Korematsu v. United States: A "Constant Caution" in a Time of Crisis

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Twenty years ago, in a crowded federal courtroom for the Northern District of California, Fred Korematsu uttered a simple request: "I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed, or color."[1] Korematsu and his team of young lawyers were there that day to argue for vacating his 1942 conviction for disobeying military wartime exclusion and detention orders, and to end the public stigma of disloyalty imprinted by the original *Korematsu* decision onto the Japanese American community. Unearthed documents had revealed that no military necessity existed to justify the incarceration, and that government decision makers knew this at the time, and later lied about it to the Supreme Court.[2] On that day, November 19, 1983, forty years after the United States Supreme Court upheld his conviction, Judge Marilyn Hall Patel reversed Korematsu's conviction, acknowledging the "manifest injustice" done to him and to all those interned.[3]

In the original 1944 *Korematsu* decision, the United States Supreme Court upheld the mass incarceration of 120,000 Americans of Japanese ancestry during World War II without charges, notice, trial or due process, and without any evidence of espionage and sabotage by persons of

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1. Record for Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu at 32, Korematsu v. U.S., 584 F. Supp. 1406 (N.D. Cal. 1984); *see also* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 221(Peter Irons ed., 1989). Peter Irons, the attorney and scholar who found most of the original evidence and who had contacted all three coram nobis Petitioners to reopen their cases, deserves special credit for his insistence that Japanese American attorneys lead the coram nobis effort. He recognized the political value of these legal cases not only to the general public but to the legal community as well.

2. *See* Korematsu v. United States, 584 F. Supp. 1406, 1416-18 (N.D. Cal. 1984).

3. *Id.* at 1416-17.

Japanese ancestry.[4] Despite the Court's lofty pronouncements that it would subject the government's discriminatory actions to the highest level of scrutiny, it nevertheless took judicial notice of innocent facts, half-truths, and stereotypes of Japanese Americans[5] to weakly conclude: "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose numbers and strength could not be precisely and quickly ascertained."[6] As a consequence, over 100,000 Japanese Americans remained imprisoned, later to carry into private life the stamp of disloyalty approved by the Supreme Court.[7]

Nearly every law student has studied the 1944 *Korematsu* case. Legal scholars continue to debate, dissect, and discuss its abstract principles—"strict scrutiny," "delegation of powers," and "due process." Many, however, never discuss the political or moral issues raised by the mass imprisonment of Japanese Americans. Nor do they examine the devastating human cost of this decision—the suffering, broken families, lost property, and shattered dreams. Perhaps most importantly, many fail to mention that the later *coram nobis* cases found that the government, in its argument to the Supreme Court, had fabricated the "military necessity" basis for the incarceration in order to justify the mass imprisonment, and that the internment had resulted in a manifest injustice warranting reparations.[8] *Korematsu v. United States* represents a compelling lesson in law but an untaught tragedy in history.

Now, it appears, *Korematsu* and the national security and civil liberties tensions that it embodies have reemerged in the wake of the September 11, 2001 ("September 11") terrorist attacks. Peter Kirsanow, a controversial Bush appointee to the U.S. Commission on Civil Rights, cited the original *Korematsu* case to support his predication of a new racial internment of Arab Americans.[9] The FBI has also been harshly criticized

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4. *See* Korematsu v. United States, 323 U.S. 214 (1944).

5. *See* Hirabayashi v. United States, 323 U.S. 81, 96-98 (1943). In accepting the government's request for judicial notice in *Hirabayashi*, the Court attached significance to sociological assertions that Japanese American children attended Japanese language school, which were believed to be sources of Japanese nationalistic propaganda; that approximately 10,000 children of Japanese ancestry had been educated in Japan; that many of the children had dual citizenship, possessing both Japanese and American citizenship under Japanese law; and that many of the resident alien Japanese "occupy positions of influence in Japanese communities." *Id.* at 97-98.

6. *Korematsu*, 323 U.S. at 218 (citing *Hirabayashi*, 323 U.S. at 99).

7. Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 28 AMERASIA J. 51, 56 (2002) [hereinafter Yamamoto, et al., *The Loaded Weapon*].

8. Eric K. Yamamoto & Susan Kiyomi Serrano, *American Racial Justice on Trial—Again: African American Reparations, Human Rights and the War on Terrorism*, __ Mich. L. Rev. __ (forthcoming 2003).

9. *See id.*; Chisun Lee, *Rounding Up the 'Enemy:' Sixty Years After It Jailed Japanese Americans, Would the U.S. Consider Another Ethnic Internment?*, THE VILLAGE VOICE, July 31-Aug. 6, 2002, *available at* http://www.villagevoice.com/issues/0231/lee.php (last visited Sept. 11, 2002).

by the Foreign Intelligence Surveillance Court for lying to the court to obtain national security wiretaps and electronic surveillance.[10] The Bush administration has even established military tribunals for civilians that the Justice Department has deemed "enemy combatants," with no right to judicial review.[11] In turn, civil liberties organizations have challenged the secretive, indefinite, and unexplained national security detention of individuals.[12]

In the 1984 *Korematsu coram nobis* decision, Judge Patel underscored the urgent need for America's institutions—including the courts—to actively protect cherished civil liberties, especially in times of national crisis:

> [*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.[13]

Does *Korematsu v. United States* have continuing vitality today? When the government abuses its national security powers, and is challenged, will the Supreme Court overlook Judge Patel's warning and blindly adopt a deferential as opposed to a heightened standard of review in evaluating the government's contention of "national security" or "military necessity?"[14] What is the significance of the original *Korematsu* case and later *coram nobis* cases to Asian Americans? To all those concerned about justice in America? To our country and its legal institutions? These are all questions that are very much alive today.

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10. The Foreign Intelligence Surveillance Court's decision was overturned by the Foreign Intelligence Surveillance Court of Review. *See In re* Sealed Case, Nos. 02-001, 02-002 (United States Foreign Intelligence Surveillance Court of Review Nov. 18, 2002); *see also* Alisa Solomon, *Things We Lost In the Fire: While the Ruins of the World Trade Center Smoldered, the Bush Administration Launched an Assault on the Constitution*, THE VILLAGE VOICE, Sept. 11-17, 2002, *available at* http://www.villagevoice.com/issues/0237/solomon.php.

11. *See infra* Section II (Civil Liberties in a Post-9/11 World).

12. *See* Solomon, *supra* note 10; Charles Pope, *Fear Grows That War on Terror is Trampling Rights*, SEATTLE POST-INTELLIGENCER, Sept. 10, 2002, *available at* http://seattlepi.nwsource.com/national/86318_rights10.shtml; CIVIL LIBERTIES AFTER 9/11: THE ACLU DEFENDS FREEDOM (Sept. 20, 2002), *available at* http://www.aclu.org/Files/OpenFile.cfm?id=10897.

13. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

14. *See* Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 4-5 (1986) [hereinafter Yamamoto, *Korematsu Revisited*].

I. THE WARTIME AND *CORAM NOBIS* CASES

A. The Wartime Cases

On February 19, 1942, President Franklin Roosevelt issued Executive Order 9066, granting the Secretary of War the power to exclude all persons of Japanese ancestry from designated military zones on the West Coast. Thereupon, the government banished 120,000 Japanese Americans—two-thirds of whom were native-born U.S. citizens—from the West Coast and imprisoned them in ten desolate camps without charges, attorneys, indictment, or hearings. The internees were forced to abandon their homes, farms, and businesses with only what they could carry. They remained behind barbed wire under the watch of armed guards.[15]

Three Japanese Americans—Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi[16]—each challenged the internment (specifically the curfew and exclusion) as a violation of their equal protection rights, among other arguments. The government had alleged that:

> [A]ll Japanese, including American citizens, were, by culture and race, predisposed to loyalty to Japan and to disloyalty to the United States; [the] Japanese on the West Coast had committed and were likely to commit acts of espionage and sabotage against the United States; and [ ] mass action was needed because there was insufficient time to determine disloyalty individually.[17]

However, the government offered virtually no evidence to support these bald assertions. All three were convicted of violating the military orders and all three appeals reached the Supreme Court.

Fred Korematsu's case was decided by the Supreme Court in 1944, eighteen months after the Court rendered its decisions in *Hirabayashi v. United States*[18] and *Yasui v. United States*.[19] The three cases (collectively, "Wartime Cases") upheld the government's claim of "military necessity" for the curfew and exclusion, as well as by implication, the detention of Japanese Americans, despite the total absence of evidence that any Japanese American had engaged in acts of espionage or sabotage.[20] In

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15. *See* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 100-01 (2001).

16. Of the three cases, the authors have chosen to highlight the *Korematsu* case for two reasons: (1) Minami's role as lead counsel for Fred Korematsu, and (2) the most significant deprivations—exclusion and detention—were central issues in the original *Korematsu* decision.

17. Yamamoto, *Korematsu Revisited, supra* note 14, at 8- 9. *See also* Korematsu v. United States, 323 U.S. 214, 223-24 (1944); Hirabayashi v. United States, 320 U.S. 81, 99 (1943).

18. 320 U.S. 81 (1943).

19. 320 U.S. 115 (1943).

20. *See generally* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); IRONS, *supra* note 1, at 221; Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations, in* ASIAN AMERICANS AND THE SUPREME COURT 755 (Hyung-Chan Kim ed., 1992).

upholding the constitutionality of the government's incarceration plan (specifically through sanctioning the curfew and exclusion), the Court outlined its heightened duty to scrutinize racial classifications: "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people[,]" [21] and "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . courts must subject them to the *most rigid scrutiny*."[22] In affirming the convictions, however, the Court abdicated its responsibility to conduct an independent review and deferred entirely to the government's falsified assertions of "military necessity" by adopting the military's sweeping conclusions about disloyal Japanese Americans. Three scathing dissents in the *Korematsu* case decried this "legalization of racism." [23]

Over the years, Supreme Court decisions in the Wartime Cases have been intensely criticized for their blind acceptance of military declarations of proof, their embrace of racial stereotypes about Japanese Americans, and for the Supreme Court's abdication of its declared legal standard of heightened judicial responsibility.[24] Yet, as Professor Sumi Cho has explained, the Supreme Court continues to cite to *Korematsu* as precedent for its "special duty to scrutinize racial classifications, implying counter-factually that those cases had actually involved some kind of meaningful scrutiny."[25] The decisions are also remarkable for their spurious logic, internal and external inconsistencies,[26] and most basically, for the Court's approval of naked racism dressed up in the clothes of Supreme Court

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21. *Hirabayashi*, 320 U.S. at 100.

22. *Korematsu*, 323 U.S. at 216 (emphasis added).

23. *Id.* at 242 (Murphy, J., dissenting).

24. *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 531 (1945) ("The first and greatest anomaly of the Hirabayashi [and] Korematsu . . . cases is that they seem to abandon the requirement of a judicial inquiry into the factual justification for General DeWitt's decisions . . . . [T]hese cases treat the decisions of military officials, unlike those of other government officers, as almost immune from ordinary rules of public responsibility . . . On this ground alone, the Japanese American cases should be most strenuously reconsidered."); Sumi Cho, *Redeeming Whiteness In the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 5-6 (2001); Arval A. Morris, *New Deal Symposium: Justice, War, and the Japanese-American Evacuation and Internment*, 59 WASH. L. REV. 843, 860-61 (1984) ("[T]he cases reflected the failure of the legal system that should have stood as a bulwark resisting racism, war hysteria, and the failure of leadership at high levels of government . . . It is capable of revival and repetition. The Japanese-American exclusion cases should be reversed, repudiated, and excised from our law."); Yamamoto, *Korematsu Revisited*, *supra* note 14, at 20-21.

25. Cho, *supra* note 24, at 142-43.

26. For example, the Court in *Korematsu* stated "[w]e uphold the exclusion order *as of the time it was made and when the petitioner violated it.*" *Korematsu*, 323 U.S. at 219 (emphasis added). However, as support for its conclusion that some Japanese Americans retained loyalty to Japan, the Court pointed to the results of loyalty questionnaires given to Japanese American *after* they had already been interned: "That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion . . ." *Id.* The Court thus applied irrelevant time periods for the convenience of bolstering the government's case.

magniloquence.

B. *The Coram Nobis Cases*

After Japanese Americans were released from the camps, many returned to the West Coast, while others made their homes wherever they could. They attempted to rebuild their lives, find jobs, raise families, and forget the hardship, humiliation, and stain of disloyalty on their reputations by the government's imprisonment. For almost 40 years, Japanese Americans rarely talked about their experiences in the prison camps. But, as part of the Japanese American Redress Movement,[27] several attorneys suggested the idea of relitigating the original Wartime Cases.

In the late 1970s and early 1980s, two noted Nisei (second generation) attorneys, Frank Chuman and William Marutani, independently proposed an obscure legal procedure—a writ of error *coram nobis*—to relitigate the Wartime Cases. This writ, a civil/criminal hybrid similar to habeas corpus, allows a petitioner to challenge his or her conviction after the sentence has been completed. It is available, however, only in very rare circumstances when one can demonstrate an error "of the most fundamental character."[28] The insurmountable obstacle of the *coram nobis* idea at that time was simple: no evidence was then available to prove that government misconduct had resulted in an injustice to Korematsu, Hirabayashi, or Yasui. No evidence, that is, until Peter Irons and Aiko Yoshinaga-Herzig[29] uncovered a clear trail of reports, notes, and memoranda penned by government lawyers and high civilian leaders which showed that the Department of Justice and War Department suppressed, altered, and destroyed important evidence during the prosecution of these three cases in order to win them at any cost. This evidence demonstrated that: (1) government prosecutors suppressed authoritative intelligence reports showing that Japanese Americans, as a whole, were loyal;[30] (2) General DeWitt's original Final Report was altered, the original Final Report was

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27. The "Redress Movement" was a campaign begun by Japanese Americans in the early 1980s to obtain recognition by the United States government that the incarceration of Japanese Americans was unnecessary and unjust. The campaign resulted in a formal apology, reparations of $20,000 to those living at the time of the Redress Bill's signing in 1987, and the establishment of a $5 million educational trust fund. *See* YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 15, at 278-80, 390.

28. *Korematsu*, 584 F. Supp. at 1419.

29. At the time of their discovery of critical evidence in late 1981, Peter Irons was a professor of political science at the University of Massachusetts at Amherst and an attorney researching a book about the attorneys in the original *Korematsu* and *Hirabayashi* cases. Professor Irons' obtained most of his dramatic evidence through a Freedom of Information Act request. Aiko Yoshinaga-Herzig was a housewife on a personal odyssey to discover the real reasons she and her family were forced from their home in Los Angeles into internment camps. She found the bulk of her evidence through a laborious review of files in the National Archives. Their fortuitous meeting at the National Archives in Washington D.C. led to an agreement to share all documents and evidence they obtained.

30. Bannai, et al., *supra* note 20, at 775.

destroyed, and an altered report was submitted to the Supreme Court to support the government's position;[31] and (3) General DeWitt's allegations of espionage and sabotage by Japanese Americans were false and known to be false by government attorneys who failed to inform the Supreme Court of this deception.[32]

With his experience as a historian and attorney, and having previously filed his own petition for *coram nobis*, Irons was keenly aware of the significance of the evidence that he and Yoshinaga-Herzig found. Legal teams were assembled in the respective venues of each petitioner's conviction (Gordon Hirabayashi in Seattle, Minoru Yasui in Portland, and Fred Korematsu in San Francisco), and they coordinated their legal research and preparations of the petitions.

Based on the newly discovered evidence, Korematsu, Hirabayashi, and Yasui filed Petitions for Writs of Error Coram Nobis in January and February 1983, to erase their World War II convictions on the grounds that prosecutorial misconduct had indelibly tainted the United States Supreme Court's decisions. However, the petitions were filed to accomplish more than just the overturning of the petitioners' convictions. In the midst of the Japanese American Redress Movement, the legal teams wanted to undermine the legal precedents which upheld the incarcerations; correct the public historical record and the public perception that legitimate reasons existed for the exclusion and detention; and vindicate these three courageous men who stood up, virtually alone, to challenge the discriminatory military orders.

In November 1983, Fred Korematsu's case was the first to be heard in the United States District Court for the Northern District of California. The U.S. government did not contest Korematsu's request that his conviction be vacated. In fact, it attempted to withdraw its prosecution of Mr. Korematsu

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31. *Id.*

32. Rostow, *supra* note 24, at 776. DeWitt's Final Report "contained an astonishing statement about the military's rationale for the evacuation: due to racial characteristics it was impossible to distinguish the loyal Japanese Americans from disloyal Japanese Americans and therefore it did not matter whether there was adequate time to determine disloyalty individually[:] 'It was impossible to establish the identity of the loyal and the disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.'" Yamamoto, *Korematsu Revisited, supra* note 14, at 10 (citing Korematsu Petition for Writ of Error Coram Nobis, Jan. 19, 1983). The Report was altered to read: "To complicate the situation, no ready means existed for determining the loyal and disloyal with any degree of safety." *Id.* at 11 (citing Korematsu Petition for Writ of Error Coram Nobis, Jan. 19, 1983). As Professor Yamamoto observed, this alteration "shifted the justification for the evacuation from unsupportable racial myths to logistical practicalities." *Id.* The government's brief in *Hirabayashi* claimed that there was insufficient time for individual loyalty investigations and hearings. *Id.* The *Hirabayashi* Court thereby upheld the curfew orders, noting that "DeWitt had determined that the Japanese American population included disloyal members [who] . . . could not readily be isolated and separately dealt with by other means." *Id.* (citing *Hirabayashi*, 320 U.S. at 99). The *Korematsu* Court also cited this passage from *Hirabayashi*. *Id.* at 12 (citing *Korematsu*, 323 U.S. at 218).

in a desperate gambit to prevent any factual findings on the allegations of prosecutorial misconduct and lack of military necessity for the exclusion and detention. The *Korematsu* legal team, however, demanded specific factual findings by the court that the internment was unjustified.

Dale Minami, one of Korematsu's attorneys, pressed the court to consider not only Fred Korematsu's interests, but also the interests of the public and of the Japanese American community as a whole. Such interests demanded "more than a sterile recitation that we should let bygones be bygones and requires that the real substantial reasons be exposed so that this tragedy will never be repeated." Fred Korematsu then addressed the court, recalling his initial appearance forty years before when he was "handcuffed and arrested as a criminal" and ended with this request: "I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed or color."[33]

From the bench, Judge Patel announced that a court review of the misconduct allegations was appropriate. She stated that the justification of "military necessity" for the executive and military orders was based on "unsubstantiated facts, distortions, and representations of at least one military commander, whose views were seriously infected by racism."[34] In the later written opinion, the court held that government officials lied to the Supreme Court about the national security risks requiring imprisonment when it "knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."[35] The court also took judicial notice of the conclusions of the Commission on Wartime Relocation and Internment of Civilians[36] that: (1) no military necessity existed to justify the mass incarceration of an entire ethnic populace; and (2) racial animosity fueled the military orders to imprison Japanese Americans. Accordingly, the writ of *coram nobis* was granted and Fred Korematsu's conviction was vacated.[37]

In Minoru Yasui's case, heard in the United States District Court for the District of Oregon, the government again moved to vacate and dismiss the indictment. Rather than hearing the evidence presented and entering

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33. Record at 32, *Korematsu*; see also IRONS, *supra* note 1, at 221.

34. Record at 32, *Korematsu*.

35. Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

36. *Id.* at 1416 ("The Commission on Wartime Relocation and Internment of Civilians was established in 1980 by an act of Congress. It was directed to review the facts and circumstances surrounding Executive Order 9066 and its impact on American citizens and permanent resident aliens; to review directives of the United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including those of Japanese ancestry; and to recommend appropriate remedies." (citing Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, § 2, 94 Stat. 964 (1980))).

37. Although the government filed a notice of appeal in the *Korematsu* case, the appeal was withdrawn and the decision became final. Bannai, et al., *supra* note 20, at 775.

any findings on the issue of prosecutorial misconduct, the court granted the government's request and vacated the conviction. Yasui appealed this order, but passed away while the appeal was pending. Minoru Yasui had received his vindication but without any findings of fact.[38]

Gordon Hirabayashi's case took a more tortuous route. Alarmed by the strong decision rendered in the *Korematsu* case, the government contested the petition. The Seattle *coram nobis* team took Hirabayashi's case to a full trial on his petition. The district court vacated his conviction for violation of the exclusion order, but upheld his conviction for violation of the curfew order. Both parties appealed. The appeal was argued before the United States Ninth Circuit Court of Appeals on March 2, 1987. In a unanimous opinion, it affirmed the district court's vacatur of the exclusion conviction and reversed the district court as to the curfew conviction.[39] In echoing the findings of Judge Patel, the Ninth Circuit concluded that the altered, suppressed, and destroyed evidence may have materially affected the original Supreme Court decisions.[40] Gordon Hirabayashi's 40-year-old convictions were finally erased from his record.

II. THE ENDURING SIGNIFICANCE OF *KOREMATSU*

A. Civil Liberties in a Post-9/11 World

In her opinion, Judge Patel underscored the urgent need for America's institutions to actively protect cherished civil liberties, especially in times of national crisis. Yet, following the horrific events of September 11, the Bush administration, despite Judge Patel's warning, expanded its vast executive and military powers to pursue its "war against terrorism." It has incarcerated civilians—including American citizens—indefinitely without charges, hearings, or access to counsel; summarily detained and deported immigrants in violation of federal law; and established military tribunals for civilians deemed by the Justice Department to be "enemy combatants" with no right to judicial review.[41] All this has occurred despite the government's official acknowledgement of the injustice in the wholesale incarceration of Japanese Americans. Sadly, the Bush administration has seemingly ignored this history.

The Bush administration also has unleashed expansive new laws designed to address potential threats to the nation's security. The 342-page

38. *Id.* at 778.

39. *See* Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987).

40. *See id.*

41. *See* Anita Ramasastry, *Do Hamdi and Padilla Need Company?*, Findlaw.com, *available at* http://writ.news.findlaw.com/ramasastry/20020821.html (Aug. 21, 2002) (describing two U.S. citizen "enemy combatants," Brooklyn-born Jose Padilla, who has been held indefinitely in solitary confinement in a military detention camp, and Yaser Esam Hamdi, a Louisiana-born U.S. citizen, who is being held in a military brig although no charges have been issued against him); Pope, *supra* note 12.

"USA PATRIOT Act" authorizes sweeping new powers for law enforcement agencies to wiretap phones, track Internet traffic, conduct secret searches, examine private financial and educational records, and prosecute anyone who supports a "terrorist."[42] The law also allows the government to detain immigrants for seven days without charges and permits the possible indefinite detention of non-citizens without meaningful judicial review.[43] The 484-page "Homeland Security Act" recently pushed through Congress may authorize a vast electronic dragnet to amass information on every American's credit card and banking transactions, travel bookings, magazine subscriptions, website and email communications, and medicine prescriptions through a "Total Information Awareness" program.[44]

Furthermore, the administration has authorized the monitoring of privileged communications between attorneys and detainees; breached the protective wall between criminal prosecutions and national security investigations, which was erected to prevent wiretap and surveillance abuse; ordered the continued detention of people in custody even after an immigration judge has found them eligible for release;[45] and launched a "terrorist tracking task force" to root out suspected terrorists who overstay their visas.[46] The FBI and INS reportedly commenced racial profiling investigations and detentions of Arab and Muslim Americans. The Department of Justice resurrected support for secret trials based on secret evidence for the deportation of "dangerous" immigrants.[47] Attorney General John Ashcroft called for a national Terrorism Information and

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42. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT Act") Act of 2001, Pub. L. No. 107-56 (2001).

43. *USA Patriot Act Boosts Government Powers While Cutting Back on Traditional Checks and Balances, at* http://archive.aclu.org/congress/l110101a.html (last visited Feb. 26, 2003); Ann McFeatters, *Bush Signs Anti-Terror Bill, Says Tough Law Will Preserve Constitutional Rights*, PITTSBURGH POST-GAZETTE, Oct. 27, 2001, at A6; Margaret Graham Tebo, *Immigration Policy: Two Minds With Single Aim*, ABA JOURNAL EREPORT, Sept. 21, 2001, *at* http://www.abanet.org/journal/ereport/immig.html.

44. *See* William Safire, *You Are a Suspect*, N.Y. TIMES, Nov. 14, 2002, at A35. The Department of Homeland Security will consolidate 22 separate federal agencies, including the INS, Border Patrol, Secret Service, Coast Guard, and Customs, into a huge single agency. *See* John Mintz & Mike Allen, *New Agency's Pieces in Place: Homeland Security Department Could be Running by Late January*, S.F. CHRON., Nov. 14, 2002, at A-3; *A Fragile Balance: Tension Between Security and Privacy Worries Some Observers*, Nov. 16, 2002, *at* http://abcnews.go.com/sections/nightline/Nightline/nl021115_homeland.html (discussing how many have argued that the Department will weaken federal workers' rights to organize).

45. *See generally* Yamamoto et al., *The Loaded Weapon*, *supra* note 7, at 51-62; Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575 (2002); Solomon, *supra* note 10; Ramasastry, *supra* note 41.

46. Elisabeth Bumiller, *Bush Announces a Crackdown on Visa Violators*, N.Y. TIMES, Oct. 30, 2001, *at* http://www.nytimes.com/2001/10/30/national/30BUSH.html.

47. Memorandum from Timothy H. Edgar, ACLU Legislative Counsel, to Interested Parties, regarding President Bush's Order Establishing Military Trials in Terrorism Cases (Nov. 29, 2001), *at* http://archive.aclu.org/congress/l112901b.html.

Prevention System ("TIPS") program, which would recruit civilians to spy on each other.[48]

In this climate, and in light of *Korematsu*, what standards will the Supreme Court employ to review governmental "national security actions inimical to the civil liberties of Americans?" And what "value choices [will be] made to accommodate national security concerns and civil liberties when a court, faced with a 'suspect' government classification, adopts a deferential as opposed to a heightened standard of review in evaluating the government's contention of military necessity?"[49]

B. Lessons from Korematsu*: Will the Court Heed Judge Patel's Caution?*

In 1984, Judge Patel issued a potent caution: institutions, including courts, during national crisis must exercise close scrutiny and vigilance in order to "protect *all* citizens from [] petty fears and prejudices."[50] A key principle implied by her caution is a doctrinal one: heightened standards of review should not be attenuated when evaluating national security restrictions of our cherished civil liberties.[51] The Supreme Court in the original *Korematsu* case and in a range of modern-day cases have ignored this principle.[52] One explanation as to why the Bush administration has proceeded in a seemingly irreconcilable manner with the historical lessons promulgated by the Redress Movement is that the Supreme Court's deferential standard of review actually applied in *Korematsu* has *never* been discarded. In fact, as Professor Yamamoto has observed, some of the Supreme Court's modern-day decisions "suggest a disturbing value judgment reminiscent of *Korematsu*: national security concerns, overt or latent, specifically defined or broadly general, justify essentially unreviewable government restrictions of American civil liberties."[53] Chief Justice Rehnquist has supported this principle. In ignoring the *Korematsu* and *Hirabayashi coram nobis* cases, he has defended the internment as legally valid, at least as to first generation Japanese Americans.[54] He also advised that the judiciary should defer to the executive branch and military during times of war, even in the absence of martial law.[55]

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48. *See* Adam Clymer, *Ashcroft Defends Plan for National Hotline on Terrorism*, N.Y. TIMES, July 25, 2002, *at* http://www.nytimes.com/2002/07/25/politics/25CND-PRIV.html.

49. Yamamoto, *Korematsu Revisited*, *supra* note 14, at 7-8.

50. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

51. *See generally* Yamamoto, *Korematsu Revisited*, *supra* note 14, at 31-33 (positing that the Supreme Court may attenuate heightened standards of review when evaluating national security restrictions on civil liberties).

52. *See* United States v. Albertini, 472 U.S. 675 (1985); Regan v. Wald, 468 U.S. 222 (1984); Haig v. Agee, 453 U.S. 280 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981).

53. Yamamoto, *Korematsu Revisited*, *supra* note 14, at 3-5.

54. *See* Alfred C. Yen, *Introduction: Praising with Faint Damnation—The Troubling Rehabilitation of Korematsu*, 19 B.C. THIRD WORLD L.J. 1 (1999) (discussing William H. Rehnquist, *When the Laws Were Silent*, AMERICAN HERITAGE, Oct. 1998, at 77-89).

55. *Id.*

Notwithstanding, some lower courts recently appear to have paid heed (at least implicitly) to Judge Patel's warning and have carefully scrutinized infringements of our civil liberties. One federal appeals court recently held that the Bush administration acted unlawfully in holding deportation hearings in secret, based only on the government's assertion that the individuals involved have links to terrorism.[56] A federal district court judge also ruled that the Bush administration must reveal the identities of hundreds of people arrested and detained after the September 11 attacks.[57] Finally, a federal district judge recently denied a motion to dismiss an airport screeners' suit, which contends that a post-September 11 federal law barring non-citizens from working as airport screeners is unconstitutional.[58]

When these and other cases reach the Supreme Court, will it heed Judge Patel's caution and scrutinize harsh restrictions of civil liberties? Or might we have a replay of 1944's *Korematsu*? No definitive answers emerge. What is clear, however, is that all concerned about both the nation's security and civil liberties today have a vital role in ensuring that our institutions exercise the vigilance called for by Judge Patel.[59] Asian Americans, especially, have a unique role to play.

C. Political Mobilization and the Special Role of Asian Americans

Today, a broadly conceived political identity is critical to the defense of civil liberties. In 1942, Japanese Americans stood virtually alone, without allies, and suffered the banishment of their entire race. Forty years later, Japanese Americans, supported by Americans of all colors, were able to extract an apology and redress from a powerful nation. That lesson of the need for political empowerment was made even more obvious after September 11, 2001, when Arab and Muslim American communities, politically isolated and besieged by hostility fueled by ignorance, became targets of violence and discrimination.

In the aftermath of September 11, Japanese Americans knew from history that the United States, which turned on them in 1942, could repeat itself in 2001. Therefore, on September 12, 2001, the Japanese American Citizens' League, the oldest Asian American civil rights organization in the country, immediately issued a press release warning against racial discrimination against Arab and Muslim Americans and supporting their

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56. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

57. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002).

58. *See* Gebin v. Mineta, No. 02-0493 (Nov. 13, 2002) (order denying a motion to dismiss for failure to state a claim). *But see In re* Sealed Case, Nos. 02-001, 02-002 (United States Foreign Intelligence Surveillance Court of Review Nov. 18, 2002) (granting the Department of Justice vast authority to expand wiretapping and other surveillance).

59. Yamamoto et al., *The Loaded Weapon*, *supra* note 7, at 59-60.

civil rights.[60] Other Japanese American individuals and groups have offered their friendship, political support, and solidarity with Arab and Muslim Americans.

Japanese Americans also knew from their Redress experience that political power was the strongest antidote. The *coram nobis* legal teams understood the political dimensions of their cases and adopted a course of litigation that would discredit the Wartime Cases by undermining the legal argument that the Supreme Court had legitimized the World War II exclusion and detention. This impaired (though did not overturn) the value of *Korematsu*, *Hirabayashi*, and *Yasui* as legal precedents for mass imprisonments of any definable racial group without due process. The even larger vision of these cases, however, was the long-term education of the American public. Many still believed (and continue to believe) that there were valid reasons for incarcerating Japanese Americans en masse: the *coram nobis* cases strongly refuted that notion and boldly illuminated the essentially political nature of the judicial system. In doing so, the *coram nobis* cases have contributed to the public's education about the frailty of civil rights and the evanescence of justice in our courts. As such, these cases highlight the need for continuing political activism and constant vigilance to protect our civil rights.

In today's climate of fear and uncertainty, we must engage ourselves to assure that the vast national security regime does not overwhelm the civil liberties of vulnerable groups. This means exercising our political power, making our dissents heard, publicizing injustices done to our communities as well as to others, and enlisting allies from diverse communities. Concretely, this may mean joining others' struggles in the courts, Congress, schools and union halls; organizing protests against secret arrests, incarcerations, and deportations; building coalitions with other racial communities; writing op-ed essays or letters to politicians; launching media campaigns; donating money; and writing essays and articles.[61] Through these various ways, "[o]ur task is to compel our institutions, particularly the courts, to be vigilant, to 'protect all.'"[62]

The lesson of the Wartime Cases and *coram nobis* cases taken together is *not* that the government may target an entire ethnic group in the name of national security; the cases teach us instead that civil rights and liberties are best protected by strongly affirming their place in our national character, especially in times of national crisis. As Fred Korematsu avowed nearly twenty years ago, we must not let our governmental

60. Press Release, Japanese American Citizens League (JACL) (Sept. 12, 2001), *available at* http://www.globalexhange.org/september11/JACL091201.html.

61. Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131, 135-38 (2000) [hereinafter Yamamoto, *Beyond* Redress]; Yamamoto et al., *The Loaded Weapon*, *supra* note 7, at 60.

62. Yamamoto et al., *The Loaded Weapon*, *supra* note 7, at 60.

institutions mistreat another racial group in such a manner again. To do this, we must "collectively [turn] the lessons learned, the political and economic capital gained, the alliances forged and the spirit renewed, into many small and some grand advances against continuing harmful discrimination across America."[63] We must become, as Professor Yamamoto has argued, "present-day social actors, agents of justice, because real, hard injustices are occurring all around us every day to Asian Americans and other racial communities and beyond."[64]

63. Yamamoto, *Beyond Redress*, *supra* note 61, at 138.
64. *Id.* at 134-35.