to death. Six of the eight were executed that weekend, while the others who had turned themselves in — hoping to be celebrated as American heroes — received life sentences and were later deported to Germany.

The Court’s opinion explaining its decision was issued twelve weeks after the executions. The Court held that: (i) Congress had authorized the President to convene military commissions, (ii) the Fifth and Sixth Amendments do not apply to military commissions that punish war crimes, and (iii) extant statutory law did not bar the government’s stripped-down adjudicative procedures. The Court described its deferential role as follows: “[T]he detention and trial of petitioners – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.”

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79 FRANCIS BIDDLE, IN BRIEF AUTHORITY 328-30 (1962).
81 DOBBS, supra note 78, at 244.
82 Quirin, 317 U.S. at 1.
83 DOBBS, supra note 78, at 253.
84 Quirin, 317 U.S. at 7.
85 Id. at 1.
86 Id. at 25 (emphasis added); id. at 19-20 (“We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform - an offense against the law of war.”); see Harold H. Koh, The Spirit of the Laws, 43 HARV. INT’L L.J. 23, 33-37 (2002).
Despite apparent differences between *Quirin* and *Korematsu*, both decisions analyzed presidential conduct that Congress had approved, and both cases allowed the executive to depart from otherwise basic legal norms. Whereas *Korematsu* enforced racist detention policies based on alleged military necessity, *Quirin* upheld a military commission that was unstitched from ordinary due process. On both occasions, the Court sacrificed basic legalist commitments in deference to presidential assertions about wartime exigency.

2. *In re Yamashita*

*Yamashita* involved the military commission trial of Lieutenant General Tomoyuki Yamashita for his subordinates’ war crimes, which occurred after the United States’ Philippine invasion had destroyed Yamashita’s control over his men. The commission was composed of five military officials, none of whom was a lawyer. The United States initially alleged sixty-four war crimes by Yamashita’s soldiers, but three days before trial, the prosecution charged fifty-nine additional atrocities. Defense counsel’s request for a continuance to address the new allegations was denied. The prosecution’s evidence from 286 witnesses and 423 exhibits was almost all hearsay, and virtually none of it showed any direct link between Yamashita and the charged war crimes. Nevertheless, on December 7, 1945 — the fraught anniversary of Pearl Harbor — Yamashita was convicted and sentenced to death by hanging.

Yamashita challenged the military commission’s lax evidentiary rules on several grounds, each of which the Supreme Court summarily rejected. First, Yamashita noted that the statutory Articles of War forbade deposition evidence in capital cases before “any military court or commission,” and they also banned hearsay evidence before “military commissions and other military tribunals.” But the Supreme Court found that enemy combatants were not listed as “persons” governed by such rules. Second, the Geneva Conventions required prisoners of

87 Morris D. Davis, *The Influence of Ex Parte Quirin and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. COLLOQUIY 121, 124 (“[I]t took only seven weeks for the President to create and convene a military commission, for prosecutors and defense counsel to prepare their cases, to litigate a joint trial for eight men, for an appeal to the district court to be filed and denied, for the Supreme Court to hear oral arguments and render a decision, and for six men to be executed and buried.”); FISHER, supra note 78, at 8 (“The commission could . . . discard procedures from the Articles of War whenever it wanted to and . . . ‘[o]f course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that.’” (quoting the prosecuting Judge Advocate General)).
89 *Yamashita*, 327 U.S. at 5.
90 *Id*. at 18-19.
91 *Id*.
war to be tried “only by the same courts and according to the same procedure” as would apply to the detaining government’s own troops. Yet the Court applied this requirement only to crimes by prisoners of war while in detention, not to crimes they committed before being captured. Third, Yamashita claimed that his trial violated constitutional due process, but the Court granted the executive irrebuttable deference: “[T]he commission’s rulings on evidence and on the mode of conducting these procedures . . . are not reviewable by the courts, but only by the reviewing military authorities. . . . [I]t is unnecessary to consider what, in other situations, the Fifth Amendment might require . . . .”

In dissent, Justice Rutledge listed various ways that Yamashita’s capital prosecution deviated from ordinary criminal-law traditions, including the military commission’s ex post facto theory of “commander liability,” insufficient notice, imposition of strict criminal liability, inadequate time for defense, and evidence without confrontation. Rutledge concluded that, whether such shortcomings were “taken singly . . . as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment, a trial so vitiated cannot stand constitutional scrutiny.” And although Rutledge acknowledged that military commission procedures deserved judicial deference in contexts of true “military necessity” or “battlefield” authority, he found such deference inapplicable to Yamashita’s trial, which occurred after hostilities ended and without any ongoing threat. As Rutledge explained: “The difference between the Court’s view of this case and my own comes down to . . . [the Court’s judgment] that no law restrictive upon these proceedings [exists] other than whatever rules and regulations may be prescribed . . . [by] the military . . . .” Just as with Quirin, Korematsu, and Hirabayashi, the Court’s decision in Yamashita created a zone of judicially unsupervised executive activity, and thereby dispensed with otherwise indispensable legal values.

3. Eisentrager v. Johnson

Eisentrager concerned the post-war habeas petitions of German citizens whom the United States detained at an American military facility in Germany. An American military commission in China had convicted these petitioners of aiding

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92 Id. at 20-21.
93 Id. at 21-23.
94 Id. at 23.
95 Id. at 23.
96 In Re Yamashita, 327 U.S. 1, 43-45 (1946) (Rutledge, J., dissenting).
97 Id. at 45.
98 Id. at 45-46.
99 Id. at 81.
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United States enemies in violation of the laws of war.\textsuperscript{100} The \textit{Eisentrager} petitioners claimed that their trial and imprisonment violated the United States Constitution and the Geneva Conventions. Unlike \textit{Yamashita}, however, the \textit{Eisentrager} Court denied even having jurisdiction to hear the case because the petitioners were not United States citizens and were not tried, held, or imprisoned within United States territory.\textsuperscript{101}

At a hypertechnical level, \textit{Eisentrager} merely affirmed criminal punishment by military commissions that — the Court said — imposed “no prejudicial disparity” as compared with courts-martial “that would try an offending soldier of the American forces of like rank.”\textsuperscript{102} In principle, however, \textit{Eisentrager} barred courthouse doors against all claims of non-resident enemy aliens, and this raised deeper questions. What if, in some future case, detainees were held without any trial, conviction, sentence, or apparent release date? What if future military commissions used procedures and evidentiary rules that were no better than a cheater’s coin flip? What if even death sentences were someday imposed based solely on tortured confessions, fabrication, racism, or bloodthirst? \textit{Eisentrager}’s logic seemed to deny habeas jurisdiction regardless of how egregious the alleged governmental misconduct might be, so long as any victims were extraterritorial aliens. “The . . . enemy alien is constitutionally subject to summary arrest, internment and deportation . . . . Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy . . . . Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.”\textsuperscript{103}

In dissent, Justice Black objected that the \textit{Eisentrager} majority was “fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations.”\textsuperscript{104} Black continued that “[p]erhaps, as some other nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a

\textsuperscript{100} Id. at 766.
\textsuperscript{101} Id. at 790-91.
\textsuperscript{102} But see \textsc{Michael T. Geary, Sweet Land of Security: America’s Responses to Terror From the Revolution Through Today’s War on Terror} 8 (2007) (asserting that military commissions’ reputation “for providing justice is questionable, while their reputation for delivering revenge is indisputable”); \textsc{H. Wayne Elliott, Military Commissions: An Overview, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES} 124 (David K. Linnan ed., 2008) (explaining that it is more difficult to fulfill the requirements of courts-martial than to fulfill “procedural[ly] flexible” rules of military commissions).
\textsuperscript{103} \textit{Eisentrager}, 339 U.S. at 775.
\textsuperscript{104} Id. at 795 (Black, J., dissenting).
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contrary policy.\textsuperscript{105} Like other Korematsu-era cases, Eisentrager’s restriction of habeas jurisdiction opened a large field of unchecked executive action, where presidential assertions of military necessity could overcome otherwise applicable limits.

C. The Korematsu Era’s Flaws

The foregoing cases about executive detention and military commissions display a common thread of extreme deference to asserted military necessity; I propose that this view of presidential power and judicial role is what defines cases from the Korematsu era. My next step is to explain why modern legal culture might view Korematsu and its contemporaries as problematic, even if the era is detached from Korematsu’s racist facts. For most readers, the very name Korematsu prompts negative reactions, yet some modern commentators might endorse the Korematsu era’s commitment to broad presidential power.\textsuperscript{106} Accordingly, this Section will sketch four historical trends that have caused the Korematsu era’s view of presidential power to become less persuasive as time has passed.

First, post-War history has shown that some Korematsu-era cases were infected by misleading and deceptive conduct by the executive branch. In \textit{Hirabayashi} and \textit{Korematsu}, the government defended its curfew and internment policies by exaggerating information about domestic espionage and by concealing such mistakes from the Court.\textsuperscript{107} These tactics mark a lowlight in the history of federal litigation, leading one scholar of the period to call the Japanese-American cases “the biggest lie of the greatest generation,” and causing a federal district court to grant Korematsu \textit{coram nobis} based on governmental concealment and misconduct in his case.\textsuperscript{108}

In \textit{Quirin}, the government factually misled the public in order to conceal the conspirators’ voluntary surrender and the corresponding weakness of American

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\textsuperscript{105}Id. at 797-98.


\textsuperscript{107}Irons, \textit{supra} note 32, at 285 (explaining that the Justice Department possessed “substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention [of the Japanese] was incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report . . . .”).

\textsuperscript{108}Muller, \textit{supra} note 42, at 1; Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).
counter-intelligence.\textsuperscript{109} Indeed, one reason for the President’s decision to use a secret military commission was to avoid embarrassing disclosures about how easily the conspirators entered and traveled around the United States, and to hide several conspirators’ intention not to harm the American public.\textsuperscript{110}

For cases like Korematsu, the President’s credibility will always be paramount. Courts will never know much about military threats or what is needed to stop them; all judges can do is hear the President, and either doubt or believe. In the words of Jackson’s Korematsu dissent:

\begin{quote}
The limitation under which courts always will labor is illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. . . . So the Court has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.\textsuperscript{111}
\end{quote}

The historical record from World War II is replete with examples of abused trust. The fact that Roosevelt misled the public, and his Solicitor General misled the Court, about military threats and American countermeasures during World War II has understandably damaged later Presidents’ credibility in applying similar arguments to modern circumstances.\textsuperscript{112}

Second, although some mid-century observers viewed Korematsu-era decisions as pragmatic and modest, subsequent history has made their security benefits seem

\textsuperscript{109} Dobb\textsuperscript{s} sup\textsuperscript{ra} note 78, 189-206.

\textsuperscript{110} Of the eight saboteurs, at most two showed any mentionable interest in pursuing their “mission.” Two men had turned themselves in, two discussed “ways out” of their predicament, and one seemed quite content to live carefree in the United States. \textit{Id.} at 124, 144.

\textsuperscript{111} \textit{Korematsu v. United States}, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting) (emphasis added). E.g., \textit{Hamdi v. Rumsfeld}, 337 F.3d 335, 375 (4th Cir. 2003) (Motz, J., dissenting) (“[O]ne need not refer back to the time of the Framers to understand that the courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of \textit{Korematsu} . . . . In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive’s actions, the Court upheld the Executive’s conviction of Korematsu for simply remaining in his home . . . . Of course, history has long since rejected the \textit{Korematsu} holding. Indeed, Congress itself has specifically repudiated \textit{Korematsu}, recognizing that a grave injustice was done to those of Japanese ancestry by the actions . . . carried out without adequate security reasons . . . .” (citation omitted)); \textit{Goldsmit\textsuperscript{h}}, sup\textsuperscript{ra} note 13, at 184-85 (noting certain academic efforts to characterize the Bush Administration’s “mendacious reaction to 9/11” as “akin to past presidential overreactions to perceived threats,” including “the Japanese internment”).
short-term when weighed against such cases’ harm to core legalist values. For example, Americans in the late twentieth century can hardly envision threats that might require prolonged executive detention, military commissions, and the like. Even now, students of Korematsu often need reminders about how dire the Japanese threat seemed in 1942, including popular fears of a West Coast invasion and the fact that Japanese firebombs fell on American soil. The United States’ long period of post-War safety has (to the dismay of national security professionals) limited Americans’ ability to imagine the threats of wholesale invasion and sabotage that the Court discussed in Korematsu.

By contrast, twentieth-century legalism has repeatedly emphasized values like procedural regularity and fairness, and federal courts have routinely enforced such principles. Through a universe of ordinary cases, courts and commentary have declared that rule-of-law norms must not bend to political pressure. Such practiced inflexibility, combined with the generational infrequency of serious security threats, has tended to reaffirm modernist judgments that the Court’s Korematsu-era priorities were skewed.

Third, the end of World War II coincided with a worldwide legal movement to limit war and executive power. In the international sphere, this process found expression in the U.N. Charter’s prohibition on the use of force, humanitarian law designed to limit armed conflict’s destructiveness, military alliances designed to deter the use of force, and the U.N. Security Council that holds “primary

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113 Compare Clinton Rossiter, Martial Rule in World War II: The Case of the Japanese-Americans, in THE SUPREME COURT AND THE COMMANDER IN CHIEF 54 (Richard P. Longaker ed., 1976) (“The government of the United States, in a case of military necessity proclaimed by the President, and a fortiori when Congress has registered agreement, can be just as much a dictatorship, after its own fashion, as any other government on earth. The Supreme Court of the United States will not, and cannot be expected to, get in the way of this power.”), with sources cited supra notes 6-7.
115 Clark G. Reynolds, Attacks on the Pacific Coast, 1942, 33 PACIFIC HISTORICAL REVIEW 183, 191 (1964); REHNQUIST, supra note 29 at 188.
116 FEITH, supra note 1, at 69 (“Because of our historical good fortune, Americans have long enjoyed a high degree of public safety.”); see GOLDSMITH, supra note 13, at 187.
118 See, e.g., FEITH, supra note 1, at 69 (“We have become accustomed to thinking that our civil liberties are not only sacred but unshakeable. But a community’s freedom is affected by circumstances. . . . Our Constitution and the judges that interpret it often seem to say that our freedoms are absolute, but when danger becomes oppressive, people will recall the quip that the Constitution is not a suicide pact.”); Corinna Barrett Lain, Countermajoritarian Hero or Zero?, 152 U. PA. L. REV. 1361, 1364-65 (2004); Owen Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 741 (1982); cf. Antonin Scalia, Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1180 (1989).
119 STONE, supra note 6, at 528-50.
responsibility for the maintenance of international peace and security.” Such formal instruments and institutions served as confluent rallying points for political and non-governmental power, and they are now a standard element of many countries’ military decisions, including those of the United States.

In the domestic sphere, legal restraints on executive power swelled after Watergate and Vietnam, although their predicate appeared as early as Youngstown. Perceived executive abuse in the 1970s spurred legal efforts to channel and limit political discretion, drawing political and cultural defenders from Congress to university campuses. Such traditions made it easy to believe the American cliche that no one is above the law, not even the President, and not even in crises. Jackson’s iconic Youngstown opinion further suggests that the status of presidential wartime activity ebbs and flows based on its relationship to congressional will — as applied and interpreted by courts. All of these heightened constraints on executive power and military activity have combined to make Korematsu-era attitudes seem out of step with the modern march of legalism.

Finally, alongside substantive limits on presidential and military power, the institutional role of federal courts has also expanded. The federal judiciary emerged after World War II as an ardent protector of individual rights and active overseer of other governmental entities. From Brown to Mapp to New York Times v. Sullivan to Griswold, an assortment of landmark decisions have augmented courts’ sphere of importance. Given federal courts’ prominence in overseeing school districts, speech in parks, police work, contraception, electoral districts, and the death penalty, modern jurists confront wartime executive abuse with the almost reflexive question “where were the courts?”

120 U.N. CHARTER art. 24, para. 1; see GOLDSMITH, supra note 13, at 53-70.
121 See Treaties Memo, supra note 8, at 38.
124 See generally WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK 1920-1980, at 142-43 (“[I]n the decade after the war, . . . . [o]nly judges who were not beholden to the majority, it seemed, could protect discrete, insular, and powerless minorities and their rights. . . . Once nearly all Americans came to define social justice in terms of protection of minorities from majoritarian power, some consensus about the judiciary’s role became inevitable.” (internal quotation marks omitted)).
125 GOLDSMITH, supra note 13, at 282-84.
None of the foregoing factors is as simple as my summary, nor do all apply equally to every Korematsu-era case. In the aggregate, however, our history of executive abuse, cultural risk assessment, substantive legalism, and judicial enforcement help explain why Korematsu-era decisions have weathered badly during the past six decades. By the end of the twentieth century, conventional reactions to the Court’s Korematsu-era decisions ranged from ignorance and desuetude (Yamashita, Quirin, Eisentrager) to disapproval of a distant ugly past (Hirabayashi, Korematsu).129

II. THE WAR ON TERROR

A. President Bush and the Korematsu Era

The twenty-first century brought new attention to Korematsu-era principles and spurred new debate over these cases’ lasting force. The Bush Administration’s crucial legal response to the 9/11 attacks was to characterize the United States as a nation struck by acts of war, not international organized crime.130 Confronting a populace desensitized by Wars on Drugs, Poverty, Crime, and Cancer, President Bush quickly compared the 9/11 attacks to Pearl Harbor, and equated the new terrorist threat with that older “great cause” of World War II.131 In speeches, policy directives, memos, and ultimately legal briefs, the Bush Administration defended national security tactics that no President had used for decades, and executive advisers cited World War II’s history as principal support.132

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To illustrate how the foregoing factors interact, see an ample literature discussing judicial role in cases affecting international affairs. E.g., THOMAS A. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 90-97 (1993); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 313-14 (1990); HAROLD H. KOM, THE NATIONAL SECURITY CONSTITUTION 147-48 (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 70-91 (1990).128

See, e.g., Muller, supra note 7, at 1334; supra notes 3, 7 (discussing casebook and law review data).

E.g., FEITH, supra note 1, at 18 (“President Bush’s decision to characterize 9/11 as a ‘war’ . . . was unusual and important. It made us all reconsider all our other national security problems in light of this new apprehension of the terrorist threat.”); id. at 14 (“Tell the lawyers we’re at war, President Bush instructed, and we’re going to get the terrorists’ money.”); id. at 58 (“By mid-September, President Bush had made his beliefs clear: As an act of war, 9/11 required a response far beyond the issuance of arrest warrants.”).130

See supra note 2 (collecting sources).

See sources cited infra, notes 2, 8; Brief for the Respondents in Opposition at 3, 6-16, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 and 03-343) (citing Quirin and Eisentrager); Brief for the Respondents at 4, 29-30, Rasul, 542 U.S. 466 (Nos. 03-334 and 03-343) (citing Quirin, Yamashita, and Eisentrager); Supplemental Brief for Respondents at 4, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (citing Quirin); Brief for the Respondents at 13-14, 17-19, 25-26, 37, 38, 49, Hamdi, 542 U.S. 507 (No. 03-6696) (citing Eisentrager, Quirin, and Yamashita); Brief for Respondents at 9, 11, 13-14,
phenomenon appears most clearly with respect to executive detention and non-
citizens’ prosecutions in military commissions.

Consistent with the Authorization of Use of Military Force (AUMF), American
forces in October 2001 began fighting against the Taliban, Al Qaeda, and other
forces in Afghanistan. Numerous prisoners were captured through military and
intelligence operations, and United States commanders did not wish to imprison
them locally due to security risks. In November, Bush authorized the Secretary
of Defense to detain certain categories of aliens and to prosecute a subset of them
in military commissions for violating the laws of war. In December, Secretary
Donald Rumsfeld announced plans to hold prisoners at Guantanamo Bay, and the
first detainees arrived fifteen days later. In March 2002, Rumsfeld outlined
procedures that would later be applied in military commission trials.

Memos from the Office of Legal Counsel (OLC) and other executive lawyers
indicate that all of these choices by the Bush Administration relied heavily on
Korematsu-era precedents. For example, a key authority supporting detention at
Guantanamo Bay was Eisentrager, which was cited to shelter Guantanamo Bay
from federal habeas review because that facility — like American prisons in post-
War Germany — held alien prisoners located outside the United States. Executive
lawyers claimed that such detention was altogether exempt from judicial
oversight, and this theory carried potentially foreseeable consequences for later
interrogation and detention activities in Abu Ghraib and elsewhere. Presidential
advisers argued that the government’s actions were substantively proper, yet the

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133 Letter from President George W. Bush to Congressional Leaders Reporting on Combat Action in
Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, in PUB. PAPERS 1211, 1211-12
(Oct. 9, 2001).
134 See, e.g., GREENBERG, supra note 19, at 5-6.
135 Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens
136 See Katharine Q. Seelye, A Nation Challenged: U.S. to Hold Taliban Detainees in “The Least
137 Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain
138 See supra note 8 (collecting sources).
139 See Habeas Memo, supra note 8, at 29 (“The basis for denying jurisdiction to entertain a
habeas petition filed by an alien held at GBC rests on Johnson v. Eisentrager, 339 U.S. 763 (1950).”).
140 Id.; see GREENBERG, supra note 19, at 219 (discussing commonalities between Guantanamo
and the subsequent lack of professionalism and unified command at Abu Ghraib).
first line of defense in each case of extraterritorial aliens was that federal courts should not consider or decide these legal claims at all. 141

The President likewise crafted policies about military commissions under the aegis of *Quirin* and *Yamashita*, which had held that courts should be permissive in evaluating such tribunals’ composition and procedures. 142 Modern military commissions offered defendants greater procedural protections than tribunals convened in the *Korematsu* era. 143 Thus, the Bush Administration argued that federal courts should not meddle with assertedly exclusive presidential decisionmaking. 144 Administration lawyers were understandably loathe to explicitly cite *Hirabayashi* and *Korematsu* because of their racist facts, yet once *Korematsu*-era ideas about presidential authority and judicial deference were detached from explicit racial classification, cases from the *Korematsu* era became indispensable support for claims of broad presidential war powers. 145

B. The Court’s Newfound Skepticism

It was perhaps predictable that the Bush Administration’s commitment to expansive presidential power would inspire reliance on *Korematsu*-era precedents. 146 But it was far less expected that the Supreme Court — including five Justices who had directly supported President Bush’s election 147 — would in subsequent war-power cases deliver a string of presidential losses. Although recent scholars have produced important analyses of these decisions, their full meaning for the *Korematsu* era has not been explored. 148 In comparing old cases

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141 *See* Habeas Memo, *supra* note 8, at 29-30.
143 *See* Goldsmith & Sunstein, *supra* note 114, at 267, 274-80, 282-84.
144 *See* Military Commissions Memo, *supra* note 7, at 3-5.
145 *See* supra note 7 (collecting memos).
146 George W. Bush, GOP Nomination Acceptance Address, August 3, 2000 (“We have seen a steady erosion of American power and an unsteady exercise of American influence . . . . [The Clinton] administration had its moment. They had their chance. They have not led. We will.”); *see also* SAVAGE, *supra* note 17, at 9 (“[Vice-President Dick] Cheney made no secret of his agenda of expanding —or ‘restoring’ —presidential power. He repeatedly declared that one of his goals in office was to roll back what he termed ‘unwise’ limits on the presidency that were imposed after the Vietnam War and the Watergate scandal.”).
with new ones, this Section suggests that modern GWOT cases, despite their superficial technicalities, pose a much deeper challenge to Korematsu-era principles than is commonly thought.

1. Rasul and Eisentrager

The Supreme Court did not pass judgment on the Bush Administration’s detention policies until June 28, 2004. A pair of cases that day — Rasul v. Bush and Hamdi v. Rumsfeld — began the most remarkable losing record of any President in history concerning executive war powers.\(^{149}\)

Rasul concerned habeas petitions from fourteen Guantanamo detainees who claimed that their uncharged detention and the conditions of that detention violated the Constitution, treaty obligations, and customary international law.\(^{150}\) The Court did not address any of these claims on the merits; instead, it focused solely on whether there was jurisdiction to even consider such arguments.\(^{151}\)

Over strong governmental protest, Rasul held that federal statutes granted habeas jurisdiction simply because the petitioners’ ultimate custodians were “within [a district court’s] jurisdiction” in the District of Columbia.\(^{152}\) The detainees’ location in Guantanamo was jurisdictionally irrelevant.\(^{153}\) The Court also rejected the government’s claim that federal habeas statutes do not apply extraterritorially. The United States’ indefinite lease and complete control over Guantanamo


\(^{150}\) 542 U.S. at 471-72. Id. at 485.

\(^{151}\) Id. at 478-79 (quoting 28 U.S.C. § 2241).

\(^{152}\) Id.
rendered the naval base “within the territorial jurisdiction of the United States.”

According to the Court, the Guantanamo detainees were not “extraterritorial” at all, and thus possessed jurisdictional opportunities much like prisoners within the fifty states.

A major challenge for the Rasul majority was whether its decision granting jurisdiction to alien detainees in Guantanamo could be reconciled with Eisentrager’s denial of jurisdiction to alien detainees in post-war Germany. The Court ostensibly distinguished Eisentrager on technical grounds, but the two cases were so normatively opposite that the latter seemed nearly overruled. Whereas Eisentrager protected a broad swath of executive activity from judicial oversight based on alleged military necessity, Rasul declared that judicial supervision over executive detention was immensely important “in wartime as well as in times of peace.” Korematsu-era deference to military detention was correspondingly reduced.

The majority’s decision to unceremoniously shelve Eisentrager caused Justice Kennedy to concur separately. Yet Kennedy’s analysis undermined the Korematsu era just as much as the majority’s. Kennedy transformed the clear jurisdictional rule from Eisentrager — no habeas for extraterritorial aliens — into a web of interdependent factors that determine whether aliens outside the United States can have habeas jurisdiction. Moreover, Kennedy applied his pseudo-Eisentrager “framework” by declaring that Rasul’s indefinite detention without trial offered “a weaker case of military necessity” than Eisentrager. Kennedy cited no proof for this military comparison, and he discarded the government’s protest to the contrary. Instead of accepting the military’s own judgments, Kennedy mused that uncharged wartime detention might perhaps “be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for . . . military exigencies becomes weaker.” All of this nuanced line-drawing is antithetical to Korematsu-era principles. The very notion that Article III judges should decide whether military detainees should be formally charged — much less whether they should be informally detained for weeks and

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154 Id. at 480 (internal quotation marks omitted).
155 Id. at 480-81.
156 See Rasul, 542 U.S. at 485-89 (Kennedy, J., concurring in the judgment) (arguing that the majority should have followed Eisentrager’s reasoning).
157 Id. at 474.
158 Id. at 485-86 (Kennedy, J., concurring in the judgment).
159 Id. at 488.
160 Id.
161 Id.
months as opposed to years — contradicts everything that the World War II precedents once stood for.\footnote{Rasul’s policy significance (and that of its contemporaries) has attracted great academic discussion,\footnote{See, e.g., H\textsc{oward} B\textsc{all}, B\textsc{ush, the D\textsc{etainees}, and the Constitution 87 (2007); E\textsc{rwin} C\text{hemerinsky}, 68 A\textsc{lb. L} R\text{ev. 1119, 1122-23 (2005); F\text{allon} & M\text{eltzer, supra note 6, at 2058-61; Roosevelt, supra note 148, at 2018-19.}} yet the ruling’s effect on Korematsu-era precedents has escaped attention. Such oversight owes largely to the Court’s nominally minimalist style.\footnote{For extensive discussion of the Court’s minimalism see Neil S. Siegel, \textit{A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar}, 103 M\textsc{ich. L} R\text{ev. 1951 (2005); Cass R. Sunstein, Testing Minimalism: A Reply}, 104 M\textsc{ich. L} R\text{ev. 123 (2005).}} Rasul addressed two of the most profound constitutional issues imaginable: whether the President can detain individuals in a “legal black hole” and how courts treat claims of wartime necessity. Yet the Court crafted its opinion to fit a narrow statutory context, and thereby avoided acknowledging or justifying any broad shift in judicial deference. As a result, Rasul’s full precedential and structural consequences remained unclear until several years later.\footnote{See infra Subsection II.B.4 (discussing Boumediene v. Bush, 128 S. Ct. 2229 (2008)).}}

2. \textit{Hamdi} and \textit{Korematsu}

\textit{Hamdi} was another blow to \textit{Korematsu}-era principles governing executive detention. Hamdi was a United States citizen captured in Afghanistan and held in a South Carolina military brig.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 510-11 (2004).} Because Hamdi was a citizen held within the United States, there were no \textit{Rasul}-based questions about habeas jurisdiction or the extraterritorial force of federal laws. Instead, the issue was whether and how federal courts could second-guess the President’s factual claim that Hamdi was an “enemy combatant” who could be held without charges until hostilities cease.\footnote{Id. at 510-11; see also Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (discussing the government’s initial refusal to proffer any supporting documents to the district court).} After extended litigation, the Bush Administration proffered a military bureaucrat’s sworn statement that Hamdi had been “affiliated” with a Taliban military unit, had “received weapons training,” and had carried arms against American allies in Afghanistan.\footnote{Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (discussing the government’s initial refusal to proffer any supporting documents to the district court).} Hamdi argued that he was an aid worker at the wrong time and place. When the case reached the Supreme Court, the government’s brief decried Hamdi’s argument as “constitutionally intolerable” —
raising the ominous possibility that the President might somehow refuse to “tolerate” or follow a ruling against the government.\textsuperscript{169}

Although \textit{Hamdi} did not produce a majority opinion, eight Justices rejected the \textit{Korematsu}-era argument that courts should leave disputes over alleged enemy combatants to unsupervised presidential judgment.\textsuperscript{169} Justice O’Connor wrote for a plurality that although the AUMF had congressionally authorized military detention of enemy combatants in Afghanistan, constitutional due process required stronger evidence and better procedures than the government had used in detaining \textit{Hamdi}.\textsuperscript{171} O’Connor quotably declared that a state of war is not a “blank check” authorizing presidential abuse.\textsuperscript{172} On the other hand, she also opined that the military might choose to detain United States citizens based on hearsay evidence, evaluated by a panel of military officials, and employing a presumption in favor of the government.\textsuperscript{173}

Despite O’Connor’s significant concessions to military circumstances, her opinion concluded — without any obvious factual basis — that giving detainees basic notice and a hearing was “unlikely to have the dire impact on the central functions of warmaking that the Government forecasts.”\textsuperscript{174} Thus, although O’Connor’s plurality was an arguably modest defeat for the government, her opinion explicitly disagreed with presidential claims of military necessity.\textsuperscript{175} By contrast, \textit{Korematsu}-era deference would have insisted that stateside judges cannot know anything at all about detention policies’ “impact on the central functions of warmaking” in Afghanistan and the GWOT.\textsuperscript{176}

\textsuperscript{169} Brief for the Respondents 46-47, \textit{Hamdi}, 542 U.S. 507 (No. 03-6696) (declaring in a section heading that “[t]he . . . proceeding envisioned by the district court and petitioners is constitutionally intolerable.”).

\textsuperscript{170} Daniel A. Farber, \textit{Justice Stevens, Habeas Jurisdiction, and the War on Terror}, 43 U.C. DAVIS L. REV. 945, 958 (2010) (“[T]he Supreme Court split in its rationale in \textit{Hamdi v. Rumsfeld}, but agreed almost unanimously on the key point: eight Justices rejected the government’s position that it had an unreviewable right to detain “enemy combatants” without a hearing.” (footnote omitted)); see also \textit{Hamdi}, 542 U.S. at 580 (Thomas, J., dissenting) (“This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”).

\textsuperscript{171} \textit{Id.} at 531 (plurality).

\textsuperscript{172} \textit{Id.} at 537.

\textsuperscript{173} \textit{Id.} at 534.

\textsuperscript{174} \textit{Id.} at 535.

\textsuperscript{175} \textit{Cf.} Rasul v. Bush, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring); see supra 158-162 and accompanying text.

\textsuperscript{176} Even though O’Connor grounded the President’s detention authority upon her interpretation of “longstanding law-of-war principles,” she also suggested that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel,” \textit{Hamdi}, 542 U.S. at 522, thereby opening to challenge all detention policies in the decidedly non-standard GWOT. John K. Setear, \textit{A Forest With No Trees: The Supreme Court an International Law in the 2003 Term}, 91 VA. L. REV. 579, 632 (2005).
Justice Souter wrote a separate concurrence that attacked *Korematsu*'s wartime precedent directly. Souter cited the Non-Detention Act (NDA), which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” He explained that the NDA was enacted in 1971 to limit the detention of United States citizens precisely because “Congress meant to preclude another episode like the one described in *Korematsu v. United States*.” Even though Hamdi’s detention was not race-based, and even though GWOT detainees are less numerous than World War II’s Japanese-American detainees, Souter used the NDA as a legal-historical link between these two seemingly distant periods.

For the NDA to be an effective safeguard against presidential abuse, Souter wrote that the statute must require a “clear statement of authorization to detain,” instead of “vague congressional authority” like the AUMF. Souter bolstered his conclusion with an analysis of constitutional structure:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

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177 *Hamdi*, 542 U.S. at 541 (Souter, J. concurring in part and dissenting in part) (quoting 18 U.S.C. § 4001(a)).
178 *Id.* at 543.
179 *Id.* at 544.
180 *Id.* at 544-45; see also GOLDSMITH, supra note 13, at 71 (quoting an executive lawyer’s objection that if the Office of Legal Counsel ruled a particular way, “the blood of the hundred thousand people who will die in the next attack will be on your hands”); *id.* at 189 (“The government’s] internal skittishness is not something we can wish or will away. For generations the Terror Presidency will be characterized by an unremitting fear of devastating attack, an obsession with preventing the attack, and a proclivity to act aggressively and preemptively to do so.”); *Letters of Helvidius No. 1* [James Madison], in *6 THE WRITINGS OF JAMES MADISON* 148 (Gaillard Hunt ed., 1906) (“Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded.”).
Evidence from the Korematsu era supports such reasoning. One need not imagine bad executive motives to justify barriers against abusive detention. The history of presidential excess in World War II — not limited to racist curfews and interment orders — confirms that much. Because Souter’s opinion rested on statutory grounds and described Korematsu’s errors with a light touch, many commentators have not given due attention to his historical approach.

Justice Scalia wrote a partial concurrence in Hamdi rejecting the plurality’s due process argument. Scalia concluded that, because Congress did not suspend habeas corpus, the Constitution required citizens like Hamdi to be either prosecuted in a civilian court or set free. The main hurdle for Scalia’s argument was Quirin, which had allowed a U.S. citizen to be detained and even electrocuted without a civilian prosecution or suspension of habeas. Scalia attacked Quirin as “not this Court’s finest hour,” as misinterpreting the Constitution’s original and Reconstruction-era meaning, and as in any event not controlling Hamdi’s result. Scalia’s broadside assault on Quirin illustrates that even vigorous proponents of presidential power have raised serious doubts the validity and scope of at least some Korematsu-era precedents.

Although Hamdi’s internal divisions make the Court’s ruling hard to interpret, each of the three opinions that rejected the government’s position (encompassing eight of nine Justices) also rejected important elements of the Korematsu era. O’Connor’s flexible pragmatism implied an institutional commitment to judicial line-drawing. Souter’s reference to historical mistakes confirmed his skepticism that even well-intentioned, well-informed presidents may not be fully trustworthy. And Scalia used historical analysis to deprecate the undisturbed, unanimous Korematsu-era precedent on which the Bush Administration had deeply relied. Accordingly, although Hamdi’s holding was arguably permissive regarding the

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181 Hamdi, 542 U.S. at 542-45 (Souter, J. concurring in part and dissenting in part) (discussing the “cautionary example of the internments in World War II”).
182 For notable exceptions, see Cass R. Sunstein, Minimalism at War, 2004 SUP. CT. REV. 47, 93-96 (2004); Cole, supra note 148 at 1357; Thomas P. Crocker, Torture, with Apologies, 86 TEX. L. REV. 569, 593 (2008).
183 Hamdi, 542 U.S. at 575 (Scalia, J., dissenting).
184 Id. at 577.
185 Id. at 569-72 (discussing Ex parte Quirin, 317 U.S. 1 (U.S. 1942)).
186 Id., at 569-70.
President’s practical power to detain United States citizens, the various Justices’ reasoning showed that a doctrinal transformation might be in the works.  

3. Hamdan and Yamashita

Like Rasul and Hamdi, the Court’s first military commissions case was also subtle in rejecting the Korematsu era. Military commissions at Guantanamo Bay began in August 2004, using procedures, adjudicators, and provisions for appellate review that were much more defendant-friendly than the military commissions that had been upheld in Quirin and Yamashita. Nonetheless, the Court in Hamdan v. Rumsfeld ruled that those modern procedures were inadequate and had to be revised.

Initially, the Hamdan Court considered a jurisdictional objection concerning the Detainee Treatment Act of 2005 (DTA) that would arise again in later GWOT litigation. Responding to Rasul, the DTA explicitly withdrew habeas jurisdiction for Guantanamo detainees and stated that detainees could challenge military commissions’ activities only in the D.C. Circuit, after a final judgment had been issued, and after administrative remedies had been exhausted. Hamdan did not follow these procedural rules, and the government argued that federal courts therefore lacked jurisdiction. The Supreme Court disagreed, holding the DTA inapplicable to habeas petitions like Hamdan’s that were pending when the statute became law.

\[\text{footnotes}\]

188 Some scholars early in the twenty-first-century tended to view the GWOT cases narrowly, as exemplifying little more than the “Youngstown principle” discussed supra notes 67-70 and accompanying text. See Barron & Lederman, supra note 138, at 699-704 (explaining that, with few exceptions, “recent scholarship still shares the conventional post-Youngstown orientation”); see also Jenny S. Martinez, Process and Substance in the “War on Terror,” 108 COLUM. L. REV. 1013, 1028 (2008) (“By September 11, 2007, the U.S. Supreme Court had issued four decisions in ‘war on terror’ cases . . . . Each of these decisions focused primarily on issues of process, while more substantive questions were left lurking in the background.” (footnotes omitted)); Samuel Issacharoff and Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQUIRIES L. 1, 1-45 (2004).

189 Some readers may wonder why the Court was so often “subtle” in its treatment of Korematsu-era precedents. The shortest answer is that no one outside the Court can be sure, but one could easily speculate that the Court’s middle votes (O’Connor and Kennedy) were perhaps loathe to limit the President more than necessary. I should stress that this Article’s analysis does not rely on any view of particular Justices’ motives.

190 See Goldsmith & Sunstein, supra note 114, at 284.

191 Hamdan, 548 U.S. at 634-35; see infra Subsection II.B.4.


194 Hamdan, 548 U.S. at 575-76.
On the merits, the Court criticized procedures that were to be used in Hamdan’s military commission, including the presiding officer’s discretion to “close” certain proceedings and to hide from Hamdan and civilian counsel certain evidence against him. The Court also discussed potential flaws in the military commission’s evidentiary rules and appellate review.

According to the Court, these procedures violated the Uniform Code of Military Justice (UCMJ), which imposed a “principle of procedural parity” and required presumptive “uniformity” between unlawful enemy combatants’ military commissions and courts-martial for United States military personnel. As I have discussed elsewhere, Hamdan’s analysis is difficult to defend using “ordinary rules” of statutory interpretation. Yet the Court anchored its “uniformity principle” in military commissions’ long historical role as “our common-law war court.” Citing authority from the Civil War, the Progressive Era, Korea, and Vietnam, the Court described the uniformity principle as a “background assumption,” even though it did not explicitly appear in any binding legal rules.

For purposes of this Article, two aspects of Hamdan need comment. First, the Court’s conclusions about military commissions relied on its own assessment of military need, much like Kennedy’s analysis in Rasul and O’Connor’s in Hamdi. The Hamdan majority explained that “[t]he military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.” In Hamdan’s particular case, however, the Court flatly rejected presidential claims that military necessity required special adjudicative processes. The Court’s seemingly narrow holding left open whether future Presidents might someday offer persuasive arguments for stripped-down military

195 See id. at 593-94, 598, 600, 613-15 (criticizing the government’s argument to dispense with Quirin and use the AUMF or DTA to authorize military commissions, highlighting the flaws in the government’s charges against Hamdan, and highlighting the unfairness of “closed sessions” whereby the accused cannot hear evidence against him as “controversial”).
196 Id. at 614-16.
197 Id. at 617.
198 Id. at 637 (Kennedy, J., concurring in part); Green, supra note 42, at 162-164; see Burt Neuborne, Spheres of Justice: Who Decides?, 74 GEO. WASH. L. REV. 1090, 1112 (2006); Cass R. Sunstein, Clear Statement Principles and National Security: Hamdan and Beyond, 2006 SUP. CT. REV. 1, 4-5, 28, 44.
199 Hamdan, 548 U.S. at 617-20.
200 Id. at 617-25.
202 Hamdan, 548 U.S. at 590.
203 “[I]t is not evident to us why [the danger of terrorism] should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.” Id. at 624 (emphasis added). “At a minimum, a military commission ‘can be “regularly constituted” by the standards of our military justice system only if some practical need explains deviations from court-martial practice.’ As we have explained, no such need has been demonstrated here.” Id. at 633 (emphasis added).
procedures. But as with other GWOT cases, the very notion that federal courts could supervise and reject a President’s assertion of military necessity completely undercut Korematsu-era deference.

Second is the Court’s discussion of Yamashita as a “glaring historical exception” to Hamdan’s “uniformity” doctrine. Contrary to the newly minted “principle of procedural parity,” General Yamashita’s military commission — like that of Quirin and other World War II defendants — used less protective procedures than courts martial used in prosecuting American soldiers. Nevertheless, Yamashita’s prosecution was upheld by a vote of seven to two, and he was later executed by hanging. If the modern Court had accepted Yamashita as good law, then any historical “parities” or “uniformities” between military commission procedures and courts martial might have reflected only military policy decisions, rather than the binding legal requirement that the Hamdan Court wished to invoke. Yamashita therefore threatened to unravel Hamdan’s “uniformity” analysis to its very core.

The Hamdan majority replied with a fair dose of bluntness, announcing that Yamashita’s precedential force “has been seriously undermined by post-World War II events.” Citing ancillary changes to the UCMJ and international law, Hamdan concluded that “[t]he most notorious exception to the principle of uniformity . . . has been stripped of its precedential value.” The force of these statements has been underappreciated, as at the time, they represented the Court’s most direct repudiations of Korematsu-era precedent to date.

4. Boumediene Beyond Youngstown

Boumediene v. Bush is the most recent case to address Korematsu-era principles. Immediately after Hamdan, Congress enacted the Military Commissions Act of 2006 (MCA), which again stripped habeas jurisdiction and provided that alien enemy combatants could obtain judicial review of their detention only through D.C. Circuit review of final decisions by administrative Combatant Status Review Tribunals, Administrative Review Boards, and military commissions. To avoid

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204 Id. at 618, 620.
205 In re Yamashita, 327 U.S. 1, 5, 25-26 (1946).
206 See Hamdan, 548 U.S. at 710 (Thomas, J., dissenting).
207 Id. at 618.
208 Id. at 620 (emphasis added).
a replay of Hamdan, however, Congress stated that the MCA’s jurisdictional limit should apply to both pending and future litigation about detainees’ rights.\textsuperscript{211}

Boumediene’s habeas petitions came from aliens who were held at Guantanamo Bay without charges as enemy combatants.\textsuperscript{212} Instead of following the MCA’s procedures, petitioners claimed that the statute itself was an unconstitutional suspension of habeas corpus.\textsuperscript{213} The Supreme Court agreed and thereby undermined Korematsu-era principles more boldly than ever. The Court in Rasul, Hamdi, and Hamdan had never contradicted judgments about military necessity by the President and Congress working in combination. Instead, the Court in those cases used statutory interpretation to characterize the President as defying Congress’s will, and had then sided with Congress.\textsuperscript{214}

By contrast, the Boumediene Court faced repeated judgments by Congress and the President that Guantanamo detainees should not receive habeas relief.\textsuperscript{215} Both political branches had crafted special review procedures to accommodate ongoing military conflicts,\textsuperscript{216} and this raised the “Korematsu problem” in its purest form: When Congress and the President together bend legal norms to accommodate asserted military necessity, how could any court second-guess that judgment?

Yet that’s exactly what happened. Boumediene parroted Kennedy’s Rasul concurrence, this time as a matter of constitutional rather than statutory interpretation, and this time supported by five Justices instead of only one. Adopting Kennedy’s idiosyncratic view of Eisentrager, the Court evaluated whether detainees should receive habeas by determining whether such proceedings would cause “practical obstacles.”\textsuperscript{217} Despite the President’s contrary argument, the Court held that habeas review would impose only ordinary “incremental expenditure[s] of resources.”\textsuperscript{218} The Court found “no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”\textsuperscript{219} Based on the Court’s own factual judgment, the majority concluded that “there are few practical barriers to

\begin{footnotesize}
\textsuperscript{211} 109 Pub. L. No. 366, § 7(b), 120 Stat. 2600, 2636 (2006); see Boumediene 128 S. Ct. at 2296; supra notes 192-194 and accompanying text (discussing Hamdan).
\textsuperscript{212} Boumediene, 128 S. Ct. at 2240.
\textsuperscript{213} Id.
\textsuperscript{214} See supra Subsections II.B.1-3.
\textsuperscript{217} Boumediene, 128 S. Ct. at 2260.
\textsuperscript{218} Id. at 2260-61; see Brief for the Respondents 5-6, Boumediene, 555 U.S. 723 (No. 06-1195) (arguing that detainee litigation was “consumming enormous resources and disrupting the operation of the Guantanamo Bay Naval Base”).
\textsuperscript{219} Boumediene, 128 S. Ct. at 2261.
\end{footnotesize}
the running of the writ” and that, “[t]o the extent barriers arise, habeas corpus procedures likely can be modified” by trial judges themselves. To be clear, the government’s briefs had indeed offered “arguments” disputing these points; the problem was judicial disbelief that these assertions were “credible.” The *Boumediene* majority thus retained judicial supervision of military detainees, at a judicially determined level of rigor, even though both political branches had made a deliberately different choice.

*Boumediene* made two more departures from *Korematsu*-era deference. First, the Court held that habeas jurisdiction was especially important because the President did not use quasi-judicial procedures to determine whether the detainees could be held indefinitely. “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” This language invoked the legalist shift that helped discredit the *Korematsu* era, and it also elided the fundamental *Korematsu*-era distinction between wartime and peacetime judicial conduct. For the *Boumediene* majority, the petitioners were no longer just enemy aliens or combatants on a global battlefield. They were also “persons” who had been “imprison[ed]” by the executive. And like other persons, they were presumptively entitled to constitutional oversight by federal courts to ensure that such confinement was lawful.

Second, the *Boumediene* majority explicitly denied “undermin[ing] the Executive’s powers as Commander in Chief.” On the contrary, the Court claimed that “the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch” — as though the President should be institutionally grateful for the Court’s diligent supervision. During the *Korematsu* era, judicial intervention to preserve fundamental fairness and constitutional structure was celebrated at most in dissents. The Court’s specific doctrinal rulings in *Boumediene* and its twenty-

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220 *Id.* at 2261, 2276.
221 *Id.* at 2261; see Brief for the Respondents 5-6, 10-11, *Boumediene*, 555 U.S. 723 (No. 06-1195).
222 *Boumediene*, 128 S. Ct. at 2269.
223 *Id.* at 2277.
224 *See supra* notes 49-55 and accompanying text.
225 *Boumediene*, 128 S. Ct. at 2269; cf. *Id.* at 2246 (“[T]he Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals . . .” (citation omitted)).
226 *Id.* at 2277.
227 *Id.*
228 In re Yamashita, 327 U.S. 1, 43 (1946) (Rutledge, J. dissenting); Eisentrager v. Johnson, 339 U.S. 763, 795 (1950) (Black, J., dissenting); *Korematsu* v. United States, 323 U.S. 214, 225-26 (1944) (Roberts, J., dissenting); *Id.* at 233 (Murphy, J., dissenting); *Id.* at 243-44 (Jackson, J., dissenting).
first-century cousins, however, represent an institutional realignment in sharp contrast with Korematsu-era principles.

5. Embarrassing Aftereffects

Perhaps the most striking departure from the Korematsu era does not concern substantive precedent at all; instead, it stems from the modern Court’s sense of timing in all of these war-power cases. In Quirin, Hirabayashi, and Korematsu, the Court not only approved the President’s wartime actions, it did so very quickly.229 By contrast, cases in the twenty-first century have not only disapproved presidential activities, they have moved very slowly. Thus, even eight years after detainees arrived in Guantanamo, and six years after the Supreme Court considered such detention’s legality, it is uncertain even now whether those detainees have any due process rights, what those rights might require, and whether the government has breached any rights that might exist.230 Much less has the Court resolved similar questions at other military bases or at CIA dark sites.231

The Court’s glacial pace of decisionmaking must seem like justice denied to the detainees and their advocates.232 Yet an unnoticed side-effect of such slowness is that — unlike the Korematsu era — the modern Court has seen real-time changes in the President’s credibility before making any broad legal decision to approve or reject his choices.

To be sure, there is no evidence that the Bush Administration misstated facts in litigation concerning the GWOT as the Roosevelt Administration did in

229 See Goldsmith & Sunstein, supra note 114, at 267; Rostow, supra note 6, at 489.


231 Bagram Air Base in Afghanistan has been likened to “the next Guantanamo” for its current extra-judicial status. Del Quentin Wilber, In Courts, Afghanist Air Base May Become Next Guantanamo, WASH. POST, June 29, 2009, at A14; see Jonathan Hafetz, Guantanamo and the “Next Frontier” of Detainee Issues, 37 SETON HALL L. REV. 699, 699 (2007); see also Mayer, supra note 1, at 145 (“The CIA . . . had to hold its prisoners somewhere beyond the reach of the American legal system, and that was the impetus for its ‘black site’ program.”). On September 6, 2006, President Bush announced that “he had emptied the black sites and transferred these suspects to Guantanamo Bay.” Id. at 325.

232 See, e.g., Mayer, supra note 1, at 332 (describing slow legal process); Martinez, supra note 188, at 1029 (“After years of litigation, hundreds of detainees continue to languish in possibly illegal custody . . . . The Court’s decisions are less like landmarks and more like small signposts directing the traveler to continue . . . .”); Neal Devins, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. PA. J. CONST. L. 491, 492-94 (2010) (bemoaning the Court’s lack of progress).
Yet presidential credibility has remained an important question below the surface of modern case law. For example, the first round of GWOT decisions witnessed an especially unfortunate juxtaposition. On the morning of April 28, 2004, government lawyers in Padilla emphatically told the Supreme Court that the United States does not torture detainees — not mildly and not ever. That same evening, national television broadcast photographs of terrible abuse of detainees at the Abu Ghraib prison.

Outside the courtroom, President Bush’s credibility was jeopardized by military setbacks in Iraq. The United States failed to discover weapons of mass destruction, which had been a principal justification for intervention. Links between Saddam Hussein and Al Qaeda also proved much weaker than the Bush Administration had claimed. And the President’s “Mission Accomplished” banner in May 2003 came to represent broader concerns about the administration’s flawed planning and execution.

Since 2002, the government has released hundreds of Guantanamo detainees or transferred them to their home countries for custody. For some individuals, it now seems that no valid basis ever existed for their detention; for other released

233 The political climates during World War II and the GWOT as well as media coverage of the two wars have exacerbated problems with presidential credibility. During the Korematsu Era, the Court focused on national security; in today’s GWOT, the Court has focused on preserving fundamental rights. See Goldsmith & Sunstein, supra note 114, at 282-83; Green, supra note 42, at 143-44. See Transcript of Record at 19, Padilla v. Rumsfeld, 542 U.S. 426 (No. 03-1027) (“JUSTICE GINSBURG: Suppose the executive says mild torture we think will help get . . . information. It’s not a soldier who does something against the Code of Military Justice, but it’s an executive command. Some systems do that to get information. MR. CLEMENT: Well, our executive doesn’t . . . .” (emphasis added)); Transcript of Record at 45, Hamdi, 542 U.S. 507 (No. 03-6696) (“MR. CLEMENT: I wouldn’t want there to be any misunderstanding about this. It’s also the judgment of those involved in this process that the last thing you want to do is torture somebody or try to do something along those lines.”). But cf. Transcript of Record at 19, Padilla v. Rumsfeld, 542 U.S. 426 (No. 03-1027) (“MR. CLEMENT: You have to recognize that in situations where there is war . . . . that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like [avoiding and punishing torture by U.S. officials].”).


235 See Julian Borger, Iraq Had No WMD: The Final Verdict, THE GUARDIAN, Sept. 18, 2004, at 1; see also Press Release, U.S. Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008).


persons, the facts are less clear.\textsuperscript{240} In either event, some Guantanamo detainees have, after their release, fiercely condemned the United States’ detention and military policies, and some have commenced or recommenced battle with United States troops.\textsuperscript{241} Such problems illustrate disturbing imperfections throughout the government’s detention and release policies at Guantanamo.

Likewise, the Bush Administration’s results in GWOT litigation did not bolster presidential credibility in the Supreme Court. The Bush Administration was partly a victim of its own success. Post-9/11 attacks did not occur even as the President’s courtroom losses accumulated, thus hinting that asserted security risks were not so severe, or that the Administration was able to work around adverse legal rulings. Each new case, with new assertions about existential threats and military needs, risked being even further discounted after each governmental defeat.

The President also suffered credibility problems in specific GWOT cases. For example, the government claimed in \textit{Hamdi} and its companion case, \textit{Padilla v. Rumsfeld}, that significant threats to national security prevented the petitioners from being criminally charged in ordinary civilian courts.\textsuperscript{242} Indeed, the government argued that even to proffer significant evidence of Hamdi’s enemy combatant status might be “constitutionally intolerable.”\textsuperscript{243} Yet after the Court ordered that Hamdi should receive basic notice and process, the government did not detain the purportedly dangerous Hamdi and Padilla as enemy combatants. Instead, Hamdi was released to Saudi Arabia after he agreed to renounce his citizenship, never return to the United States, and waive any lawsuit about his detention and interrogation.\textsuperscript{244} On the other hand, Padilla was held in military detention until his case returned to Supreme Court. Then at the last moment, the government charged Padilla in civilian court with criminal conspiracy, thereby mooting all issues of uncharged executive detention.\textsuperscript{245} A federal district court ultimately convicted and sentenced Padilla to more than seventeen years in prison, which showed both that he was culpable of terrorist

\begin{footnotes}
\item[245] See Padilla v. Rumsfeld, 432 F.3d 582, 584 (4th Cir. 2005).
\end{footnotes}
activity and that he could have been prosecuted without resorting to uncharged, indefinite military detention.\footnote{246}{See Abby Goodnough & Scott Shane, Padilla is Guilty on All Charges in Terror Trial, N.Y. TIMES, Aug. 17, 2007, at A1; Peter Whoriskey, Jury Convicts Jose Padilla of Terror Charges, WASH. POST, Aug. 17, 2007, at A1.}

Similarly in Hamdan, the government claimed an urgent need for military commissions, but that exigency seemed attenuated when two years passed before Hamdan’s prosecution even began.\footnote{247}{See Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).} In 2008, Hamdan was tried under congressionally prescribed procedures, was convicted of giving material aid to terrorists, and was acquitted of conspiracy to participate in terrorism.\footnote{248}{See William Glaberson, Bin Laden’s Former Driver is Convicted in Split Verdict, N.Y. TIMES, Aug. 6, 2008, at A1.} He was sentenced to sixty-six months but was credited with sixty-one months of time served. Then, only months after his conviction, Hamdan was transferred to Yemen to serve the last few weeks of his sentence.\footnote{249}{See Carol J. Williams, Terror Convict Back to Yemen; Bin Laden’s Driver Served More Than 5 Years at Gitmo, CHI. TRIB., Nov. 25, 2008, at C10.} Once again, the President’s assertions of military danger and desperate need vanished like mirages into sand.

A last credibility issue concerned Boumediene, which extended habeas jurisdiction and provided judicial review to Guantanamo detainees.\footnote{250}{Some scholars have argued that society is better off following any number of exaggerated images of danger because there are enormous costs if any threat proves to be real. See Richard A. Posner, Countering Terrorism: Blurred Focus, Halting Steps 84 (2006); Richard A. Posner, Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11, at 99 (2005); Richard A. Posner, Catastrophe: Risk and Response (2004). Such discussions of risk analysis tend to be theoretical in nature, and although such theories surely have value, they are not supported by the historical episodes discussed in this Article. Phrased differently, it is possible that courts could go too far in restricting presidential prerogatives, thereby putting the country in significant danger. It is quite difficult to find examples of that scenario in the real world, however.} Here, the credibility problem was not with the lame-duck Bush Administration, but instead with its champions on the bench and campaign trail. Scalia’s dissenting opinion in Boumediene contained especially unhappy rhetoric: “[T]oday’s opinion . . . will make the war harder on us. It will almost certainly cause more Americans to be killed.”\footnote{251}{Id. at 2294 (Scalia, J., dissenting).} And Presidential aspirant John McCain was similarly dire: “The United States Supreme Court yesterday rendered a decision which I think is one of the worst decisions in the history of this country. . . . Our first obligation is the safety and security of this nation, and the men and women who defend it. This decision will harm our ability to do that.”\footnote{252}{CNN: John McCain Holds Town Hall Meeting; Flooding Still Ravaging Midwest; Space Shuttle Investigates Possible Problem (Cable News Network television broadcast June 13, 2008).}
Now two years later, there is no evidence of Boumediene’s deadly impact, nor is there reason to hold one’s breath. The differences between constitutional habeas and statutory MCA review are so mild that gory scenarios are hard to fathom. On the contrary, with historical evidence from the Korematsu era and the twenty-first century, such unexplained images of dead soldiers and national threats seem like the worst kind of wolf-crying. Scalia and McCain staked their own credibility on Presidential claims of military necessity, and against meddlesome judicial intervention. Here again, that institutional wager has thus far seemed risky, and McCain’s and Scalia’s comments have only dimmed their credibility with respect to national security issues.

Sixty years from now, historians will know more than current observers about the United States’ threats, countermeasures, and truthfulness in the GWOT. What is clear even now, however, is that the modern Court’s plodding slowness has let the crisis mentality of 2001 dissipate, and has let presidential steps and missteps unfold as an ongoing aspect of current litigation about military need and executive credibility. All of these modern delays contradict the Court’s Korematsu-era approach, and the delays themselves may have influenced the Court’s substantive results.

III. ENDING THE KOREMATSU ERA?

Thus far, I have proposed that the Korematsu era is a vital category of Supreme Court precedent, and that modern cases have undermined such decisions’ institutional assumptions. This Part explores what these historical and doctrinal conclusions imply for future war-power controversies. There are always risks in seeking present-minded guidance from historical research — in law, as in finance, past performance does not assure future results. Nonetheless, this Part sketches two patterns from experiences in World War II and the GWOT that may carry lasting importance for modern legal culture.

Even this pursuit of present-minded guidance is inspired by the past. Consider a passage from Jackson’s Korematsu dissent: “[The majority] argues that we are bound to uphold the conviction of Korematsu because we upheld one in Hirabayashi v. United States, when we sustained [DeWitt’s military] orders in so

254 Cf. Boumediene, 128 S. Ct. at 2280, 2283-84, 2286 (Roberts, C.J., dissenting) (explaining that procedures under habeas and the DTA are “equally undefined”).

255 Cf. GORDON S. WOOD, THE PURPOSE OF THE PAST 71 (2008) (“History does not teach lots of little lessons. Insofar as it teaches any lessons, it teaches only one big one: that nothing ever works out quite the way its managers intended or expected. History is like experience and old age: wisdom is what one learns from it.”).
far as they applied a curfew requirement to a citizen of Japanese ancestry.” \(^{256}\)

Jackson did not respond as one might expect; he did not distinguish Hirabayashi and Korematsu, nor did he otherwise justify his year-old, pro-government vote. \(^{257}\)

Instead, Jackson described his feelings about Hirabayashi as follows: “I think we should learn something from that experience.” \(^{258}\)

From the premise that understanding the past can affect how present events are perceived, this last Part considers what we might “learn” from World War II and the GWOT about (i) the institutional role of courts and (ii) the cultural role of law in the politicized context of wartime detention and military commissions.

A. “To Preclude Another Episode Like the One Described in Korematsu” \(^{259}\)

One lesson from these materials concerns how to prevent “another Korematsu” — even as the comparison between old and new cases expands the meaning of that term. Under a conventionally narrow interpretation of Korematsu, it is impossible that wholesale racist internment of American citizens could ever happen again, so “preventing” Korematsu is just absurd. \(^{260}\)

By contrast, this Article’s broad view of Korematsu-era deference raises problems that exist today and are quite likely to repeat. As we have seen, the essential “Korematsu question” is how courts can uphold core legalist values even in wartime contexts, where their institutional limits are severe. Such scenarios may be accompanied by governmental racism, uncharged detention, casual trial and punishment, or other circumstances that can only be imagined today.

From the latter perspective, the experience of Roosevelt in World War II and Bush in the GWOT confirms that national security matters may be too important for Presidents to decide alone. \(^{261}\)

Twentieth-century history illustrates that security crises can place predictably overwhelming pressure on Presidents and officials who must struggle to keep the country strong and their fellow citizens safe.

Surprise attacks like Pearl Harbor and 9/11 demand quick responses to scenarios that were unforeseen just hours before. Mistakes will occur, individuals will be

\(^{256}\) Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

\(^{257}\) See supra section I.A.1.

\(^{258}\) Korematsu, 323 U.S. at 246 (emphasis added).


\(^{260}\) Racist internment is inconceivable for almost countless reasons. Modern technologies allow relatively quick verification of data about personal identities, thereby reducing any need to detain large numbers of innocents for long periods of time. Modern politics and sociology have rendered the entire concept of “racial classifications” problematic, as issues of multiraciality overlap with problems of visually interchangeable, variable, and indistinct “races.” Finally, the legal world of Brown has raised the stakes of racial subordination to an exceedingly high level, making it extremely unlikely that any neo-racist internment plan could be upheld.

\(^{261}\) See supra section II.B.2.
mistreated, and any belief that future presidents will resist political pressures is as naïve as thinking that future crises won’t arise at all.262

What I have called the “Youngstown principle” — that Presidents must typically seek congressional approval to support wartime activities — can be an important corrective to executive abuse. But the Korematsu era shows that this institutional brake may not be enough.263 Congressional judgment can be swayed by the same political winds that affect Presidents, and Presidents can often influence the timing and scope of legislative authorization to suit their political objectives.264 Congressional action may occur before important facts about wartime necessities are known, as happened with the AUMF and the MCA.265 And in the immediate aftermath of a crisis, Congress may grant Presidents extremely broad authority, as when Congress in 1942 criminalized all violations of military orders that might be issued at some later date.266

The Korematsu era shows an important institutional role for courts in these contexts. To be sure, judges cannot move fast enough to evaluate immediate military reactions in real time, and they will always lack adequate information and expertise. Yet ex post judicial oversight of executive detention requires Presidents at some point to explain what they have done before nonexperts — in the face of adverse lawyers’ counterarguments — and this supervision can be useful. If a President uses congressionally authorized war powers wisely and credibly, then subsequent litigation should be quite easy to win. After all, judges are presidentially selected federal officials, and many Justices have their own work experience in the executive branch.267 Such individuals understand their own institutional limitations, and they appreciate a strong, secure America just like any other resident who wishes to stay safe and alive.

By contrast, twentieth- and twenty-first-century litigation suggests that problems arise when Presidents push their authority beyond what time reveals as necessary, and this is when courts can play a tempering role. In Souter’s phrase, “The

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262 Cf. PHILLIP BOBBITT, TERROR AND CONSENT 404 (2008) (“[I]n addition to stockpiling vaccines, we need to stockpile rules . . . to anticipate such a crisis, for that step too is a way of decreasing our vulnerabilities.”).

263 Note that all of this Article’s Korematsu-era cases involve both Congress and the President working together. See supra Sections IA-IB.


265 See supra section II.B.5


defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. Without impugning any President’s motives or competence, history proves that the balance among such crucial values cannot always be left to the executive without both congressional and judicial supervision.

B. “The Tools Belong To The Man Who Can Use Them”

Another lesson from sixty years of wartime cases concerns the role of precedent itself in guiding presidential action. Two viewpoints merit special notice, with each having roots in opinions by Justice Jackson. On one hand is his explanation in Korematsu that courts must not approve illegal executive action:

A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

This “loaded weapon” idea is orthodox in analysis of Korematsu as a racist morality play. The passage is cited as evidence that Supreme Court precedents really matter, and that tragically racist errors retain their menacing power throughout the decades. Students are reminded that Korematsu has never been directly overruled, thereby inviting imagination that Korematsu itself is a loaded weapon just waiting for a President to grasp and fire.

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269 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 589, 654 (Jackson, J., dissenting) (attributing the quotation to Napoleon).
270 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
271 BONS, supra note 32, at 366.
272 Eric L. Muller, All The Themes But One, 66 U. CHI. REV. 1395, 1425 (1999) (“The nation may again see a race-based evacuation or internment. But Korematsu, although fallen from favor, has never been overruled – the weapon is still loaded and lying about.”).
This conventional approach is incomplete. As we have seen, the first and decisive precedent supporting World War II’s racist policies was not Korematsu but Hirabayashi; thus, Jackson himself helped to “load” the doctrinal “weapon” over which he worried just a year later. Jackson’s willingness to eviscerate Hirabayashi in Korematsu only exemplifies (as if anyone could doubt it) that no Supreme Court decision can fiat a legal principle “for all time.” Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds reason to do so, and this is effectively what has happened to Korematsu and Hirabayashi themselves in the wake of Brown, the civil rights era, and other modern history. Korematsu was a direct “repetition” of Hirabayashi’s racism for “expand[ed]” purposes, yet it only launched these two cases farther toward their current pariah status.

A second perspective on war-power precedents is Jackson’s Youngstown concurrence, which rejected President Truman’s effort to seize steel mills and maintain output for the Korean War. Jackson’s opinion ends with self-referential pessimism about judicial authority itself:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

This “no illusion” realism about presidential authority views judicial limitations on the President as contingent on Congress’s political wisdom and responsiveness — without any bold talk about precedents as “loaded weapons” or stalwart shields. On the contrary, if taken seriously, Jackson’s opinion almost suggests that judicial decisions about presidential wartime activities are epiphenomenal: When Congress asserts its institutional prerogatives and uses them wisely, the executive

273 Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).
274 Id.
275 See supra Subsection I.A.2.
277 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).
278 Id.
might be restrained, but the Court cannot do much to swing that political balance of power.

Jackson’s hardnosed analysis may seem intellectually bracing, but it understates the real-world power of judicial precedent to shape what is politically possible. 279 Although Presidents occasionally assert their willingness to disobey Supreme Court rulings, actual disobedience of this sort is vanishingly rare and would carry grave political consequences. 280 Even President Bush’s repeated losses in the GWOT did not spur serious consideration of noncompliance, despite strong and obvious support from a Republican Congress. 281 Likewise, from the perspective of strengthening presidential power, Korematsu-era precedents clearly emboldened President Bush in his twenty-first-century choices about Guantanamo and military commissions. 282 The modern historical record thus shows that judicial precedent can both expand and limit the operative sphere of presidential action.

Indeed, the influence of judicial precedent is stronger than a court-focused record might suggest. The past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government. 283 From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers have risen to such high levels of governmental administration that almost no significant policy is determined without multiple layers of internal legal review. 284 And these executive lawyers are predominantly trained to think — whatever else they may believe — that Supreme Court precedent is authoritative and binding. 285

279 See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 296 (2007) (“Though chosen by presidents and confirmed by senators, the justices have been able to gain authority over the president and the Congress. They have asserted the right to say what the Constitution means, and political leaders have generally chosen to respect that right. Judicial supremacy is not intrinsic to the constitutional scheme, but it has often emerged out of it.”).

280 See IRONS, supra note 32, at 153-54 (noting the surpassing rarity “in the history of the United States of armed revolt by the military against duly constituted judicial authority”).

281 George W. Bush, The President’s News Conference with Prime Minister Silvio Burlusconi of Italy in Rome (June 12, 2008) (“First of all [Boumediene] is the Supreme Court decision. We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.”); George W. Bush, The President’s News Conference with Prime Minister Junichiro Koizumi of Japan (June 29, 2006) (responding to Hamdan: “I will protect the people and, at the same time, conform with the findings of the Supreme Court”).

282 See supra Section II.A.

283 Goldsmith & Sunstein, supra note 114, at 285-88.

284 Cf. GOLDSMITH, supra note 13, at 90 (“[t]he number of CIA lawyers rose and rose, and today stands at well over one hundred. The number of lawyers in the Defense Department grew even more steeply . . . and today stands at over ten thousand . . . .”).

285 See GOLDSMITH, supra note 13, at 81; cf. id. at 90 (“Roosevelt’s political conception of legal constraints had largely vanished, and by 2001 had been replaced by a fiercely legalistic conception of unprecedented wartime constraints on the presidency.”).
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Some middle ground seems therefore necessary between the “loaded weapon” and “no illusion” theories of precedent. Although Supreme Court decisions almost certainly influence the scope of presidential war powers, such practical influence is neither inexorable nor timeless. A more accurate theory of war-power precedents will help explain why it matters that American case law includes a reservoir of Korematsu-era decisions supporting excessive executive war power, and will also suggest how lawyers, judges, and scholars might eviscerate such rulings’ force.

Korematsu is the kind of iconic negative precedent that few modern lawyers would cite for its legal holding. Yet even as Korematsu’s negative valence is beyond cavil, the breadth and scope of that negativity are not clear. Everyone knows that Korematsu is wrong, yet like other legal icons — Marbury, Dred Scott, Lochner, Erie, and Brown — its operative meaning is debatable. Just as Korematsu was once an authoritative precedent and is now discredited, this Article has sought to revise Korematsu’s cultural meaning even further, transforming it from an isolated and irrelevant precedent about racial oppression to a broadly illuminating case about how courts supervise presidential war powers.

Under a “loaded weapon” theory of timelessly fixed precedential meaning, this Article’s project might be impossible; and under a “no illusion” theory of politics, all precedential analysis must wilt before the hot wind of power. On the other hand, if Korematsu is indelibly wrong, but its scope and substance are malleable, then interpreting Korematsu’s meaning could be very important. A culturally situated view of iconic precedents’ force suggests that Korematsu’s significance does not simply appear from the Court’s written opinions. Instead, the decision’s import is a matter of doctrinal and historical exegesis, and any interpretation’s success may be measured by its influence on the current generation of scholars and commentators, who will in turn guide the next generation of lawyers and judges.

If our judges and executive lawyers of the future can be persuaded that Korematsu is not just a case of racist internment, but also represents an era of excessive judicial deference to military necessity, then that precedential and cultural truth may influence the next generation’s presidential advice and case law. This is how

286 Balkin, supra note 11, at 682 (“[N]ew decisions and new events place older cases in new perspective. They change our attitudes both about the meaning of older decisions and their canonical status. Over time, the dialectic of new theories interacting with new cases and new events reshapes the constitutional canon and our attitudes about particular decisions from the past.”); Balkin & Levinson, supra note 22, at 30 (“Law professors exercise their control [over the legal canon] primarily through influence over their students and their fellow academics and through their work as legal advisors and advocates. This influence is not insignificant . . . the way in which constitutional law is taught may affect the development of the constitutional doctrine.”); Lynn M. Lopucki, Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads, 90 Nw. U. L. Rev. 1498, 1501 (1996) (describing how lawyers understand cases as “mental models” that are shared within legal communities, thereby “implicitly proclaim[ing] ‘this is how we do things’ (or, if the conversation should skip to a higher plane, ‘this is the right thing to do.’”).
iconic precedents function, and it is also why they are perennially worth fighting over. To borrow Jackson’s language, the influential and changeable role of iconic precedents is another “something” that “we should learn” from our experience of applying Korematsu-era case law in the GWOT.287

IV. EPILOGUE: WHAT THE KOREMATSU ERA MEANS “NOW”

Iconic war-powers precedents offer special interpretive challenges because such cases arise only infrequently from clustered factual circumstances that differ greatly from any other group of cases. The result is an uncommon risk that each generation of lawyers may forget or misread the wisdoms and follies of the past. I believe that this is what happened before the 9/11 attacks. Lawyers, judges, scholars, and commentators had not adequately appreciated the Court’s unfortunate history surrounding World War II. Then as old issues resurfaced concerning detention and military commissions, executive lawyers and federal courts of appeals used Korematsu-era precedents (though not Korematsu itself) as “positive” precedents instead of “negative” ones. This was a mistake, and the modern Court has repeatedly so held. This Article’s historical and cultural analysis seeks to bolster recent safeguards against presidential abuse and, at long last, to limit the Korematsu era’s influence. But like everything else, such scholarship operates in a world of contingent circumstances where pens and ideas are only sometimes mightier than swords and the politics of war.

If my thesis is correct that the modern GWOT cases have now implicitly undermined the Korematsu era’s institutional assumptions, the episodic nature of war-power cases yields incentives to solidify that interpretation quickly. Elections have delivered a new President, with a potentially different approach to presidential power, and an increasingly new set of Justices have come to fill the High Bench — with the especially notable departures of Justice Stevens, who himself witnessed the Korematsu era as a young man,288 and Justice Souter, whose Hamdi opinion showed uncommon insight regarding war powers. It seems at least possible that our current cluster of wartime decisions may soon draw to a close; and if that happens, issues of executive detention and military commissions may once more drift from focus.

In particular, it may soon be normal to forget the political pressures on the Court in 2004, when it for the very first time said “no” to a popular, self-declared wartime President. As memories fade, the modern Court’s remarkable steps in rejecting Korematsu-era deference might be similarly forgotten or misconstrued. Rasul

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might become a case “just” about federal habeas statutes, *Hamdi* “just” a set of divided opinions about enemy combatants, *Hamdan* “just” an interpretation of the UCMJ, and *Boumediene* “just” a constitutional decision about Guantanamo Bay. For anyone who wishes to celebrate the *Korematsu* era’s end, and thereby endorse the modern Court’s skepticism about asserted military necessity, the time to determine the recent war powers cases’ meaning is now. The Court’s subtle language and narrow holdings will make it all too easy for future executive lawyers — whose own distant controversies may contain facts very different from the *Korematsu* era and the GWOT — to deflect our recent precedents and revive *Korematsu*-era principles that were once firmly and quietly laid to rest.
## APPENDIX A

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CITES
BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING
ERWIN CHEMIRINSKY, CONSTITUTIONAL LAW
GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW
KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW
### APPENDIX B

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