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PRESSURE ON THE TRIGGER WILL NOW FIRE THE WEAPON¹

AN EXAMINATION OF HOW THE SUPREME COURT, CONGRESS, AND PRESIDENTS HAVE LEFT THE LEGAL FOUNDATION FOR EXECUTIVE DETENTION AKIN TO THE WORLD WAR II ERA INTERNMENT OF JAPANESE AMERICANS LARGELY INTACT

*Kevan F. Jacobson**

¹ The title is drawn from language commonly found in small arms training materials. It refers to the fact that once all other steps necessary to place a weapon in a state of readiness to fire have been taken, pressing the trigger will cause the weapon to discharge the ammunition with which it has been loaded. *See, e.g., Defensive Shooting: Part 4 – Trigger Manipulation, Recovery, and Follow-Through*, SPARTAN FIREARMS TRAINING GROUP, LLC (Sept. 15, 2018), <https://www.spartanfirearmstraininggroup.com/defensive-shooting-part-4-trigger-manipulation-recovery-and-follow-through/>.

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ABSTRACT

Contrary to Chief Justice Robert's dicta, *Trump v. Hawaii* (2018) did not overrule *Korematsu v. United States* (1944) which upheld the exclusion of Japanese Americans from the West Coast during World War II. *Korematsu* and its related cases are still troublingly vital. Their expansive reading of the war powers justifying executive detention has been bolstered by the Court's cases addressing detainees held at Guantanamo Bay. *Hamdi v. Rumsfeld* (2004), which sanctioned the detention of a U.S. citizen pursuant to the Authorization for the Use of Military Force, exposed a fundamental weakness in the Non-Detention Act, the principal statutory barrier to executive detention. Today, despite the appalling history of the World War II era internment of Japanese Americans, the authority of the President to employ preventive executive detention remains both remarkably intact and remarkably broad. That authority should be restrained by appropriate amendments to the Non-Detention Act.

INTRODUCTION

On June 26, 2018, the United States Supreme Court issued its opinion in *Trump v. Hawaii*.² The case challenged President Donald J. Trump's authority to impose selected conditions upon the entry into the U.S. by nationals of eight named foreign nations. Chief Justice John Roberts authored the majority opinion which upheld the President's authority to impose such conditions.³ In doing so, the Chief Justice briefly addressed a reference by the dissent to *Korematsu v. United States*,⁴ one of four now ill-famed World War II era Supreme Court cases which dealt with the treatment of Japanese Americans and others of Japanese ancestry who were subject to exclusion and evacuation from the West Coast of the U.S. and subsequent internment during war. In pertinent part, the Chief Justice wrote:

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 dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious:

² *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³ *Id.* at 2415.

⁴ *Id.* at 2423; *Korematsu v. United States*, 323 U.S. 214 (1944).

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.⁵

On the heels of the decision in *Trump*, media outlets rushed to announce that *Korematsu* had at long last been reversed.⁶ But as the Chief Justice wrote, *Korematsu* truthfully had *nothing* to do with the *Trump* case. In fact, *Korematsu* never addressed “[t]he forcible relocation of U.S. citizens” to camps, a matter the Court expressly recognized when it decided that case.⁷ However gratifying the Chief Justice’s remarks were, they were dicta;⁸ stirring, hopeful, and encouraging, but dicta, nonetheless. Accordingly, *Korematsu* and its fellow travelers, live on.

This paper briefly examines the history of the exclusion, evacuation, and internment of 110,000 persons of Japanese ancestry by the U.S. during World War II. It analyzes three U.S. Supreme Court cases which addressed aspects of those measures along with subsequent Congressional actions designed, at least in part, to avoid a repetition of such deprivations of liberty. It explains how these developments have left the legal authority for potential broad scale wartime executive detentions largely intact, raising the troubling prospect of a repetition of our unhappy history should time and circumstances again provoke aggressive reactions to perceived existential national threats. It concludes with a recommendation for legislation which could erect a better bulwark against unjust executive detention in times of war or another dire national emergency.

I. Historical Background

At 7:55 a.m. on Sunday, December 7, 1941, airplanes launched from aircraft carriers of the Imperial Japanese Navy appeared in the skies above Pearl Harbor located on the island of Oahu, Hawaii.⁹ Within the following two

⁵ *Trump*, 138 S. Ct. at 2423 (citing *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., dissenting)).

⁶ See Charlie Savage, *Korematsu, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html>.

⁷ *Trump*, 138 S. Ct. at 2423. *Korematsu* addressed the lawfulness of an order issued by military authorities which excluded the appellant from a specified area - which included his home. It did not address the lawfulness of other measures, including internment in a relocation center. As Justice Black wrote: “Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case.” *Korematsu*, 323 U.S. at 222.

⁸ *Dictum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).”).

⁹ *Remembering Pearl Harbor, A Pearl Harbor Fact Sheet*, CENSUS.GOV,

hours, Japanese airmen killed “2,403 U.S. personnel . . . and destroyed or damaged 19 U.S. Navy ships, including 8 battleships.”¹⁰ The attack shocked the nation and “aroused the people of the United States as no other event in their history ever had.”¹¹ The people “reeled with a . . . staggering mixture of surprise . . . grief, humiliation, and, above all, cataclysmic fury.”¹² Within a day, President Franklin D. Roosevelt asked Congress to declare war against Japan.¹³ Congress passed a Joint Resolution to that effect on December 8.¹⁴

Rumors of Japanese “fifth column” activities, which were alleged to have facilitated the attack, spread broadly in Hawaii.¹⁵ They found receptive ears on the West Coast of the U.S. where they proved “particular[ly] [influential] in the formulation of public attitudes[.]”¹⁶ Wary of sabotage and “[f]earing an invasion of the continent,” citizens, media representatives, members of Congress, and military leaders began to advocate for “strong precautionary measures” including “‘the immediate evacuation of all persons of Japanese lineage’ and other ‘dangerous’ persons from California, Oregon, Washington, and Alaska.”¹⁷

In this highly charged environment, President Roosevelt issued Executive Order 9066 on February 19, 1942.¹⁸ Citing the need to provide “every possible protection against espionage and against sabotage” the President authorized “the Secretary of War, and the Military Commanders whom he may . . . designate . . . to prescribe military areas . . . from which any or all persons may be excluded[.]”¹⁹ Contrary to long-standing public perception, Executive Order 9066 was not explicitly directed at persons of Japanese ancestry.²⁰ As implemented, however, most of those the order would impact were of

<https://www.census.gov/history/pdf/pearl-harbor-fact-sheet-1.pdf> 1 (last visited Nov. 3, 2020).

¹⁰ *Id.*

¹¹ GORDON W. PRANGE, *AT DAWN WE SLEPT, THE UNTOLD STORY OF PEARL HARBOR* 582 (1981).

¹² *Id.*

¹³ Franklin D. Roosevelt, President of the United States, *The President Requests War Declaration 125: December 7, 1941 A Date Which Will Live in Infamy, Address to the Congress Asking That a State of War Be Declared Between the United States and Japan* (Dec. 8, 1941) (transcript available in the Library of Congress).

¹⁴ S.J. Res. 116, 77th Cong. (1941).

¹⁵ PRANGE, *supra* note 11, at 561.

¹⁶ Leonard J. Arrington, *The Price of Prejudice* 4 (Utah State Univ., Working Paper 23, 1962).

¹⁷ *Id.*

¹⁸ Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 25, 1942).

¹⁹ *Id.*

²⁰ *See id.*

Japanese descent and they were clearly intended to be the primary focus.²¹ Approximately 70,000 of these were native born citizens of the U.S..²²

On February 20, 1942, the Secretary of War, Henry L. Stimson, designated Lieutenant General John L. Dewitt, Commanding General, Western Defense Command and Fourth Army, “as the Military Commander to carry out the duties and responsibilities imposed by . . . Executive Order [9066] for that portion of the United States embraced in the Western Defense Command . . . as [deemed] proper to prescribe.”²³ This designation effectively delegated a material degree of the President’s authority as Commander in Chief of the Army to General Dewitt.²⁴

General Dewitt promptly began to exercise his delegated authority; by proclamations on March 2 and 16, 1942, he established “military areas” within the states of Washington, Oregon, California, and Arizona.²⁵ He further established “restricted” and “prohibited” zones within the military areas.²⁶

On March 18, 1942, the President issued Executive Order Number 9102,²⁷ which established the War Relocation Authority (the “WRA”), an executive agency which the order charged with “provid[ing] for the removal from designated areas of persons whose removal is necessary in the interests of national security.”²⁸

General Dewitt issued the first of a series of “Civilian Exclusion Orders” on March 24, 1942.²⁹ Each order prohibited persons of Japanese ancestry from remaining within designated boundaries encompassed by military areas and directed them to be processed through so called “control stations” and “assembly centers,” thereafter to be evacuated and face indefinite internment in so called “relocation centers.”³⁰ By November 1942, approximately 110,000 persons of Japanese ancestry residing in designated military areas had been subjected to the exclusion procedure and interned, pending

²¹ See J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii-viii (U.S. Gov’t Printing Off. 1943).

²² *Japanese-American Internment During World War II*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/japanese-relocation> (last visited Nov. 30, 2020).

²³ See DEWITT, *supra* note 21, at 25–26.

²⁴ See *id.* at 25; see generally U.S. CONST. art. II, § 2, cl. 1 (describing the commander-in-chief power of the president).

²⁵ See DEWITT, *supra* note 21, at 32.

²⁶ See *id.*

²⁷ Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 20, 1942).

²⁸ *Id.*

²⁹ DEWITT, *supra* note 21, at 114.

³⁰ *Id.*

resettlement elsewhere, in one of ten relocation centers distributed across the continental U.S..³¹

While these actions were underway, on March 21, 1942, Congress provided criminal penalties against persons who chose to violate exclusion orders or their attendant regulations.³² Anyone who should “enter, remain in, leave, or commit any act in any military area or military zone . . . contrary to the restrictions applicable to any such area or zone . . . [was] guilty of a misdemeanor and upon conviction [was] liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both[.]”³³

Between the military orders issued pursuant to the delegation of Presidential powers and the penalties for their violation established by Congress, the stage was set for litigation which would test their validity before the U.S. Supreme Court.

II. The Supreme Court Addresses Exclusion, Evacuation, Relocation, and Internment

Four U.S. citizens eventually contested aspects of the exclusion, evacuation, relocation, and internment process in the courts. The Supreme Court ultimately reviewed each case and issued opinions between June 1943 and December 1944. *Hirabayashi v. United States*³⁴ and *Yasui v. United States*,³⁵ were companion cases, both of which addressed convictions for violating curfews to which the appellants had been subjected.³⁶ *Korematsu v. United States*³⁷ examined the constitutionality of a civilian exclusion order, of which the appellant was convicted of violating.³⁸ Lastly, *Ex parte Endo*³⁹ considered whether Endo, a concededly loyal citizen, could be required to comply with an administrative leave procedure as a condition of release from a relocation center.⁴⁰

³¹ See *id.* at 279, 282–84.

³² Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

³³ *Id.*

³⁴ *Hirabayashi v. United States*, 320 U.S. 81, 83–84 (1943).

³⁵ *Yasui v. United States*, 320 U.S. 115, 116 (1943). As a companion case, the Court’s opinion in *Yasui* did little more than sustain Yasui’s conviction on the same grounds as it elaborated extensively in *Hirabayashi* and hence will not be explored further herein.

³⁶ *Hirabayashi*, 320 U.S. at 83; *Yasui*, 320 U.S. at 116.

³⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

³⁸ *Id.* at 215.

³⁹ *Ex parte Endo*, 323 U.S. 283 (1944).

⁴⁰ *Id.* at 293–95.

A. Hirabayashi v. United States

In the spring of 1942, Kiyoshi Hirabayashi was living in Seattle, Washington.⁴¹ On March 24, 1942, General Dewitt issued Public Proclamation No. 3,⁴² providing that as of March 27, 1942, “all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the [curfew] hours of 8:00 P.M. and 6:00 A.M.[.]”⁴³ Acting pursuant to his belief that he would be waiving his rights as a citizen should he comply, Mr. Hirabayashi chose to be “away from his residence after 8 p.m. on May 9, 1942.”⁴⁴ He was subsequently indicted, tried in U.S. District Court, and convicted for violating the act of March 21, 1942.⁴⁵ He was sentenced to confinement for three months.⁴⁶ Before the Supreme Court, Mr. Hirabayashi asserted that “Congress unconstitutionally delegated its legislative power to [General Dewitt] by authorizing him to impose the [curfew], and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibit[ed] the discrimination made between citizens of Japanese descent and those of other ancestry.”⁴⁷

The Court emphasized that the issues must be considered in the light of the “conditions [prevailing] in the early months of 1942.”⁴⁸ Allowing that many matters “were then peculiarly within the knowledge of military authorities,”⁴⁹ the Court observed that it was known that Japan “had gained a naval superiority . . . in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast.”⁵⁰ In light of these circumstances, the Court was content “[t]hat reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the

⁴¹ *Hirabayashi*, 320 U.S. at 88.

⁴² Public Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942).

⁴³ 320 U.S. at 88.

⁴⁴ *Id.* at 84.

⁴⁵ *Id.* at 83.

⁴⁶ *Id.* at 84. Hirabayashi was also convicted of a violation of the March 21 act for having failed to report to a Civil Control Station as had been mandated by Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725 (1942), which General Dewitt issued on May 10, 1942. He was sentenced to a concurrent term of 3 months confinement for that offense. Since the Court ultimately found no “constitutional infirmity” regarding the curfew violation, and since the sentences ran concurrently, the Court declined to consider issues associated with the failure to report to a control station. *Id.* at 85, 105.

⁴⁷ *Id.* at 89.

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* at 94.

⁵⁰ *Id.*

danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.”⁵¹

As to Mr. Hirabayashi’s claim of unconstitutional delegation of legislative power, the Court noted that in issuing Executive Order 9066, the President did so in time of war and for the “declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage.”⁵² When General Dewitt issued proclamations pursuant to the Order, he “recited that the entire Pacific Coast ‘by its geographical location is particularly subject to attack, to attempted invasion...espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations[.]’”⁵³ The Court also noted that the Secretary of War helped instigate the March Act via letters he wrote to Congressional leaders wherein he recommended that Congress “provide means for the enforcement of orders issued under Executive Order No. 9066.”⁵⁴ The Secretary also conveyed General Dewitt’s opinion that any act “‘should be broad enough to enable the [enforcement of] curfews . . . within military areas and zones[.]’”⁵⁵ Congressional Committee reports and Senate floor speeches all explicitly acknowledged that the Act was intended as a means to enforce curfews.⁵⁶ Given this sequence of events, the Court said that “[t]he conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066” and that “so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President.”⁵⁷

In the Court’s view, the real issue was “not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew[.]”⁵⁸ Yet further refined, the issues were

whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal . . . promulgat[e] . . . the curfew order and whether the order itself was an appropriate means of carrying out the Executive Order for the ‘protection

⁵¹ *Id.*

⁵² *Id.* at 92.

⁵³ *Id.* at 86.

⁵⁴ *Id.* at 89.

⁵⁵ *Id.* at 90.

⁵⁶ *See id.*

⁵⁷ *Id.* at 91.

⁵⁸ *Id.* at 91–92.

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against espionage and against sabotage' to national defense materials, premises and utilities.⁵⁹

The Court answered these questions in the affirmative through reliance upon war powers the Constitution vests in the Executive and Legislative branches. Of those powers, the Court said:

The war power of the national government is 'the power to wage war successfully.' It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.⁶⁰

In deference to the political branches, the Court said that the Constitution grants them:

wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it [and that]...[w]here...conditions call for the exercise of judgment and discretion...by those branches...it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.⁶¹

Concluding that the President and Congress had acted together, the Court held that "it was within the constitutional power of Congress and the executive arm of the Government to prescribe [the] curfew order . . . and that its promulgation by the military commander involved no unlawful delegation of legislative power."⁶²

The degree of the Court's deference—and the bases upon which it supposed that the President, Congress, and military leaders had acted—were further revealed in the Court's treatment of Mr. Hirabayashi's assertion that the curfew unlawfully discriminated against citizens of Japanese ancestry.⁶³ First, the Court noted that the coastal regions comprising the relevant military areas contained vast numbers of military installations and defense industrial facilities, including production facilities for ships and aircraft.⁶⁴ Second, the danger of sabotage and espionage in the area was obvious and espionage by "persons with sympathy with the Japanese Government" was believed "to have been particularly effective in the surprise attack on Pearl Harbor."⁶⁵

⁵⁹ *Id.* at 92.

⁶⁰ *Id.* at 93.

⁶¹ *Id.*

⁶² *Id.* at 92.

⁶³ *Id.* at 82, 94–95.

⁶⁴ *See id.* at 95 (noting that approximately one-fourth of U.S. aircraft production occurred in California alone).

⁶⁵ *Id.* at 96.

The Court then went on to indulge an exercise in generalized suspicion of the loyalty of persons of Japanese descent. The Court boldly asserted that “[t]here [was] support for the view that social, economic and political conditions which have prevailed since the close of the last century . . . have intensified [Japanese ethnic] solidarity and have in large measure prevented . . . assimilation as an integral part of the [general] population.”⁶⁶ The Court was satisfied that “Congress and the Executive could reasonably have concluded that [such] conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions” and that the conditions could be taken into consideration “by those charged with the responsibility for the national defense . . . in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack.”⁶⁷ The heart of the matter came down to the following:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, 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 national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.⁶⁸

The Court readily acknowledged the due process and equal protection implications of a curfew based on racial/ancestral distinctions. As it stated: “Distinctions between citizens solely because of their ancestry are by their very nature odious to . . . doctrine[s] of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”⁶⁹ But in the Court’s eye, the ultimate question to be decided was “whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a *reasonable basis* for the action taken in imposing the curfew.”⁷⁰ Ultimately, the Court answered that question and held:

We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense

⁶⁶ *Id.*

⁶⁷ *Id.* at 98–99.

⁶⁸ *Id.* at 99.

⁶⁹ *Id.* at 100.

⁷⁰ *Id.* at 101 (emphasis added).

afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.⁷¹

Having found no constitutional infirmity in Kiyoshi Hirabayashi's conviction, the Court let it stand.⁷²

B. Korematsu v. United States

Fred Korematsu faced prosecution for a violation of the act of March 21, 1942 at about the same time as did Hirabayashi. Mr. Korematsu was a resident of San Leandro, California at the outbreak of war.⁷³ On May 3, 1942, General Dewitt issued Civilian Exclusion Order 34 which excluded persons of Japanese ancestry from San Leandro beginning a mere 5 days later, specifically by 12 noon on May 8, 1942.⁷⁴ Mr. Korematsu elected not to leave San Leandro and was found there on or about May 30, 1942.⁷⁵ Charged with remaining in an area from which he was, by order, excluded, Mr. Korematsu was tried in U.S. District Court where he stipulated that he had knowingly violated the order.⁷⁶ He was convicted with his sentence being suspended during a five year period of probation.⁷⁷ When his case reached the Supreme Court, Mr. Korematsu "challenge[d] the assumptions upon which [the Court rested its] conclusions in the *Hirabayashi* case."⁷⁸ He argued that by the time General Dewitt issued Civilian Exclusion Order Number 34, there was no longer any real threat of a Japanese invasion.⁷⁹

The Court accepted that "exclusion from the area in which one's home is located is a far greater deprivation than [the] constant confinement to [one's] home" during specified hours.⁸⁰ But the Court quickly found *Hirabayashi* dispositive as to the more significant deprivation of liberty.⁸¹

The Court recognized from the outset that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny."⁸² Justice Black, who wrote the Court's opinion, thus suggested that the Court would apply a more exacting standard than the "reasonable" or "rational" basis Chief Justice

⁷¹ *Id.* at 102 (emphasis added).

⁷² *Id.* at 105.

⁷³ *Korematsu v. United States*, 323 U.S. 214, 226 (1944) (Roberts, J., dissenting).

⁷⁴ *Id.* at 229.

⁷⁵ *Id.* at 220 (majority opinion).

⁷⁶ *Id.*

⁷⁷ *Id.* at 230 (Roberts, J., dissenting).

⁷⁸ *Id.* at 218 (majority opinion).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.* at 218–19.

⁸² *Id.* at 216.

Stone articulated in the majority opinion in *Hirabayashi*.⁸³ He reinforced that suggestion by observing that “[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either” curfew or exclusion.⁸⁴ Having thus arguably set a higher standard, Justice Black indicated it could be met provided that constraints bore “a definite and close relationship to the prevention of espionage and sabotage.”⁸⁵

Whatever degree of scrutiny Justice Black thought necessary, the Court was convinced that the exclusion measures were lawful. As it had with regard to the curfew in *Hirabayashi*, the Court “could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal” and thus “temporary exclusion of the entire group” was permissible.⁸⁶ Finding that it was “unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did[.]”⁸⁷ the Court went on to “uphold the exclusion order as of the time it was made and when the petitioner violated it.”⁸⁸

Mr. Korematsu further urged the Court to determine whether detention in an assembly center or relocation center, subsequent to exclusion, would constitute an unlawful deprivation of liberty.⁸⁹ He argued that “the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center.”⁹⁰ Mr. Korematsu, however, had been convicted solely of violating an exclusion order.⁹¹ Accordingly, the Court declined to “go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in [the] case.”⁹²

Thus, *Korematsu* “deal[t] specifically with nothing but an exclusion order.”⁹³ Though the court affirmed Fred Korematsu’s conviction,⁹⁴ it

⁸³ See *Hirabayashi v. United States*, 320 U.S. 81, 94, 102 (1943).

⁸⁴ *Korematsu*, 323 U.S. at 218.

⁸⁵ *Id.*

⁸⁶ *Id.* at 219.

⁸⁷ *Id.* at 217–18.

⁸⁸ *Id.* at 219.

⁸⁹ See *id.* at 221.

⁹⁰ See *id.*

⁹¹ *Id.* at 215–16.

⁹² *Id.* at 222.

⁹³ *Id.* at 223.

⁹⁴ *Id.* at 224.

addressed the essence of the other issues he raised in the *Endo* case which it decided the same day.

C. *Ex parte Endo*

Mitsuye Endo was living in Sacramento, California in early 1942.⁹⁵ Pursuant to Civilian Exclusion Order Number 52,⁹⁶ which General Dewitt issued on May 7, 1942, Ms. Endo was required to leave Sacramento by midday May 16.⁹⁷ Unlike Hirabayashi and Korematsu, she submitted to the order.⁹⁸ She was first sent to an assembly center in Sacramento and thereafter to the Tule Lake Relocation Center in California, arriving there on June 19, 1942.⁹⁹ She was transferred to the Central Utah Relocation Center (Topaz) in the late summer of 1943.¹⁰⁰

Endo's detention at the various centers was administered under the auspices of the WRA.¹⁰¹ On May 19, 1942, General Dewitt issued Civilian Restriction Order Number 1.¹⁰² The order provided that persons then residing in centers were "required to remain within the bounds of ... center[s] at all times unless specifically authorized to leave" by Headquarters, Western Defense Command and Fourth Army.¹⁰³ The order further provided that violators were subject to "the penalties and liabilities provided by law."¹⁰⁴ On August 11, 1942, General Dewitt delegated authority to WRA officials to permit persons to depart centers.¹⁰⁵ The WRA subsequently developed a detailed process by which those detained in centers could first apply to be cleared to leave, and once granted such clearance, could apply for indefinite leave in order to live and work elsewhere.¹⁰⁶

While Endo ultimately applied for leave clearance,¹⁰⁷ she did not, in the meantime, rest upon her rights. She challenged the lawfulness of her detention by petition for a writ of habeas corpus which she filed in federal court in

⁹⁵ *Ex parte Endo*, 323 U.S. 283, 284–85 (1944).

⁹⁶ Civilian Exclusion Order Number 52, 7 Fed. Reg. 3559 (May 13, 1942).

⁹⁷ *Ex parte Endo*, 323 U.S. at 288.

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 285.

¹⁰¹ *Id.* at 290.

¹⁰² *See* Civilian Restrictive Order 1, 8 Fed. Reg. 982 (Jan. 21, 1943).

¹⁰³ *Id.*

¹⁰⁴ *Id.* The relevant law was the Act of March 21, 1942, ch. 191, 56 Stat. 173. *See also Ex parte Endo*, 323 U.S. at 289.

¹⁰⁵ *Ex parte Endo*, 323 U.S. at 290.

¹⁰⁶ *See id.* at 291–93.

¹⁰⁷ *Id.* at 293–94. Endo applied for leave clearance on February 19, 1943 and was granted clearance on August 16 of that year. She did not thereafter apply for leave.

July 1942.¹⁰⁸ She requested that “she be discharged and restored to liberty.”¹⁰⁹ The District Court denied her request a year later.¹¹⁰ Endo’s case finally reached the Supreme Court in May 1944—nearly two years after she first sought a writ.¹¹¹

Endo asserted that she was “a loyal and law-abiding citizen . . . that no charge ha[d] been made against her, that she [was] unlawfully detained, and that she [was] confined . . . under armed guard and held . . . against her will.”¹¹² The Government conceded that she was both loyal and law-abiding and made “no claim that she [was] detained on any charge or that she [was] even suspected of disloyalty.”¹¹³ Moreover, the Government conceded that it was “beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness had been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation.”¹¹⁴ In essence, the Government’s argument for continued detention following the issuance of leave clearance was that it was necessary in order to ensure arrangements could be made for the orderly disposition of those who would be released to carry on with their lives.¹¹⁵

The Court began its analysis by focusing on the roots of the authority for WRA detention: Executive Order Number 9066 and the Act of March 12, 1942.¹¹⁶ The Court recognized them for the war measures that they were.¹¹⁷ To interpret and apply them, the Court emphasized that it “must assume that their purpose was to allow for the greatest possible accommodation between . . . liberties and the exigencies of war.”¹¹⁸

The Court then noted that both the Order and the Act were expressly intended as measures to protect against sabotage and espionage.¹¹⁹ The Order “gave as the reason for the exclusion of persons from prescribed military areas the protection of such property ‘against espionage and against

¹⁰⁸ *See id.* at 285 (“[S]he filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California...”).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 294.

¹¹³ *Id.*

¹¹⁴ *Id.* at 295.

¹¹⁵ *See id.* at 296–97.

¹¹⁶ *Id.* at 298.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 300.

¹¹⁹ *Id.*

sabotage.”¹²⁰ The House report relevant to the Act related that “[t]he necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage.”¹²¹ The “[s]ingle aim [of the measures] was the protection of the war effort against espionage and sabotage.”¹²²

Tellingly, the Court observed that neither the Order nor the Act mentioned detention.¹²³ Given such silence, the Court said, “[A]ny such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.”¹²⁴

The Court then found that there was no nexus between the continued detention of Ms. Endo, a concededly loyal citizen, and the prevention of either espionage or sabotage.¹²⁵ In the Court’s language: “[She] who is loyal is by definition not a spy or saboteur.”¹²⁶ The justification proffered by the WRA, i.e. that it was necessary to continue to detain Ms. Endo in order to facilitate an orderly transition to a life free of such detention, was entirely unrelated to the prevention of the feared hostile acts.¹²⁷ Therefore, as the Court put it: “[w]hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.”¹²⁸ The Court’s ultimate holding was concise: “Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.”¹²⁹

Mitsuye Endo’s success before the Supreme Court may have been of cold comfort. On December 17, 1944, one day before the Court announced its decision in her case, the Western Defense Command, by then commanded by Major General Henry C. Platt, issued Public Proclamation Number 21.¹³⁰ The proclamation effectively revoked all exclusion orders except those pertaining to “[t]hose persons concerning whom specific individual exclusion orders [had] been issued.”¹³¹ With this, and with the decision in *Endo*, conditions

¹²⁰ *Id.* at 301.

¹²¹ *Id.* at 300 (quoting H.R. 1906, 77th Congress (1942)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 301–02.

¹²⁵ *Id.* at 302.

¹²⁶ *Id.*

¹²⁷ *Id.* at 303.

¹²⁸ *Id.* at 302.

¹²⁹ *Id.* at 304.

¹³⁰ Persons of Japanese Ancestry Exemption from Exclusion Orders, 10 Fed. Reg. 53 (Dec. 17, 1944).

¹³¹ *Id.*

were set for the release of almost all those of Japanese ancestry who then remained in relocation centers. The WRA further announced that its intention was that “[a]ll relocation centers [would] be closed within a period of six months to one year[.]”¹³²

III. Post-World War II Congressional Actions

A. *The Emergency Detention Act of 1950*¹³³

The existential threat which the Axis powers posed to the free world ended with the unconditional surrender of Germany in May of 1945 followed by that of Imperial Japan in September of that year.¹³⁴ But the end of the “hot-test” war the world had yet known carried with it the seeds of the so-called Cold War. Finding in September 1950 the existence of “a world Communist movement...whose purpose it [was], by . . . espionage, sabotage, . . . and . . . other means . . . , to establish a Communist totalitarian dictatorship in all the countries of the world.”¹³⁵ Congress determined that “[t]he detention of persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage [was], in a time of internal security emergency, essential to the . . . defense . . . of the United States.”¹³⁶ Accordingly, Congress passed the Emergency Detention Act (the “EDA”) which authorized preventive detention by the Executive Branch under defined conditions and subject to considerable procedural protections on the part of anyone subjected to the Act.¹³⁷

B. *The Non-Detention Act*¹³⁸

Neither President Harry S. Truman nor any of his successors invoked the EDA.¹³⁹ Though dormant, it was not forgotten. The cultural, social, and

¹³² Memorandum from the Dir. of the War Relocation Auth. to Evacuees Resident in Relocation Ctrs. 4 (Jan. 1945) (on file with the National Archives).

¹³³ Emergency Detention Act of 1950, Pub. L. 81-831, 64 Stat. 1019.

¹³⁴ *Axis Alliance in World War II*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/axis-alliance-in-world-war-ii> (last visited Nov. 8, 2020).

¹³⁵ Emergency Detention Act § 101(1).

¹³⁶ *Id.* at § 101(14).

¹³⁷ *See id.* at §§ 102–105, 109–111.

¹³⁸ Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified at 18 U.S.C. § 4001(a)) (prohibiting the establishments of detention camps).

¹³⁹ President Truman opposed passage of the EDA and vetoed it. Congress thereafter overrode the veto. *Vetoes by President Harry S. Truman*, U.S. SENATE, <https://www.senate.gov/legislative/vetoes/TrumanHS.htm> (last visited Nov. 17, 2020). When President Richard M. Nixon signed the EDA, he remarked that no president had invoked it and that its existence had “aroused concerns...that the act might someday be used to apprehend and detain citizens who [held] unpopular views.” Richard Nixon, President of the United States, Statement on Signing Bill Repealing the Emergency Detention Act of 1950 (Sept. 25, 1971) (transcript available in the University of Michigan Digital Library).

political unrest of the 1960s fostered anxiety about how the Federal Government might respond to public disorder and helped drive Congressional interest in reexamining the EDA. For example, in 1969, Senator Daniel Inouye introduced legislation which would repeal the act.¹⁴⁰ He wrote the chairman of the Senate Judiciary Committee on December 4, 1969 stating:

I [am] aware of the widespread rumors circulated throughout our Nation that the Federal Government was readying concentration camps to be filled with those who hold unpopular views and beliefs. These rumors are...believed in many urban [areas] as well as by those dissidents who are at odds with many of the policies of the United States. There is a current mood of tension among some citizens in our land which does not permit these rumors...to be laid to rest. I believe that the [EDA] stands as a barrier to trust between some of our citizens and the Government. For these reasons I hope your committee will immediately and favorably consider...my legislation to repeal the [EDA].¹⁴¹

In his own letter to the Committee chair on behalf of the Nixon Administration, Deputy Attorney General Richard G. Kleindienst invoked the shadows of World War II internments:

[T]he [EDA] has aroused among many of the citizens of the United States the belief that it may one day be used to accomplish the apprehension and detention of citizens who hold unpopular beliefs and views. In addition, various groups, of which our Japanese-American citizens are most prominent, look upon the legislation as permitting a recurrence of the roundups which resulted in the detention of Americans of Japanese ancestry during World War II. It is therefore quite clear that the continuation of the [EDA] is extremely offensive to many Americans. In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions - unfounded as they may be - of many of our citizens. This benefit outweighs any potential advantage which the act may provide in a time of Internal security emergency. Accordingly, the Department of Justice recommends the repeal of the [EDA].¹⁴²

Congressional efforts to readdress the EDA culminated on September 25, 1971.¹⁴³ Following debate which included extensive discussion of the need to avoid a repetition of detentions such as those suffered by Japanese Americans between 1942 and 1945,¹⁴⁴ Congress passed Public Law 92-128.¹⁴⁵ It amended 18 U.S.C. §4001(a) to read: “(a) No citizen shall be imprisoned or

¹⁴⁰ LOUIS FISHER, CONG. RSCH. SERV., RS22130, DETENTION OF U.S. CITIZENS 3 (2005).

¹⁴¹ S.R. No. 91-162, at 40702 (1969).

¹⁴² U.S. CONG. HOUSE JUDICIARY COMM., PROHIBITING DETENTION CAMPS: HEARING BEFORE SUBCOMMITTEE NO. 3, at 98 (1971).

¹⁴³ FISHER, *supra* note 140, at 1.

¹⁴⁴ 117 CONG. REC. 31534 (1971).

¹⁴⁵ Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347-48 (codified at 18 U.S.C. § 4001(a)).

otherwise detained by the United States except pursuant to an Act of Congress.”¹⁴⁶ It also repealed the EDA in its entirety.¹⁴⁷

C. *The Civil Liberties Act of 1988*¹⁴⁸

Continued advocacy to confront the deprivations and losses associated with the World War II internments, notably by the Japanese American Citizens League,¹⁴⁹ spurred Congress to take further action in the 1980s. On July 31, 1980, Congress passed the Commission on Wartime Relocation and Internment of Civilians Act.¹⁵⁰ The act established a commission with a charter “to review the facts and circumstances surrounding Executive Order Number 9066...and the impact of [the] order on American citizens and permanent resident aliens;” examine the military directives which led to the relocation and internments; and “recommend appropriate remedies.”¹⁵¹

The Commission submitted its report, *Personal Justice Denied*, in two parts: factual matters in December 1982 and recommendations in June 1983.¹⁵² In essence, the Commission found that “Executive Order 9066 was not justified by military necessity, and the decisions that followed from it . . . were not founded upon military considerations. The broad historical causes that shaped these decisions were race prejudice, war hysteria and a failure of political leadership.”¹⁵³ The Commission made five recommendations: (1) Congress and the President should acknowledge the grave injustice which was done and issue a national apology; (2) the President should pardon those convicted of violating curfews and the Department of Justice should review other wartime convictions with a view toward recommending appropriate Presidential pardons; (3) Federal executive agencies should grant liberal consideration to any applications made for the restoration of any positions, status, or entitlements lost as a consequence of exclusion, evacuation and

¹⁴⁶ 18 U.S.C. § 4001(a).

¹⁴⁷ Act of Sept. 25, 1971 § 2(a) (repealing Title II of the Internal Security Act of 1950 (50 U.S.C. § 811–826)).

¹⁴⁸ Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903.

¹⁴⁹ The League, commonly known by its acronym JACL, succinctly describes itself and its mission on its website as follows: “Founded in 1929, the JACL is the oldest and largest Asian American civil rights organization in the United States. The JACL monitors and responds to issues that enhance or threaten the civil and human rights of all Americans and implements strategies to effect positive social change, particularly to the Asian Pacific American community.” See *About: JACL, JAPANESE AM. CITIZENS LEAGUE*, <https://jacl.org/about/> (last visited Nov. 5, 2020).

¹⁵⁰ Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980).

¹⁵¹ *Id.* at §§ 4(a)(1)–(3), 94 Stat. 964, 965.

¹⁵² *Personal Justice Denied*, NAT’L ARCHIVES, <https://www.archives.gov/research/japanese-americans/justice-denied> (last visited Nov. 5, 2020).

¹⁵³ JOAN Z. BERSTEIN ET AL., COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS 5 (1983).

relocation; (4) Congress should establish a fund to support an educational and humanitarian foundation devoted to preserving the history of the wartime events and the study of similar denials of civil liberties; and (5) Congress should appropriate sufficient funds to provide \$20,000 in personal redress to living persons who had suffered exclusion.¹⁵⁴

Five years later, Congress acted upon the Commission's recommendations by passing the Civil Liberties Act of 1988.¹⁵⁵ The act included provisions implementing all five recommendations with no material changes.¹⁵⁶ These included a Statement of Congress containing acknowledgements that “a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II,” and that such persons had “suffered enormous damage [and] significant human suffering for which appropriate compensation has not been made.”¹⁵⁷ Congress then declared, “For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”¹⁵⁸

When President Ronald Regan signed the act he stated, “[W]e gather here today to right a grave wrong. [W]e admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law.”¹⁵⁹

IV. A Dangerous Legacy - The Continued Vitality of *Hirabayashi*, *Korematsu*, and *Endo*

The passage of time, the perception of lessening threats, legislative changes, the documentation of, acknowledgement of, and apology for wrongs, the vacation of convictions, along with token compensation, may have helped cause the reality of World War II executive detentions to fade in the collective national memory. But a conclusion that the legal underpinnings

¹⁵⁴ *Id.* at 8–10.

¹⁵⁵ Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903.

¹⁵⁶ The Commission recommended that Congress appropriate \$1.5 billion to fund personal redress payments. BERSTEIN ET AL., *supra* note 153, at 9. In the Act, Congress authorized \$1.25 billion for this purpose. Civil Liberties Act of 1988 § 104(e). Congress did, however, extend eligibility for payments to select heirs of former internees who died before payment could be made to them. *Id.* at § 105(a)(7).

¹⁵⁷ *Id.* at § 2(a).

¹⁵⁸ *Id.*

¹⁵⁹ Ronald Regan, President of the United States, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1998) (transcript available at the Ronald Reagan Presidential Libr. & Museum). Among many notable milestones of the campaign to right wrongs was the eventual vacation of the criminal convictions of Hirabayashi, Yasui, and Korematsu. In the mid-1980s, all three men prevailed in cases they brought seeking writs of *coram nobis*. See *Hirabayashi v. United States*, 627 F.Supp. 1445, 1457–58 (W.D. Wash. 1986) (vacating one conviction and upholding another); *United States v. Hirabayashi*, 828 F.2d 591, 608 (9th Cir. 1987) (vacating both convictions against Hirabayashi); *Yasui v. United States*, 772 F.2d 1496, 1497 (9th Cir. 1985); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

of such detentions have been effectively overruled or amended away is ill founded. Instead, careful analysis suggests that a number of other conclusions are warranted.

A. *Executive Detention can be a Legitimate Exercise of the War Power.*

Some of what the World War II era cases stand for is clearly gone. Their darkest aspect was their explicit reliance upon racial stereotypes to justify profound deprivation of liberties.¹⁶⁰ Fortunately, such irrational bases for governmental action could not now be sustained. *Brown v. Board of Education*¹⁶¹ long ago condemned the practice of denying educational opportunities to public school students based solely upon their race.¹⁶² The Court later invoked both *Hirabayashi* and *Korematsu* when it decided *Loving v. Virginia*.¹⁶³ It recalled *Hirabayashi's* dictum that “[d]istinctions between citizens solely because of their ancestry’ [were] ‘odious . . . to . . . equality.’”¹⁶⁴ It cited *Korematsu* favorably for the proposition that “‘the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny[.]””¹⁶⁵ The *Loving* Court famously went on to hold that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”¹⁶⁶ While both *Brown* and *Loving* addressed and vindicated key liberty interests, i.e., education and marriage, they did not address *liberty in its essence*, which is “freedom from physical restraint.”¹⁶⁷ Should the Court be asked today to sustain the deprivation of that most basic liberty, in the form of executive detention based solely upon racial distinctions or classifications, there can likewise be no doubt that it would find a glaring Constitutional violation.

If, however, the World War II cases are stripped of their racial odium, much of their substance remains undisturbed. All other considerations aside, the Court has not to date directly encountered their equivalents since they were decided and hence has had no formal opportunity to authoritatively reverse them. *Trump v. Hawaii*¹⁶⁸ did not present such an opportunity as it did

¹⁶⁰ See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943); *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944).

¹⁶¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹⁶² See *id.* at 495 (holding that racial segregation in education was unconstitutional).

¹⁶³ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁶⁴ *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

¹⁶⁵ *Id.* (quoting *Korematsu v. United States*, 323 U.S., 214, 217–19 (1944)).

¹⁶⁶ *Id.* at 12.

¹⁶⁷ See *Obergefell v. Hodges*, 576 U.S. 644, 725–26 (2015) (Thomas, J., dissenting).

¹⁶⁸ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

not examine restraints upon the liberties of Americans subject to wartime executive detention measures. It dealt instead with “. . . whether the President had authority under the [Immigration and Nationality] Act to issue [a] Proclamation, and whether the entry policy [announced in the Proclamation] violate[d] the Establishment Clause of the First Amendment.”¹⁶⁹ The Proclamation “. . . impose[d] entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks.”¹⁷⁰ As dicta, Chief Justice Robert's observation that *Trump* overruled *Korematsu* was limited in its jurisdictional reach to “the court of history”¹⁷¹ rather than serving as binding legal precedent among the nine current or future justices of the Supreme Court. Justices Sotomayor's and Ginsburg's assertion in their dissent “that the Court [had taken] the important step of finally overruling *Korematsu*”¹⁷² was thus overblown.

The critical remnant from World War II cases is what they have to say about the war powers of the political branches. It is true enough that in the cases the Supreme Court did not face any litigant who was a traitor, spy, saboteur, or who was otherwise disloyal to the U.S. But that does not detract from the authority of the Government—and what the cases said about that authority—to address persons who actually *do* constitute such threats.

Justice Stone, from the dusty pages of *Hirabayashi*, still tells us that “The war power . . . is ‘the power to wage war successfully’ [and] extends to every matter and activity [that] substantially . . . affect[s] its conduct and progress.”¹⁷³ Further, that power allows for broad “judgment and discretion in . . . the selection of the means” of waging war.¹⁷⁴ The Court found that the imposition of restraint associated with a curfew was a constitutionally permissible exercise of the discretion allowed under the war power.¹⁷⁵ If, in the future, a given curfew is *in fact* rationally based, it may very well be deemed a legitimate exercise of the war power— however irrational the curfew was in actuality against a guileless Kiyoshi Hirabayashi.

Fred Korematsu never plotted the destruction of defense plants. But Justice Black still speaks down through the years that “the gravest imminent danger to the public safety can constitutionally justify [curfews and

¹⁶⁹ *Id.* at 2403.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 2423.

¹⁷² *Id.* at 2448 (Sotomayor, J., dissenting).

¹⁷³ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles E. Hughes, *War Powers Under the Constitution*, 40 ANNU. REP. AM. B. ASS'N 232, 238 (1917)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 92, 102.

exclusions]” so long as they bear “a definite and close relationship to the prevention of [wartime] espionage and sabotage.”¹⁷⁶

For over two years, Mitsuye Endo, a concededly loyal American, languished in harsh desert camps while she patiently litigated the lawfulness of her detention.¹⁷⁷ The ghost of Justice Douglas continues to whisper, “[w]hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.”¹⁷⁸ But if one listens carefully, one will also hear it utter that, given the war power, *Endo* “does not, of course, mean that any power to detain is lacking.”¹⁷⁹

More recent cases reinforce and buttress the reality of the war power as it relates to executive detention. In *Rasul v. Bush*,¹⁸⁰ *Hamdi v. Rumsfeld*,¹⁸¹ *Hamdan vs. Rumsfeld*,¹⁸² and *Boumediene v. Bush*,¹⁸³ the Supreme Court expounded procedural protections due to persons detained as enemy combatants by the U.S. at Naval Station Guantanamo Bay, Cuba, following the terrorist attacks of September 11, 2001.¹⁸⁴

Hamdi, a U.S. citizen, was believed to have fought with Taliban forces in Afghanistan following the U.S. invasion of that country in 2001.¹⁸⁵ He alleged that his detention was in violation of the Fifth and Fourteenth Amendments.¹⁸⁶ Justice O’Connor, author of the plurality opinion, articulated a central question as “[w]hether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”¹⁸⁷ The plurality ultimately found that

¹⁷⁶ *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

¹⁷⁷ See Stephanie Buck, *Overlooked No More: Mitsuye Endo, a Name Linked to Justice for Japanese-Americans*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/10/09/obituaries/mitsuye-endo-overlooked.html>.

¹⁷⁸ *Ex parte Endo*, 323 U.S. 283, 302 (1944).

¹⁷⁹ *Id.* at 301.

¹⁸⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁸¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁸² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁸³ *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁸⁴ A primary issue in each of the cases was the extent to which the detainees enjoyed the right to habeas corpus review of their detention. *Rasul* found it as a matter of statutory right, even for non-citizens. *Rasul*, 542 U.S. at 484. *Hamdi* reiterated that it always applies to citizens. *Hamdi*, 542 U.S. at 525. *Hamdan* found that federal courts retained habeas jurisdiction despite a Congressional attempt to withdraw it. *Hamdan*, 548 U.S. at 584. Finally, *Boumediene* held that habeas extended to noncitizens held at the Naval Station as a matter of constitutional right. *Boumediene*, 553 U.S. at 771.

¹⁸⁵ *Hamdi*, 542 U.S. at 510.

¹⁸⁶ *Id.* at 511.

¹⁸⁷ The plurality limited the reach of its opinion to enemy combatants as that term was defined by the Government for the purposes of the case, that is, persons who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States.” *Id.* at 516. Chief Justice Rehnquist, and Justices Kennedy and Breyer joined Justice O’Connor. *Id.* at 508. Justice Souter authored a separate opinion, joined by Justice Ginsburg, in which he

authority in the guise of the Authorization for Use of Military Force (the “AMUF”)¹⁸⁸ by which Congress granted President George W. Bush authority “to use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001[.]”¹⁸⁹ Justice O’Connor concluded that “detention of [enemy combatants] . . . is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”¹⁹⁰ The plurality also found that there was “no bar to this Nation’s holding one of its own citizens as an enemy combatant.”¹⁹¹

While he concurred with the plurality’s judgment, Justice Souter was unwilling to find, in general, that the AUMF authorized Hamdi’s detention,¹⁹² but acknowledged one argument for it to be considered as approval: that the AUMF empowered “the military and its Commander in Chief . . . to deal with enemy belligerents *according to the treaties and customs known collectively as the laws of war.*”¹⁹³

The ultimate question in *Boumediene* was ‘whether [non-citizen petitioners had] the *constitutional* privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause[.]’¹⁹⁴ The Court held in the affirmative as to this issue.¹⁹⁵ But the Court tempered its holding by forthrightly acknowledging the robust character of the war power. Justice Kennedy wrote for the majority that “[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of

concurrent in part, dissented in part, but concurred with the Court’s judgment. *Id.* at 539.

¹⁸⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified as amended at 50 U.S.C. § 1541 (2001)).

¹⁸⁹ *Id.*

¹⁹⁰ *Hamdi*, 542 U.S. at 518.

¹⁹¹ *Id.* at 519. The Court relied in part on *Ex parte Quirin* in setting forth its proposition. The *Quirin* case reviewed the trial by military commission of eight German agents who were apprehended in the U.S. in 1942. *Ex parte Quirin*, 317 U.S. 1, 18, 21 (1942). They had been trained in Germany as saboteurs, transported to America via German submarines, and landed here at locations on the east coast. *Id.* at 21. One of them, Herbert Hans Haupt, maintained that he was a naturalized U.S. citizen. *Id.* at 20. The Court in *Quirin* affirmed the convictions, as well as the capital sentences of Haupt and several of his fellow agents. *Id.* at 48. Justice O’Connor wrote that in *Quirin* “[w]e held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.’” *Hamdi*, 542 U.S. at 519 (citing *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942)). Justice O’Connor observed that “[w]hile Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of these levanted hostilities.” *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942)).

¹⁹² *Hamdi*, 542 U.S. at 545 (Souter, J., concurring).

¹⁹³ *Id.* at 548 (Souter, J., concurring) (emphasis added).

¹⁹⁴ *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

¹⁹⁵ *Id.*

terrorism, *proper deference must be accorded to the political branches*¹⁹⁶ and “[t]he law *must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.*”¹⁹⁷ And of everything in the cases from the two different eras regarding the war powers, no comment is perhaps more significant than this by Justice Kennedy: “[I]t has been [thus far] possible to leave the outer boundaries of war powers undefined.”¹⁹⁸

In truth, the outer boundaries of the war powers do remain undefined. Yet, the Court has thus far left squarely within those otherwise ill-defined borders readily available authority for a President to employ executive detentions. When ridded of its irrational raced-based distinctions, *Hirabayashi* still stands as authority for rationally based curfews as a wartime security measure.¹⁹⁹ *Korematsu*, similarly purged, still holds that exclusion from specified areas can be sustained on similar grounds.²⁰⁰ *Endo* does *not* bar the executive detention of persons, regardless of citizenship, if they *can* be legitimately determined to pose clear and present dangers to national security.²⁰¹ *Hamdi* establishes that U.S. citizens, properly classified as enemy combatants, may lawfully be subjected to executive detention as an incident of war.²⁰² Lastly, *Boumediene*, which suffers from none of the deserved taint of the World War II era cases, is a contemporary reminder that judicial deference is still due to an Executive possessed of “substantial authority to apprehend and detain those who pose a real danger to our security.”²⁰³

In the absence of more definitive margins to the war power, the detention cases collectively remain an open invitation to the political branches to define the limits for themselves.

B. The Non-Detention Act is a Thin Shield against Executive Detention

The Non-Detention Act (the “NDA”) invoked the memory of the detention of Japanese Americans and sought to prevent similar events after its passage.²⁰⁴ In effect, however, all the NDA did was to require

¹⁹⁶ *Id.* at 796–97 (emphasis added) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936)).

¹⁹⁷ *Id.* at 797 (emphasis added).

¹⁹⁸ *Id.* at 797–98.

¹⁹⁹ See *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943).

²⁰⁰ See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

²⁰¹ See *Ex parte Endo*, 323 U.S. 283, 297, 301–302 (1944).

²⁰² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004).

²⁰³ *Boumediene*, 553 U.S. at 797.

²⁰⁴ Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347, 348.

that Congress sanction future detentions in its own right.²⁰⁵ As laudable as Congressional motives may have been in 1971, it must not be forgotten that Congress itself approved the World War II detentions when it passed the act of March 21, 1942,²⁰⁶ well before most of those who would be detained would look out upon America from within the wire surrounding a relocation center.²⁰⁷

The *Hamdi* decision illustrates that Congressional sanction of war-time detentions can still take similar form. Hamdi argued that the President lacked authority to detain him, citing the NDA.²⁰⁸ Relying upon §4001(a) which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress[.]” Hamdi’s position was essentially that Congress had passed no act authorizing the type of detention to which he was subject.²⁰⁹ Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer, four of the five members of the Court who produced a plurality opinion, were satisfied that the AUMF *explicitly* authorized detention of Hamdi—a U.S. citizen—in the face of his Non-Detention Act challenge. As Justice O’Connor wrote:

[W]e conclude that *the AUMF is explicit congressional authorization for the detention* of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied §4001(a)’s requirement that a detention be ‘pursuant to an Act of Congress’ (assuming, without deciding, that §4001(a) applies to military detentions).²¹⁰

In other words, the four justices were content that the AUMF, which approved “‘all necessary and appropriate force,’” also approved the detention of Hamdi as “a fundamental and accepted . . . incident to war” during a war Congress authorized the President to wage.²¹¹ To the extent, then, that detention of persons who can be proven to constitute imminent security threats can be construed as a fundamental incident of war, and thus of the war power, the requirements of NDA may well be satisfied by a general Congressional approval of Presidential resort to that power.

Such approval could be found in a declaration of war. Article I, Section 8, Clause 11 of the U.S. Constitution grants Congress the sole authority to

²⁰⁵ *See id.*

²⁰⁶ Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

²⁰⁷ *See* DEWITT, *supra* note 21, at 279, 282–84.

²⁰⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

²⁰⁹ *Id.*

²¹⁰ *Id.* (emphasis added).

²¹¹ *Id.* at 518.

declare war.²¹² Though it has this authority, Congress has long since proven unwilling or incapable of assuming the political responsibility for its exercise. The last time it invoked its authority was early in the United States' involvement in World War II, when on June 5, 1942, it declared war against Bulgaria, Hungary, and Rumania.²¹³ Future declarations seem unlikely.

Some Congressional reluctance is understandable given international developments since 1945. In the aftermath of World War II, the United States, along with most of the other nations of the world, committed to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²¹⁴

It can be argued, however, that it is equally, if not more likely, that Congress has refrained from using its authority due to domestic political considerations. Since World War II, Congress has commonly chosen to approve the use of military force—the waging of war in all practical senses—through resolutions akin to the AUMF.²¹⁵ Half measures when compared to declarations of war, such resolutions on the one hand represent Congressional approval of the use of force by the President, but on the other provide a measure of political cover should Congress subsequently develop a mind to criticize how the President pursues a war it authorized.

The historical reluctance of Congress to assume a more proactive role in how the nation resorts to military force represents its own form of deference to the Executive. A deferential or pliant legislative branch may content itself to remain silent regarding the constraints of the EDA, referencing it in neither authorizations nor any future declarations of war. Or it might otherwise refrain from reinforcing it should a President affirmatively test its limits—and simply await the political fallout of such a test.

²¹² U.S. CONST. art. I, § 8, cl. 11 (“[The Congress shall have Power] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[.]”).

²¹³ H.R.J. Res. 319, Pub. L. No. 77-563, 56 Stat. 307 (1942); H.R.J. Res. 320, Pub. L. No. 77-564, 56 Stat. 307 (1942); H.R.J. Res. 321, Pub. L. No. 77-565, 56 Stat. 307 (1942).

²¹⁴ U.N. Charter art. 2, ¶ 4.

²¹⁵ The Joint resolution to promote the maintenance of international peace and security in Southeast Asia was the so called “Gulf of Tonkin Resolution” which authorized President Lyndon Johnson “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” H.R.J. Res. 1145, Pub. L. No. 88-408, 78 Stat. 384 (1964). It served as the legal basis for the subsequent broad scale engagement of the U.S. in the Vietnam War. *Gulf of Tonkin Resolution*, HISTORY (June 7, 2019), <https://www.history.com/topics/vietnam-war/gulf-of-tonkin-resolution-1>. The Joint resolution to authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678 provided the legal authority for the President George H.W. Bush to commit U.S. forces in the Gulf War against Iraq. H.R.J. Res. 77, Pub. L. No. 102-1, 105 Stat. 3,4 (1991); Stephen Knott, *George H. W. Bush: Foreign Affairs*, MILLER CTR., <https://millercenter.org/president/bush/foreign-affairs> (last visited Nov. 12, 2020).

The relative passivity of Congress has left a state of affairs wherein it is quite possible that leaders “of wisdom and of reach, with windlasses and with assays of bias, by indirections [may] find directions out[.]”²¹⁶ In other words, as did Justice O’Connor and those who joined her, a future President and a future Court might find sufficient *explicit* Congressional sanction for executive detentions *indirectly* rather than *directly*. Under the strain of a future national security crisis, the Non-Detention Act, as it is currently written, may thus prove to be an easily penetrated shield.

V. The Bases for Executive Detention and the Proof Required to Sustain it Remain Matters of Broad Discretion by the Political Branches

The detentions and other constraints on liberty of 1942 to 1945 were putatively justified as measures meant to protect against sabotage and espionage.²¹⁷ However, none of the cases that reached the Supreme Court purported to establish a standard of proof or a procedure by which a person might be determined to be an actual potential spy or saboteur.²¹⁸ On the other hand, none of them stand for the proposition that appropriate definitions, standards of proof, and procedures, to support detentions could *not* be developed. Indeed, the essence of *Endo*, the case which dealt most directly with long term detention, is that a “concededly loyal” American could not be subjected to detention— not “that any power to detain [was] lacking.”²¹⁹

The post 9/11 cases are no barrier to the development of standards either. They all involved persons who at some point had been designated as enemy combatants and who thus threatened security.²²⁰ But the Court did little to elaborate on what that term meant, nor did it ever materially question the authority of the Executive to define the term and then rely upon it. Justice O’Connor observed in *Hamdi* that while “the Government [had] never provided any court with the full criteria that it uses in classifying individuals” as combatants, but:

[i]t [had] made clear... that, for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individual who, it alleges, was ‘part of or supporting

²¹⁶ WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 2, sc. 1., l. 69.

²¹⁷ Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 25, 1942).

²¹⁸ See e.g. *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 538–39 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

²¹⁹ *Ex parte Endo*, 323 U.S. 283, 301 (1944).

²²⁰ *Rasul*, 542 U.S. at 470–71; *Hamdi*, 542 U.S. at 510–11; *Hamdan*, 548 U.S. at 570; *Boumediene*, 553 U.S. at 734.

forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States.'²²¹

The Court was content to use that definition to resolve the case.²²²

Following the decision in *Hamdi*, the Department of Defense publicly defined the term in an order issued by Deputy Secretary of Defense Paul Wolfowitz on July 7, 2004.²²³ As the order provided, an enemy combatant was "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."²²⁴ Thus, the definition was essentially what the Court accepted in *Hamdi*.

The Court in *Boumediene v. Bush* likewise supplied no further insight regarding the character or limits of the definition. It made but two references and both were passing remarks to it "as the Department of Defense defines that term."²²⁵ In the end, the Court made clear that it affirmatively declined to address the *substance* of standards regarding who might be subjected to executive detention. As Justice Kennedy wrote in *Boumediene*, "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention."²²⁶ The Court likewise refrained from any attempt to quantify a burden of proof, remarking instead: "The extent of the showing required of the Government in these cases is a matter to be determined."²²⁷

In the presence of such a vacuum, the President and/or Congress are left with potentially broad discretion to define who and what might threaten national security and how such threats may be proven. After the attacks of 9/11, the President effectively did so with regard to the unprivileged belligerents he chose to call "enemy combatants" in order to detain those who had been captured and thus "prevent [their] return to the battlefield [all as] a fundamental incident of waging war."²²⁸

²²¹ *Hamdi*, 542 U.S. at 516.

²²² *Id.* ("We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.")

²²³ Letter from the Deputy Sec'y of Defense to the Sec'y of the Navy (July 7, 2004) (on file with the Dep't of Defense).

²²⁴ *Id.*

²²⁵ *Boumediene*, 553 U.S. at 733, 788.

²²⁶ *Id.* at 798.

²²⁷ *Id.* at 787.

²²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

Combatants, privileged or otherwise, are obviously not the only persons who can pose imminent threats to national security in times of war.²²⁹ Nothing in the detention cases prevents the political branches from developing appropriately tailored, rational, and justly drawn standards addressing such threats should they be posed by non-combatant U.S. citizens or others. An invitation to do so, likewise, remains open.

VI. Filling the Vacuum - A Recommendation for Legislation

Whether by chance, luck, fate, or the steady ebb and flow of history itself, the U.S. has been spared from executive detentions like those imposed during World War II. The boldest step in the direction of detention was likely the passage of the Emergency Detention Act,²³⁰ which was repealed nearly 50 years ago.²³¹

Yet the very instrument of that repeal, the Non-Detention Act, when viewed in the stark light of the war power authorities which remain from the World War II cases, further brightened by those indicated in the cases from the era of the so called Global War on Terror, continues to help prop open the door to potentially broad based executive detention.²³² That door can be closed.

If the will of Congress is that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to”²³³ an explicit act of its own, it should amend 8 U.S.C. § 4001 to foreclose the possibility that either a declaration of war or a Congressional authorization for the use of military force, standing alone, constitute the required act. Such an amendment could take this form:

²²⁹ Laws and Customs of War on Land (Hague, IV), Annex to the Convention, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 (“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war . . . In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’ . . . The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war . . . The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”). Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 (noting similar provisions exist in Article 4 of convention).

²³⁰ Emergency Detention Act of 1950, Pub. L. No. 81-831, 64 Stat. 1019.

²³¹ Act of Sept. 25, 1971, Pub. L. No. 92-128, § 2(a), 85 Stat. 347–48 (codified at 50 U.S.C. §§ 811–826) (repealing the Emergency Detention Act of 1950).

²³² *Id.* at § 2(a), 85 Stat. 348.

²³³ 18 U.S.C. § 4001(a).

Unless imprisonment or detention of citizens is expressly authorized by Congress as an incident of war in the text of a Declaration of War made by Congress pursuant to Article I, Section 8, Clause 11 of the U.S. Constitution or in the text of any authorization to use military force, neither said Declaration nor authorization constitutes an Act of Congress for purposes of this section.

In order to accommodate the vital need during military operations to capture, control, and detain enemy belligerents, whether privileged or unprivileged, Congress could further provide:

Nothing in this section prevents the detention or imprisonment of any person, regardless of citizenship, who is either a privileged or unprivileged belligerent under the Law of Armed Conflict as defined by custom, practice, treaty, convention, or other international agreement, including, but not limited to, Laws and Customs of War on Land (Hague IV) and the Geneva Convention (III) Relative to the Treatment of Prisoners of War.

To accommodate potential U.S. specific national preferences or practices, Congress could also include language which excluded belligerents defined in a manner consistent with how the Department of Defense has described "enemy combatants."²³⁴

Presidents could perceive that amendments of this nature would intrude upon the war making prerogatives of the Commander-in-Chief²³⁵ and thus, represent an unconstitutional breach of the principle of separation of powers. Should such Congressional amendments be enacted, and should such a Presidential challenge be made, the Court might be confronted with a reality about which Justice Kennedy cautioned in *Boumediene*, i.e. that in the future “. . . the Court might not have the luxury” “to leave the outer boundaries of war powers undefined.”²³⁶

CONCLUSION

This paper does not advocate resorting to preventive executive detention as a means of fostering national security. It is meant, instead, as a caution that both history and the law have left more latitude for resort to such detention than might meet the common eye. A studied reading of that history, including the Supreme Court cases that are part of it, reveals authorities upon which the machinery for executive detention can be built or rebuilt. Those authorities stand for the proposition that however irrational and unjust were the detentions of World War II, it is possible to conduct executive detentions, even on a broad scale, if they are administered justly.

²³⁴ Letter from the Deputy Sec’y of Defense to the Sec’y of the Navy, *supra* note 223.

²³⁵ *Id.*

²³⁶ *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008).

Whether it would be prudent to do so is another a question. The statutory changes identified herein could be a substantial step toward better insulating the nation from the prospect of future deprivations of liberty and perhaps help foster greater prudence in matters of such tremendous consequence as the wartime detention of American citizens.

The World War II executive detention of Japanese Americans arose in an environment comprised of several distinct and recognizable elements. The first was a perceived existential threat which burst from Hawaiian skies on that Sunday morning of nearly 80 years ago.

Three additional elements entered the mix: an aggressive executive in the guise of President Franklin D. Roosevelt, a pliant Congress, and ultimately, a deferential Supreme Court. The detention of 110,000 persons of Japanese ancestry could not have happened but for the interaction and cooperation of all three branches of the U.S. Government.²³⁷

There was a fifth element as well: the American public. That public was stoked by the fear brought on by the first element and fired by an unfortunate capacity to harbor racial animus.²³⁸ It was a public that yielded, to paraphrase Abraham Lincoln—another war time president—to the lesser angels of its nature.²³⁹

The World War II cases can be likened to the unexploded ordnance which, to this day, is regularly found around the globe, in the fields, seas, and cities where the war was waged.²⁴⁰ The cases lurk like rusty bombs, still laden with high explosives. They wait—and if disturbed—they can function in a manner consistent with their design. Neither the President, the Congress, nor the Courts have defused them despite remorse, apologies, statutes, compensation, decisions, etc.

They may be seemingly buried amid the long-cooled ashes of a long ago won war. Yet absent material legislative changes, or binding changes in the Court's interpretation of law and the Constitution, the cases remain

²³⁷ See *Japanese Internment Bill*, HIST., ART & ARCHIVES, https://history.house.gov/Records-and-Research/Listing/Ifp_004/ (last visited Nov. 8, 2020) (noting actions taken by Executive and Legislative Branches); *Facts and Case Summary – Korematsu v. U.S.*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-korematsu-v-us> (last visited Nov. 8, 2020) (noting actions taken by Judicial Branch).

²³⁸ See PRANGE, *supra* note 11, at 561, 582.

²³⁹ Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861) (on file with the Libr. of Cong.) (“The mystic chords of memorys (sic), stretching (sic) from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”).

²⁴⁰ See, e.g., *German bomb experts defuse WWII-era bomb in Frankfurt*, AP NEWS (June 5, 2020), <https://apnews.com/article/41eed85258163cbe5325da9699c617c6> (noting that a 500 kilogram bomb was found on a construction site).

nonetheless dangerous. Almost exactly two years before he died,²⁴¹ Justice Antonin Scalia was asked for his thoughts about *Korematsu*. He replied that it was wrong, though he added: "[b]ut you are kidding yourself if you think the same thing will not happen again[.]"²⁴²

The elements, which combined to produce the World War II detentions, are never far from hand. In an increasingly disordered and dangerous world, existential threats may reveal themselves in sudden and shocking ways. The nation may look to an aggressive executive for leadership in a time of crisis. Congress may grow remarkably pliant as it bends to political winds which blow fiercely, sounding deeply in their roar for protection and retribution. A Court, which has left ample room for maneuver, may again prove deferential. And a public may be willing to suffer that some Americans lose their liberty in the hope of gaining security for others.

Under such circumstances, pressure on the trigger could, again, fire the weapon.

²⁴¹ Justice Scalia passed away in Texas on February 13, 2016. See David G. Savage, *Supreme Court Justice Antonin Scalia dies at 79; ardent conservative fought liberalism's tide*, L.A. TIMES (Feb. 13, 2016), <https://www.latimes.com/local/lanow/la-me-antonin-scalia-20160213-story.html>.

²⁴² Ilya Somin, *Justice Scalia on Kelo and Korematsu*, WASH. POST (Feb. 8, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-ke-lo-and-korematsu/>.