Cite as Dycus, 10 J. NAT'L SECURITY L. & POL'Y __ (forthcoming 2019)

Book Review
Requiem for *Korematsu*?

In the Shadow of *Korematsu*: Democratic Liberties and National Security. By Eric K. Yamamoto. New York, N.Y.: Oxford University Press. Pp. xiv, 248. $39.95.

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INTRODUCTION

In 1992, on the fiftieth anniversary of the internment of 120,000 Japanese Americans following the attack on Pearl Harbor, Fred Korematsu remarked, "The constitutional violations that were committed have been cleared. This will never happen again."[1] Sadly, Korematsu was wrong.

Professor Eric Yamamoto has spent much of his brilliant career as a scholar keeping Fred Korematsu's story alive. His latest book, *In the Shadow of Korematsu: Democratic Liberties and National Security*, comes at a propitious time, as civil liberties that we have long taken for granted are threatened anew with compromises in the name of national security, and as the Supreme Court has at last formally repudiated its 1944 decision in *Korematsu v. United States*[2]– sort of. This last development came just weeks after Yamamoto's book was published.[3]

Korematsu is one of the Supreme Court's most reviled decisions – a relic of this nation's dark past widely regarded as unlikely to be repeated.[4] But Yamamoto demonstrates that the case is still acutely relevant today, even though it is almost never cited for its precedential value. "*Korematsu*'s long persisting shadow," he explains, "traces an arc from World War II through 9/11 and into the present and potentially beyond."[5] In the aftermath of the September 11 attacks, for example, White House lawyers discussed the use of racial profiling as a security measure, citing *Korematsu* as a precedent.[6] Even more recently, the Court's ruling in *Trump v. Hawaii*,[7] the Trump travel ban case, clearly demonstrates its relevance.

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[1] Katherine Bishop, *Japanese-Americans Treat Pain of Internment in World War II*, N.Y. TIMES (Feb. 19, 1992), https://www.nytimes.com/1992/02/19/us/japaneseamericans-treat-pain-of-internment-in-world-war-ii.html.

[2] Korematsu v. United States, 323 U.S. 214 (1944).

[3] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). Yamamoto and Rachel Oyama have since written a kind of epilogue that analyzes this development and supplies many additional sources. Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security,"* 128 YALE L.J. FORUM (forthcoming 2019).

[4] *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (describing *Korematsu* as one of a handful of cases embodying "a set of propositions that all legitimate constitutional decisions must be prepared to refute").

[5] ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY xii (2018).

[6] In a 2002 email colloquy between two White House Associate Counsels, Brett M. Kavanaugh and Helgard C. Walker, Ms. Walker suggested that one "school of thought is that if the use of race renders security measures more effective, than [sic] perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu." E-mail from Helgard C. Walker, White House Associate Counsel, to Alberto R. Gonzales, White House Counsel, et al. (Jan. 17, 2002, 10:12 AM), https://www.cnn.com/2018/09/06/politics/email-kavanaugh-release/index.html.

[7] Trump v. Hawaii, *supra* note 3.

The revulsion and embarrassment that most Americans feel about the imprisonment without process of 120,000 ethnic Japanese for years during World War II is based on a vague sense of unfairness – a belief that it resulted from some malfunction of a constitutional system that ordinarily treats people as equals under the law. For some, however, those feelings are tempered by a suspicion that the personal losses of so many innocent people might somehow be justified by the desperate circumstances facing the nation in wartime. Yet, three quarters of a century after the event the actual depth of the injustice and the reasons for it are still not generally known.

In his extensively annotated new book, Yamamoto seeks to shed new light on this history, relating it to more recent developments after 9/11 and to initiatives of the Trump administration. He shows that when national security fears are coupled with racism, nativism, or religious animosity, only an independent, skeptical judiciary can protect liberty interests guaranteed by the Bill of Rights. Yamamoto's mission is to prevent a repetition of our earlier mistakes.

I. THE JAPANESE AMERICAN INTERNMENT

After the attack on Pearl Harbor in December 1941, Yamamoto notes, racist voices of fear, tribalism, and economic opportunism rose in response. In January 1942, the *Los Angeles Times* editorialized that "the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots" on the West Coast,[8] while the Los Angeles Chamber of Commerce called for the evacuation of all ethnic Japanese, aliens and citizens alike. Nationally syndicated columnist Walter Lippmann wrote, "The Pacific Coast is officially a combat zone; some part of it may at any moment be a battlefield. Nobody's constitutional rights include the right to reside and do business on a battlefield."[9] Another journalist added, "and to hell with habeas corpus."[10] Joining the clamor, nativist groups such as the American Legion and the Native Sons and Daughters of the Golden West, allied with commercial interests such as the California Farm Bureau Federation and the Grower-Shipper Vegetable Association, argued that all ethnic Japanese were "unassimilable" and maintained their allegiance to the Japanese Emperor. Congressional delegations from California, Washington, and Oregon urged President Roosevelt to order the "immediate evacuation of all persons of Japanese lineage" from the West Coast.[11]

Attorney General Francis Biddle initially argued against exclusion, calling it "ill-advised" and "unnecessary."[12] On February 17, 1942, Biddle wrote to the President that

> [f]or several weeks there have been increasing demands for evacuation of all Japanese, aliens and citizens alike, from the West Coast states. A great many of the West Coast

[8] Editorial, *75 Years Later, Looking Back at The Times' Shameful Response to the Japanese Internment*, L.A. Times (Feb. 19, 2017, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-internment-anniversary-20170219-story.html (quoting Editorial, *Facing the Japanese Issue Here*, L.A. TIMES, Jan. 28, 1942).
[9] Walter Lippmann, Opinion, *Today and Tomorrow: The Fifth Column on the Coast*, WASH. POST, Feb. 12, 1942, at 9.
[10] Westbrook Pegler, *quoted in* FRANCIS BIDDLE, IN BRIEF AUTHORITY 217-18 (1962).
[11] *See* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 81-82 (1982). This background and the events that followed are reviewed briefly in YAMAMOTO, *supra* note 5, at 23-25.
[12] BIDDLE, *supra* note 10, at 213.

> people distrust the Japanese, various special interests would welcome their removal from good farm land and the elimination of their competition, some of the local California radio and press have demanded evacuation, the West Coast Congressional Delegation are asking the same thing . . . . My last advice from the War Department is that there is no evidence of imminent attack and from the F.B.I. that there is no evidence of planned sabotage.[13]

Secretary of War Henry Stimson also expressed doubts about the legality of the proposed expulsion. Evacuation of "citizen Japanese," he wrote in his diary on February 10, 1942, would make "a tremendous hole in our constitutional system."[14]

Meanwhile, California state officials and members of Congress appealed directly to Army Lieutenant General John L. DeWitt, head of the Western Defense Command, to expel all Japanese Americans. DeWitt soon began to repeat rumors of espionage by ethnic Japanese along the coast, including signaling to Japanese submarines. After extensive investigations, however, the FBI, the Office of Naval Intelligence, and the Federal Communications Commission all reported to DeWitt that these rumors were completely groundless.

Nevertheless, in a February 14, 1942, report General DeWitt concluded that mass evacuation was necessary because, he asserted, it was impossible to distinguish loyal from disloyal Japanese Americans. The "Japanese race is an enemy race," he wrote.[15] Eleven days later, President Roosevelt, whose antipathy toward Japanese Americans is well-documented,[16] signed the infamous Executive Order No. 9066, authorizing "the Secretary of War, and Military Commanders . . . to prescribe military areas . . . from which any and all persons may be excluded," using federal troops if necessary.[17]

General DeWitt then issued the first of a series of public proclamations declaring that the entire Pacific Coast of the United States was in danger, establishing "as a matter of military necessity" military areas and zones from which "[s]uch persons or classes of persons as the situation may require" would be "excluded."[18] This was followed by a curfew and orders directing that "all persons of Japanese ancestry, both alien and non-alien," report to assembly centers and be removed from the designated military areas.[19] Congress then made it a crime to violate such orders.[20]

By October 1942, more than 110,000 Japanese Americans had been rounded up by the Army and sent off to ten so-called "relocation centers" in the interior of the country, where they suffered shocking privations over the next two and a half years. The internees were allowed to

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[13] Memorandum from Attorney General Biddle to President Roosevelt (Feb. 17, 1942), *quoted in* PERSONAL JUSTICE DENIED, *supra* note 11, at 83-84.

[14] PERSONAL JUSTICE DENIED, *supra* note 11, at 79.

[15] Memorandum for the Secretary of War, *Evacuation of Japanese and Other Subversive Persons from the Pacific Coast* (Feb. 14, 1942), *reproduced in* J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (1943), at 33-38.

[16] *See, e.g.*, GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2001) (chronicling the shocking story of Roosevelt's personal involvement in the exclusions and internments).

[17] Exec. Order No. 9066, 3 C.F.R. § 1092-93 (1938-1943).

[18] Public Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 26, 1942).

[19] *See, e.g.*, Exclusion Order No. 34, *Instructions to All Persons of Japanese Ancestry* (May 3, 1942), *available at* http://www.hsp.org/files/030002.jpg.

[20] An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining In, Leaving, or Committing Any Act in Military Areas or Zones, Pub. L. No. 77-503, 56 Stat. 173 (1942).

take with them only what they could carry. The camps were surrounded by barbed wire, searchlights, and machine gun emplacements manned by military police.

Not one of those confined in the camps was ever charged with a crime. The writ of habeas corpus was never suspended. There was no domestic violence, other than attacks on Japanese Americans by Caucasians. And after the Battle of Midway in June 1942, the West Coast of the United States was never threatened. A congressional commission studying the internments years later found that there was "not a single documented act of espionage, sabotage, or fifth column activity . . . committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast. . . . [T]here was no justification in military necessity for the exclusion, . . . there was no basis for the detention."[21]

It is impossible to know precisely the political calculus that guided the President's decisions. But in May 1944 Secretary of War Stimson recommended to Roosevelt that the internments be ended. The President nevertheless delayed ordering immediate closure of the camps, fearing that an adverse reaction by California voters could cost him reelection later that year. He finally agreed to release the internees three days after the November elections. In the words of the congressional commission investigating the internments, "The inescapable conclusion . . . is that the delay was motivated by political considerations."[22]

The circumstances leading up to the exclusion and imprisonment of 120,000 Japanese Americans are profoundly disturbing. As Yamamoto makes clear, what happened next is even more so.

II. FRED KOREMATSU'S CONVICTION AND VINDICATION

Fred Korematsu was a Japanese American shipyard welder born in Oakland, California to immigrant parents. He was arrested in 1942 and found guilty of violating a military evacuation order. His case was taken up by the American Civil Liberties Union (ACLU), which argued that in the absence of martial law, with the civilian courts open and operating, his imprisonment violated the Fourth Amendment ban on seizure without probable cause, the Fifth Amendment guarantees of due process and equal protection of the laws, the Sixth Amendment right to a fair trial, the Eighth Amendment ban on cruel and unusual punishment, and the Thirteenth Amendment prohibition of slavery and involuntary servitude.

The Supreme Court responded that the executive and military orders on which Korematsu's conviction was based were "aimed at the twin dangers of espionage and sabotage."[23] It found that the war power of Congress and the Executive enabled the exclusion of all Japanese Americans from the West Coast. Moreover, said the Court,

> we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the

[21] PERSONAL JUSTICE DENIED, *supra* note 11, at 3, 10.
[22] *Id.* at 15; *see also* ROBINSON, *supra* note 16, at 216-27.
[23] Korematsu v. United States, 323 U.S. 214, 217 (1944).

> national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[24]

"There was evidence of disloyalty on the part of some," the Court concluded, "the military authorities considered that the need for action was great, and time was short. We cannot . . . now say that at the time these actions were unjustified."[25]

But of course the Court could have questioned those actions, as Yamamoto forcefully demonstrates. There was no evidence of disloyalty, and two and one-half years after the internments began, time was no longer "short." The Court forgot its earlier insistence in *Ex parte Milligan* that, at least in the absence of martial law, "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[26] It ignored Justice Murphy's complaint that the claim of military necessity should, "like other claims conflicting with the asserted constitutional rights of the individual, . . . subject itself to the judicial process of having its reasonableness determined."[27] It yielded instead to false claims of military necessity.

Not until 40 years later did it become clear that the Supreme Court had allowed itself to be hoodwinked. Professor Peter Irons discovered in a Freedom of Information Act (FOIA) request that the Justice Department and the Solicitor General had lied to the Court about the existence of a threat from West Coast Japanese Americans.[28] In a last-minute change to the government's brief to the Court in 1944, Yamamoto notes, it asked the Justices to "take judicial notice" of "facts relating to the justification for the evacuation" as set forth in a 1943 report from General DeWitt,[29] knowing full well that the recited facts were groundless.

When this fraud on the Court was revealed, Fred Korematsu applied for a writ *coram nobis* to reverse his earlier conviction. In granting the writ in 1984, Judge Marilyn Patel issued this warning:

> *Korematsu* . . . stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to

[24] *Id.* at 218 (quoting from its earlier opinion in Hirabayashi v. United States, 320 U.S. 81, 99 (1943), a case testing the validity of General DeWitt's curfew program).
[25] *Id.* at 223-24.
[26] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120 (1866).
[27] *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting).
[28] *See* PETER H. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES, at viii, ix (1993). The Acting Solicitor General in 2011 suggested that Korematsu might have been decided differently if the Solicitor General at the time, Charles Fahy, had been candid in his oral arguments before the Court about the lack of any evidence of military necessity. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, DEP'T OF JUST. BLOG (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.
[29] Brief for the United States at 11 n.2, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

> exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[30]

One might imagine that such a monstrous injustice would provoke widespread outrage. But it didn't. Chief Justice William H. Rehnquist, writing about the Japanese American internment cases 14 years later, failed even to mention the 1984 *coram nobis* ruling.[31] More astonishing still, some current Constitutional Law casebooks include an excerpt of the 1944 *Korematsu* decision, but neglect to note either the subsequent reversal of Fred Korematsu's conviction or the government's shocking misrepresentations to the Court.[32]

III. THE TROUBLE WITH COURTS

The central message of Yamamoto's book is that the Supreme Court failed in 1944 to do its judicial duty – to demand credible evidence that the suspension of constitutional rights was somehow justified by real threats to national security – and that courts since then have often not taken that failure to heart. By continuing to defer easily to claims of military necessity, they represent a danger not only to fundamental liberty interests but also to the separation of powers that the Framers of the Constitution intended to protect such interests. "Among the three branches," writes Yamamoto, "the courts, and at times only the courts, are constitutionally empowered and pragmatically situated to accommodate both security and liberty in preserving democracy's separation of powers hallmark: the rule of law."[33]

In its 1944 *Korematsu* decision, the Supreme Court declared that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."[34] But of course in the case before it the Court did nothing of the kind. Instead, the Court's majority uncritically accepted the government's knowing misrepresentations in ruling that national security concerns outweighed constitutional liberties. To be sure, it should not have expected Justice Department lawyers or the Solicitor General to perpetrate a fraud on the Court. But because the stakes were so high – the lives and liberties of so many individuals, as well as the Constitution's guarantee of equal protection and due process – the Court should have required credible evidence of military necessity.

Justice Jackson, dissenting, asked rhetorically, "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."[35] Without real evidence, he pointed out, the Court had "no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."[36] Yet he doubted the Court's competence to second-guess the military's judgment:

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[30] Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).
[31] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).
[32] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed. 2017); LAWRENCE FRIEDMAN, MODERN CONSTITUTIONAL LAW: CASES, PROBLEMS AND PRACTICE (2017).
[33] YAMAMOTO, *supra* note 5, at 17.
[34] *Korematsu*, 323 U.S. at 216.
[35] *Id.* at 245 (Jackson, J., dissenting).
[36] *Id.*

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. . . . [C]ourts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.[37]

Still, he concluded, the Court's duty to uphold the Constitution should have led it to reverse Korematsu's conviction. In a separate dissent, Justice Murphy viewed the Court's competence and responsibility differently.

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.[38]

Nevertheless, he insisted, "the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.'"[39]

In his new book, Yamamoto traces what he calls the subsequent "chameleonic" deployment of the *Korematsu* decision as precedent, taking special note of a number of courts' failure after 9/11 either to closely question government claims of national security as justification for the suspension of civil liberties, or to provide remedies for suspensions that were not justified. In the weeks following the terrorist attacks, for example, the government detained more than a thousand ethnic Arab and Muslim men for questioning, citing national security as justification.[40] When several of these detainees sued for breach of their Fourth and Fifth Amendment rights while in custody, in *Ziglar v. Abbasi* the Supreme Court refused in 2017 to recognize a *Bivens* remedy for any such violations, especially because doing so would challenge

> major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. . . . "[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise."[41]

Justice Breyer, dissenting, cautioned that "[h]istory tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination,

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[37] *Id.*
[38] *Id.* at 233-34 (Murphy, J., dissenting).
[39] *Id.* at 234 (quoting Sterling v. Constantin, 287 U.S. 378, 401 (1932)).
[40] *See* **Error! Main Document Only.**Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001. Several public figures called for the internment of Arab Americans, citing *Korematsu* as a precedent. *See* YAMAMOTO, *supra* note 5, at 59-61.
[41] Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)). In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court awarded damages for violation of Fourth Amendment rights.

turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights," citing *Korematsu* as an example.[42]

The Court similarly shirked its duty in 2010, Yamamoto asserts, in *Holder v. Humanitarian Law Project*, when several individuals and groups challenged a statute that criminalizes "material support" for designated foreign terrorist organizations.[43] Seeking to provide humanitarian and educational assistance to two such organizations, the plaintiffs claimed that the statute abridged their First Amendment rights of free speech and association. Chief Justice Roberts, writing for the Court, declared that the case required heightened scrutiny, then relied instead on a conclusory affidavit from a State Department official to show that any form of assistance would lend legitimacy to terrorist groups, strain U.S. relations with its allies, and free up other resources that could be put to violent ends.[44] While "concerns of national security and foreign relations do not warrant abdication of the judicial role," he wrote, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate."[45] Justice Breyer disagreed here, as well, complaining that while "the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense," in this case the Court "failed to examine the Government's justifications with sufficient care . . . [and] failed to insist upon specific evidence, rather than general assertion."[46]

To be sure, as Yamamoto makes clear, the courts have not always been so deferential. In *Hamdi v. Rumsfeld*, for example, a habeas action brought by a suspected Taliban fighter in military custody, the Supreme Court refused to accept the declaration of a Department of Defense official, based entirely on hearsay, as proof of facts that would justify the detainee's indefinite detention without charges or trial.[47] A "state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," Justice O'Connor wrote for a Court plurality.[48] "[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving [civil liberties] claims like those presented here," citing Justice Murphy's dissent in *Korematsu*.[49] Yet the Court went on to approve a relaxed standard of review, utilizing hearsay and a presumption in favor of government evidence.

So why have courts tended to react so deferentially to government claims of national security? Yamamoto believes that it is not because the Constitution fails to provide the political branches with very broad powers to protect the country in emergencies, to gather intelligence, or to declare, pay for, and conduct war. Nor is it because the government can be trusted never to knowingly abuse civil liberties, as we learned in the *coram nobis* cases. Neither, Yamamoto insists, is it because an active, skeptical judiciary would hamstring the nation's defense; settled law gives the government wide latitude in such matters.

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[42] *Ziglar*, 137 S. Ct. at 1884 (Breyer, J., dissenting).
[43] *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
[44] *Id.* at 33-34.
[45] *Id.* at 34 (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).
[46] *Humanitarian Law Project*, 561 U.S. at 61-62 (Breyer, J., dissenting).
[47] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[48] *Id.* at 536.
[49] *Id.* at 535.

One possible reason, no doubt felt acutely by understandably risk-averse judges, is that judicial intervention or an unwise ruling in a given case might actually jeopardize national security. Yet no court proceeding or judicial stay of government action has ever been shown to have done so.

Another oft-stated reason for judicial restraint is that the separation of powers envisioned by the Framers demands judicial deference to the political branches in such cases. Courts in recent years have increasingly relied on the "political question" doctrine to avoid ruling in national security cases.[50] They have also accepted government claims that state secrets would make trials of such cases too risky,[51] or they have, as in the *Ziglar* case described above, ruled that *Bivens* claims for constitutional violations are not available to plaintiffs in cases that implicate national security.[52]

Morever, says Yamamoto, judges are affected by the historical context in which they perform their duties: "Judges 'are heavily influenced by the perceived practical consequences of their decisions rather than being straight-jacketed by legal logic.' The 'law is responsive to the flux and pressure of contemporary events.'"[53]

The fundamental difficulty, however, according to Yamamoto, lies in judges' failure to appreciate "the judiciary's role as final arbiter of constitutional disputes."[54] "In a democracy," he writes, "judicial independence serves as the crucial check on the political branches' majoritarian impulses."[55] Careful judicial scrutiny is especially important in times of stress, when Americans may find themselves "at the mercy of wicked rulers, or the clamor of an excited people."[56] Thus, Yamamoto emphatically rejects the notion, advanced by former Chief Justice Rehnquist, that courts should never intervene in cases that seem political in character.[57]

Yet few cases have seemed so political in character as the ones challenging President Trump's bans on travel from several Muslim majority countries. These cases were decided by the Supreme Court shortly after Yamamoto's book was published.

IV. THE TRUMP TRAVEL BANS

One week after taking office in January 2017, President Trump signed an executive order barring entry by all Syrian refugees indefinitely and blocking any admission from seven Muslim majority countries temporarily.[58] This extraordinary measure was said to be justified by the need to protect U.S. citizens "from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United

[50] *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 303-04 (D.D.C. 2016), *vacated as moot*, 731 Fed. Appx. 8 (2018) (refusing on political question grounds to decide whether Congress had authorized the use of force against the Islamic State in Iraq and whether the President correctly interpreted any such authority).
[51] *See, e.g.*, Sterling v. Tenet, 416 F.3d 338, 345-348 (4th Cir. 2005).
[52] *See supra* note 41.
[53] YAMAMOTO, *supra* note 5, at 18 (quoting RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 16 (2006)).
[54] *Id.* at 85.
[55] *Id.*
[56] *Id.* at 87 (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866)).
[57] *Id.* at 87-88.
[58] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). The order included waiver provisions apparently intended to allow the entry of Christian refugees. *Id.* §§ 3(g), 5(b), 5(e), 5(f).

States immigration laws for malevolent purposes."[59] It followed campaign statements by candidate Trump proposing "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on," adding, "I think Islam hates us," and, concerning Muslim immigrants, "there's no real assimilation."[60]

When two U.S. states challenged the executive order as violating the First, Fifth, and Tenth Amendments, the government argued not only that courts "owe substantial deference to the immigration and national security policy determinations of the political branches," but also that "the President's decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections."[61] It went on to assert that "it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one."[62] The Ninth Circuit found no precedent to support this extreme claim of unreviewability, which it said ran "contrary to the fundamental structure of our constitutional democracy."[63]

The initial executive order was shortly replaced by a second very similar one,[64] which was immediately challenged by several states as violating both the Establishment Clause and the Immigration and Nationality Act.[65] Following adverse rulings in the Fourth and Ninth Circuits, President Trump issued a proclamation (then a second one slightly modifying the first) restricting or indefinitely barring the entry of nationals from five Muslim-majority countries, as well as from Venezuela and North Korea, with various exceptions.[66]

When the Supreme Court ruled on the President's proclamation in June 2018, a 5-4 majority concluded that it had neither an obligation nor the competence to consider alternative means for achieving the national security objectives espoused in the proclamation.[67] "Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. . . . [That fact] inform[s] our standard of review."[68] Judicial inquiry "'into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs," the Court declared, quoting from its earlier ruling in *Ziglar v. Abbasi*.[69] Moreover, said the Court, "'when it comes to collecting evidence and drawing inferences' on questions of

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[59] *Id.* §2.
[60] Jenna Johnson & Abigail Hauslohner, *"I Think Islam Hates Us": A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.b04d8d56d6ad.
[61] Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (emphasis in original).
[62] *Id.*
[63] *Id.*
[64] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).
[65] Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017) (en banc); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw.), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017) (per curiam).
[66] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), *modified by* Proclamation No. 9723, 83 Fed. Reg. 15,937 (Apr. 10, 2018). Omitted from the original list of Muslim-majority nations were Sudan, Somalia, and Iraq, the last because of its cooperation in combating the Islamic State.
[67] Trump v. Hawaii, 138 S. Ct. 2392 (2018).
[68] *Id.* at 2418.
[69] *Id.* at 2419 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017)).

national security, 'the lack of competence on the part of the courts is marked,'" this time quoting from its *Humanitarian Law Project* decision.[70]

The Court concluded, astonishingly, that it would uphold the policy set forth in President Trump's latest proclamation "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds,"[71] in other words, even though its primary justification might be unconstitutional. This is, of course, precisely the rationale that produced the tragic result in *Korematsu*. The Court then refused to question critically the asserted national security justification for the travel bans.[72]

Justice Sotomayor, dissenting, complained that by refusing to look behind the plain language of the presidential proclamation, the Court's majority had ignored abundant evidence that the proclamation was "driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[73] Even the Court's relaxed, rational-basis review, she said, should have demonstrated that "the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country."[74]

Sotomayor saw "stark parallels between the reasoning of this case and that of *Korematsu*," when "the Court gave 'a pass [to] an odious, gravely injurious racial classification' authorized by an executive order."[75]

> By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.
>
> Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. . . . [T]he Court's decision today has failed in that respect.[76]

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[70] *Id.* at 2419 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010)).
[71] *Id.* at 2420.
[72] The decision has been widely criticized. *See, e.g.*, Elizabeth Goitein, *Trump v. Hawaii: Giving Pretext a Pass*, JUST SECURITY (June 27, 2018), https://www.justsecurity.org/58553/trump-hawaii-giving-pretext-pass/ ("The section of the opinion that performs the 'rational basis' review contains not a single word about the president's anti-Muslim statements. . . . The court did not expressly hold that a president may intentionally discriminate on the basis of race or religion in national security policies, as long as he comes up with a pretext that has some minimal quantum of evidentiary support. But that is the functional outcome of the court's approach."); Harold Hongju Koh, *Trump v. Hawaii: Korematsu's Ghost and National Security Masquerades*, JUST SECURITY (June 28, 2018), https://www.justsecurity.org/58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/ (arguing that the majority's rhetoric about Korematsu "can only be understood as dissembling or self-deception. . . . In both cases – FDR's Japanese internment and Trump's travel ban – the government misstated key facts to the court. And the manifest wrong of both policies rested on the government's insistence on judging and harming people based not on the content of their individual character, but on their membership in a supposedly dangerous group – defined by descent, nationality or religion – whose dangerousness the government never proved.").
[73] *Trump*, 138 S. Ct. at 2438 (Sotomayor, J., dissenting).
[74] *Id.* at 2445.
[75] *Id.* at 2447 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)).
[76] *Id.* at 2448.

Stung by the comparison, the Court majority took the opportunity, in a dictum, to disavow its commitment to the 1944 decision:

> Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President – the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.
>
> The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – "has no place in law under the Constitution." 323 U.S., at 248 (Jackson, J., dissenting).[77]

This language in the majority opinion was widely celebrated as the Court's long-overdue repudiation, if not overruling, of its earlier ruling. But the Court's actions spoke louder than its words. Its uncritical acceptance of the government's claim that the travel ban was justified by national security, especially when a fundamental constitutional liberty interest was at stake, belied any apparent promise to do its judicial duty in the future.

In fact, according to Yamamoto, the Court's decision poses a far greater danger: "In national security cases after June 2018, judges possess a citation to bolster an exceedingly deferential judicial posture without having to draw, at least implicitly, on *Korematsu*. What could not be comfortably cited earlier can be openly cited now – as *Trump v. Hawai'i*."[78]

V. REASON FOR CAUTIOUS OPTIMISM?

In the concluding chapters of his new book, Yamamoto sets forth what he calls "a jurisprudentially grounded and practically workable" process for judicial review in cases that involve both national security and civil liberties.[79] In most national security matters, he observes, courts quite properly defer broadly to government justifications. But "[w]hen the government claims *pressing public necessity* to legitimize measures that curtail constitutionally prescribed liberties of citizens or noncitizens – liberties central to a vibrant democracy – careful judicial scrutiny kicks in."[80]

The required careful judicial scrutiny, Yamamoto argues, includes a searching inquiry into whether targeted groups or individuals truly pose an imminent, serious threat to national security. If so, the court should determine whether the restrictions are carefully tailored in light of the danger, and whether feasible alternatives exist, judged by the timing and likely impacts on

[77] *Id.* at 2423.
[78] Yamamoto & Oyama, *supra* note 3.
[79] YAMAMOTO, *supra* note 5, at 95.
[80] *Id.* (emphasis in original). This, of course, is precisely what the Supreme Court majority said it was obliged to do in its 1944 *Korematsu* decision. Korematsu v. United States, 323 U.S. 214, 216 (1944).

those targeted. The attendant adversarial process, Yamamoto optimistically suggests, "'can produce a fuller factual record, exposing faulty assumptions, and . . . deliberative review by life-tenured judges can protect against rash decisions resulting from pressures by elected officials.'"[81]

"What careful scrutiny looks like in a specific case will . . . be shaped by the particular circumstances," Yamamoto tells us.[82] One of these circumstances may be a judge's belief that she lacks competence to evaluate such cases. Here Yamamoto quotes Ninth Circuit Judge Stephen Reinhardt, who describes his job as

> essentially no different from . . . any other important or controversial matter – maybe a little more difficult, maybe a little more daunting, maybe a little more perilous, but in the end it is simply a matter of what good jurists regularly do – weighing, balancing, exercising independent judgment, and safeguarding the Constitution.[83]

Indeed, courts routinely conduct fact-finding in the most complex cases imaginable, including those involving extremely sensitive information.[84]

One circumstance that should not compel greater judicial deference, according to Yamamoto, is congressional approval of the President's actions, precisely because in times of crisis the two political branches may collaborate to curtail the liberty interests of minorities, as they did in 1942. A better practice is reflected in the Supreme Court's 2008 ruling in *Boumediene v. Bush*.[85] There the Court engaged in a review process like that outlined in Yamamoto's book to strike down a statute that denied habeas relief for Guantánamo prisoners.

Yamamoto points out that his recommended method for judicial review in cases like *Korematsu* requires no new substantive or procedural doctrine. It accommodates competing constitutionally recognized interests. And it acknowledges a history of sometimes grossly abusive government conduct in the name of national security. Equally important, it brings "a significant measure of clarity to the mechanics for deciding whether judicial deference or careful scrutiny is appropriate in a specific case."[86]

Yamamoto is nevertheless realistic about prospects for adoption of his recommendations. For one thing, the "'weights' judges assign in security and liberty controversies are 'inescapably subjective'" – the product of "personal factors, such as temperament (whether authoritarian or permissive), moral and religious values, life experiences that may have shaped those values . . . of which the judge is quite unaware."[87] For another, as noted earlier, judges may be swayed by the contemporary political context in which cases come to them.

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[81] YAMAMOTO, *supra* note 5, at 97-98 (quoting DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 241 (3rd ed. 2006)).
[82] *Id.* at 98.
[83] *Id.* at 99 (quoting Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV.1309, 1313 (2006)).
[84] A dramatic example is United States v. United States District Court (*Keith*), 407 U.S. 297 (1972), a domestic terrorism case in which Justice Powell rejected government arguments that a court was not sufficiently sophisticated or trustworthy to entertain an application for a wiretap warrant.
[85] Boumediene v. Bush, 553 U.S. 723 (2008).
[86] YAMAMOTO, *supra* note 5, at 107.
[87] *Id.* at 109 (quoting Posner, *supra* note 53, at 24).

Still, Yamamoto finds reason for optimism in the ability of journalists, policy advocates, policy makers, businesses, and ordinary citizens to shape that political context, using media campaigns and grass-roots activism.[88] He recalls Justice Douglas's observation that the "Court does move with political trends. . . . And community attitudes are not without their effect. The Court is not isolated from life. Its members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors."[89]

As an example, Yamamoto cites the case of Dr. Wen Ho Lee, a Los Alamos scientist charged in 1999 with violating the Espionage Act and the Atomic Energy Act.[90] The court initially was persuaded by government claims, based in part on racial stereotypes, of a national security risk if Lee were not held for months in solitary confinement without bail. Subsequently, a vigorous campaign by social justice advocates, local media, and amici prompted the judge to order the disclosure of evidence that the prosecution was ethnically biased. When the government decided instead to drop some of the charges against Lee, the court accepted a single guilty plea for mishandling confidential computer files, dismissed the remaining charges, and issued a public apology to Dr. Lee. "I am truly sorry that I was led by our Executive Branch of government to order your detention. . . . I feel I was led astray," the judge said, by the Justice Department, the FBI, and the U.S. Attorney for New Mexico.[91]

VI. NEVER HAPPEN AGAIN?

Of course, history may repeat itself – if we ignore the lessons of the past, and if the courts fail to do their duty. The terrorist threat to national security seems unlikely to end anytime soon. And the assertion by populist politicians of new threats may present new opportunities to abuse the rights of disfavored minorities.[92]

The Trump administration's indefinite exclusion of large numbers of immigrants and refugees based on their national origins (if not on their religion) is one lamentable current example. The President's claim that national security requires tighter restrictions on illegal entry across the Southern U.S. border is another.[93] A Defense Department plan to house thousands of "unaccompanied alien children" at four military bases,[94] is all too reminiscent of the isolation and imprisonment of Japanese Americans during World War II.

But it doesn't have to be this way. Professor Yamamoto's fine and timely book illuminates "the United States' simultaneous fragility and vitality as a checks-and-balances

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[88] *See id.* at 111.
[89] *Id.* at 113 (quoting WILLIAM O. DOUGLAS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS: THE COURT YEARS 1939-1975 (1980), at 38).
[90] The case is reported in part at United States v. Lee, 90 F. Supp. 2d 1324 (D.N.M. 2000).
[91] YAMAMOTO, *supra* note 5, at 116. Details of this mostly unreported episode are set forth *id.* at 114-18.
[92] *See* Michiko Kakutani, *When History Repeats*, N.Y. TIMES, July 15, 2018, at SR1.
[93] *See* Louis Nelson & Cristiano Lima, *Trump Proposes Sending Troops to U.S.-Mexico Border Until Wall Is Built*, POLITICO (Apr. 3, 2018, 7:11 PM), https://www.politico.com/story/2018/04/03/trump-military-guard-mexico-border-498480.
[94] *See* Michael D. Shear, Helene Cooper & Katie Benner, *U.S. Prepares to House Up to 20,000 Migrants on Military Bases*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/us/politics/trump-immigration-border-family-separation.html.

democracy."[95] It points us toward a "path through legal and political thickets" that will prevent "public fears 'coupled with racism or nativism or religious intolerance backed by the force of law'" from once again enabling "'the deep and lasting social injustice we later come to regret.'"[96] "With clear-eyed judges buttressed by vigorous advocacy and organizing, America's constitutional democracy may yet rise to prevent religious or racial animosity from again masquerading behind a façade of national security."[97] Judges, lawyers, and ordinary citizens with a sense of history and a commitment to the rule of law will be inspired by Yamamoto's insights and will come away eager to follow his direction.

[95] YAMAMOTO, *supra* note 5, at 20.
[96] *Id.* (quoting Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27 AMERASIA J. 51, 57 (2001)).
[97] Yamamoto & Oyama, *supra* note 3.