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Articles

ENDING THE *KOREMATSU* ERA: AN EARLY VIEW FROM THE WAR ON TERROR CASES

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INTRODUCTION

When President George W. Bush started the Global War on Terror (GWOT) in response to the 9/11 attacks, the United States legal community was as unprepared as the country.[1] Bush immediately asserted presidential

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[1] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, at xv–xvi (2004), *available at* http://govinfo.library.unt.edu/911/report/index.htm; *see* DOUGLAS J. FEITH, WAR AND DECISION: INSIDE THE PENTAGON AT THE DAWN OF THE WAR ON TERRORISM 17 (2008) ("[By September 13,] the President's advisers agreed that we were at war. Still, we all had a way to go to understand what kind of war we were in and how the United States should fight it."); JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 80 (2004) ("It was not just the Twin Towers that collapsed on the morning of September 11, 2001: so too did some of [America's] most fun-

wartime prerogatives and drew analogies to the last great war, World War II.[2] Yet as the Bush Administration designed policies of "executive detention" and "military commissions," most civilian lawyers had never heard those terms, much less analyzed their constitutional limits.[3] In this instance, unfamiliarity bred power, as executive lawyers seized political initiative and created unforeseen opportunities for abuse.[4]

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damental assumptions about international, national, and personal security."); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 34 (2008) ("[T]o say we're in a state of war with Al Qaeda . . . set us on a course not only for our international response, but also in our domestic constitutional relations. . . . But there was little or no detailed deliberation about long-term consequences." (quoting Matthew Waxman, special assistant to Condoleezza Rice)).

[2] *E.g.*, Remarks at a Ceremony Commemorating the 60th Anniversary of Pearl Harbor in Norfolk, Virginia, 2 PUB. PAPERS 1492, 1492–94 (Dec. 07, 2001); Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1140–42 (Sept. 20, 2001) ("[F]or the past 136 years, the[re] have been wars on foreign soil, except for one Sunday in 1941. . . . Americans have known surprise attacks, but never before on thousands of civilians. . . . This is the world's fight. This is civilization's fight."); *see also* Commencement Address at the United States Air Force Academy in Colorado Springs, Colorado, 1 PUB. PAPERS 974, 975 (June 2, 2004) ("Like the Second World War, our present conflict began with a ruthless surprise attack on the United States.").

[3] It is hard to convey the inattention to war powers that prevailed before 2001, but I have collected two sets of materials to corroborate my personal experience (and ignorance) as a governmental lawyer during part of this period. First, I surveyed four leading casebooks' treatments of executive detention and military commissions from 1990 to 2010. *See infra* Appendix A. These widely used casebooks were authored by agenda-setting scholars, and they indicate topics that were taught to the mainstream of American law students. In 2001, none of these casebooks contained any major excerpt or discussion concerning military commissions or executive detention except for *Korematsu v. United States*, 323 U.S. 214 (1944), and even *Korematsu* appeared in sections concerning equal protection rather than war powers until well after 2001. *See infra* Appendix A (tabulating results). Second, I compared law review articles from 1991 to 2001 with those from 2001 to 2010. Combinations of search terms and case names revealed that articles about executive detention and military commissions were approximately ten times more common in the decade after 9/11 than in the decade before. *See infra* Appendix B.

[4] For recent histories of the current conflict, see PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 88–90 (2008); IAN SHAPIRO, CONTAINMENT: REBUILDING A STRATEGY AGAINST GLOBAL TERROR 16–31 (2007); CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY 36–40 (2007); STEVEN T. WAX, KAFKA COMES TO AMERICA: FIGHTING FOR JUSTICE IN THE WAR ON TERROR 318–23 (2008); John E. Owens, *Congressional Acquiescence to Presidentialism in the US "War on Terror": From Bush to Obama*, *in* THE "WAR ON TERROR" AND THE GROWTH OF EXECUTIVE POWER? A COMPARATIVE ANALYSIS 33 (John E. Owens & Riccardo Pelizzo eds., 2010); and Julian E. Zelizer, *How Conservatives Learned to Stop Worrying and Love Presidential Power*, *in* THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT 15, 36–37 (Julian E. Zelizer ed., 2010). *Cf.* Mary L. Dudziak, *A Sword and a Shield: The Uses of Law in the Bush Administration*, *in* THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT, *supra*, at 39, 39 ("[W]ithin the [Bush] administration, law was not ignored. Instead, although the president and his advisers feared law as a potential threat to the operation of the executive branch, they turned to law as a means of achieving important goals.").

A main element of the Bush legal strategy was reliance on cases from what I call the "*Korematsu* era."[5] Every American lawyer knows *Korematsu v. United States* as a discredited precedent.[6] Yet conventional wisdom has too often viewed *Korematsu* narrowly as a singular error in Supreme Court history concerning the racist internment of United States citizens.[7] That portrayal allowed President Bush's legal advisers to sideline *Korematsu*'s "negative precedent" as categorically separate from twenty-first-century events even as the Administration cited other World War II deci-

[5] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Korematsu*, 323 U.S. 214; *Ex parte* Quirin, 317 U.S. 1 (1942); *infra* Part I.B (discussing these cases as elements of the *Korematsu* era).

[6] *E.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 472 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf (statement of Elena Kagan, U.S. Solicitor Gen. & Supreme Court Nominee) (singling out *Korematsu* as a "relatively recent decision . . . that was poorly reasoned and that is unlikely to come before the Court again"); GEOFFREY R. STONE, PERILOUS TIMES 297–310 (2004) ("*Korematsu* has become a constitutional pariah."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2077 (2007) (describing *Korematsu* as a reviled precedent); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 531–32 (1945) (criticizing *Korematsu* in the strongest of terms); *see* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J. dissenting) (comparing *Korematsu* to *Dred Scott*); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011) ("[I]t appears that at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions.").

[7] *See infra* Appendix A (summarizing casebook treatment of *Korematsu* as a case about racial discrimination rather than war powers); *see also* ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II 2 (2007) [hereinafter MULLER, AMERICAN INQUISITION] (describing Japanese-American internment as "a system of legalized racial oppression"); BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW 77 (1997) ("[*Korematsu*'s] racist approach is plainly inconsistent with the . . . law since *Brown v. Board of Education*."); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 239 (1945) ("[*Korematsu*] resulted in the establishment of an extremely weak standard of review of the justifiability of measures of racial discrimination . . . for the emergencies of peace as well as of war."); Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933, 1938 (2003) ("[W]hat we remember about the Supreme Court's internment cases is . . . the fact of racism, the failures of legal process, the corrosive effects of gross institutional responses."); Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1334 (2010) (referencing the Supreme Court's acknowledgment that *Korematsu's* approval of racial exclusion was an "error" and a "fail[ure] to detect an illegitimate racial classification" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995))).

To be sure, this conventional preoccupation with *Korematsu*'s racism continues to emphasize important egalitarian norms, and its dominant focus has never been exclusive within the academy. For important exceptions, see Fallon & Meltzer, *supra* note 6, at 2077 (analyzing *Korematsu* as a "tainted precedent" in the context of executive detention); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 311 (2004) (analyzing *Korematsu*'s "lessons about the inability of courts during wartime to provide any check on political excesses, particularly those jointly endorsed by the executive and legislature"); and Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1000 (1999) (discussing *Korematsu*, *Hirabayashi*, and judicial deference).

sions as "good law" to support unrestrained executive power.[8] Unlike the government's actions in *Korematsu*, modern detention policies do not typically involve United States citizens, explicit racial classifications, wholesale detention, or restraint in the American homeland. For lawyers who focus

[8] Several important Bush Administration memos cite *Korematsu*-era cases. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3, 5 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (relying on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to argue that the President has "broad constitutional authority to use military force in response to threats to the national security"); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, Gen. Counsel, Dep't of Def. 33 (Oct. 23, 2001), *available at* http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf (citing *Ex parte* Quirin, 317 U.S. 1 (1942), to claim that enemies should not receive certain basic constitutional rights and that "United States citizenship may not negate the possibility . . . [of] legal status [as] an enemy"); Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 5–9, 13, 17, 19–21 (Nov. 6, 2001) [hereinafter Military Commissions Memo], *available at* http://www.justice.gov/olc/2001/pubmillcommfinal.pdf (relying on *Quirin*, *Eisentrager*, and *Yamashita* to argue against the restriction of military commissions); Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, and John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001) [hereinafter Habeas Memo], *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra*, at 29, 29–33 (analyzing *Eisentrager* and *Yamashita* as authority for denying jurisdiction over the habeas petitions of detainees at Guantánamo Bay); Draft Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002) [hereinafter Treaties Memo], *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra*, at 38, 76 (citing *Quirin* as authority for trying members of al Qaeda and the Taliban before military courts under the laws of war); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Feb. 26, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra*, at 144, 147–50, 163 (citing *Quirin*, *Eisentrager*, and *Yamashita* to assert that the privilege against self-incrimination does not apply to trials in military tribunals or to aliens captured outside of the United States and involuntarily transported into the United States for trial); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. 3 (Mar. 13, 2002), *available at* http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf (relying on *Eisentrager* to claim that courts should defer to the President when he is acting as Commander in Chief); Memorandum from Patrick Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs 3, 5–7, 9–10, 14, 16, 18–19 (Apr. 8, 2002), *available at* http://www.justice.gov/olc/docs/memojusticeauthorizationact0482002.pdf (citing *Eisentrager*, *Quirin*, and *Yamashita* to argue that the President enjoys authority to order military action, detain individuals involved in terrorist acts, and establish military commissions); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to John Ashcroft, Attorney Gen., Dep't of Justice 4–6 (June 8, 2002), *available at* http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020608.pdf (relying on *Quirin* to support the President's authority to seize and detain enemy combatants); and Memorandum from Jack L. Goldsmith III, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 12 (Mar. 18, 2004), *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf (citing *Quirin* to argue that spies are unlawful enemy combatants). For citations to governmental briefs that invoke *Korematsu*-era precedents, see *infra* note 144.

on those differences, any comparison between modern detention and the internment in *Korematsu* must seem wildly exaggerated.[9]

This Article offers a different view of *Korematsu* with correspondingly different implications. By revisiting *Korematsu*'s historical context, I suggest that the decision extends beyond its racist facts and embodies a general theory of presidential war powers. Controversies continue today over the President's authority to fight terrorism and pursue American policy. And this Article's hindsight about precedents from the Roosevelt, Truman, and Bush Administrations may offer valuable foresight about what is yet to come.

The Article proceeds in three steps. Part I applies a mix of doctrine and history to identify the *Korematsu* era as a category of Supreme Court cases and thereby disputes narrow conventions about *Korematsu*'s meaning. Commonalities among *Korematsu* and other mid-century precedents concerning executive detention and military commissions show that these cases all implemented *Korematsu*'s distinctive view of executive authority. As with the "*Lochner* era's" approach to economic liberty or the "Civil Rights era's" approach to legal equality,[10] conceptualizing war power precedents as

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[9] Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in denial of rehearing en banc) ("There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese–Americans in California in *Korematsu*."); STONE, *supra* note 6, at 551 ("President Bush deserves credit for his response to the risk of hostile public reactions against Muslims and Muslim Americans. The contrast with . . . Roosevelt's treatment of Japanese Americans is striking. This is a good example of lessons learned.").

[10] *Cf.* Gudridge, *supra* note 7, at 1934 ("*Korematsu* is an infernal baseline. Like *Lochner*, *Dred Scott*, and *Plessy*, it marks what we hope not to repeat . . . ." (footnotes omitted)). For debates about the *Lochner* era and its meaning, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 222–23 (2004); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 196–97, 205 (1993); and Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 875 (1985) ("Almost eighty years since the case was decided, the lesson of the *Lochner* period has yet to be settled."). *Compare* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 274–82 (1989) (defending *Lochner*-style review for eminent domain), *with* WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123–25 (1988) ("*Lochner* has become in modern times a . . . negative touchstone. Along with *Dred Scott*, it is our foremost reference case for describing the Court's malfunctioning. . . . We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature."), *and* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373–75 (2003) ("*Lochner v New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years. . . . [T]he *Lochner*-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it.").

Other scholarship exemplifies debates over the Civil Rights era. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 13–15 (2007) (analyzing what was sacrificed in making *Brown* a focal point for civil rights litigation); JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 113–21 (2004) (offering a firsthand account of twentieth-century civil rights litigation); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 27–29 (2007) (discussing *Brown*'s complex relationship to civil rights movements and social change).

Because my use of "*Korematsu* era" depends on analogies to the *Lochner* and civil rights eras, I should say explicitly that none of these terms identifies a group of cases that was precisely or self-

a distinct *Korematsu* "era" can make a real difference for legal culture and judicial results, augmenting lawyers' litigative vocabulary and offering distinct perspectives on past and future problems.[11]

Analysis of the Court's votes, language, and context[12] shows that the originally dominant feature of *Korematsu*-era case law was not racism but a permissive approach to asserted military necessity and unsupervised presidential activity. *Korematsu*'s sixty-five-year-old bigotry, which so deeply offends modern morals, was secondary to the Court's judgments about war powers and executive deference.

In addition to descriptively synthesizing an era of cases applying high deference to asserted military necessity, Part I uses subsequent history to show that the *Korematsu* era has—apart from issues of racism—earned its eponymous place in the legal hall of shame. With each passing decade, *Korematsu*-era case law has become less defensible and authoritative. However, even as *Korematsu*'s significance has waned as a precedent concerning race and equal protection, the *Korematsu* era remains highly relevant to a certain type of war powers case: "*Youngstown* One" decisions where Congress has approved the presidential policy under review.[13]

Part II applies my revisionist perspective[14] to the recent past, documenting how Bush Administration lawyers used *Korematsu*-era precedents

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consciously defined at the time. Instead, my goal is to collect an open set of decisions that present-day observers can recognize by reference to a cluster of important legal principles. *See infra* Part I.A–B (detailing the *Korematsu* era's organizing themes).

[11] *Cf.* Jack M. Balkin, "*Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 682–712 (2005) (discussing how *Lochner* came to symbolize the entire jurisprudential period between 1897 and 1937 and is an established element of the constitutional canon: "[L]egal materials and legal conventions . . . offer sufficient flexibility to allow constitutional argument to be a site for political and social struggle. Through these struggles, the internal conventions of constitutional argument and the constitutional common sense of a particular historical period are reshaped.").

[12] *See* JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 254–55 (2004) (examining the Court's response to perceived military necessity in *Korematsu*); LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 143 (2005) (highlighting executive deception of the judiciary in *Korematsu*); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1304 (2002) (contending that *Korematsu*'s precedential force has been diminished by subsequent events); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-emergency Constitution*, 113 YALE L.J. 1801, 1802 (2004) (describing commentators' efforts to "square the circle that [Justice Jackson in *Korematsu*] left unsquared"); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 307 (exploring *Korematsu* as a retroactively excoriated decision).

[13] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

[14] *See* James M. McPherson, *Revisionist Historians*, PERSP. ON HIST., Sept. 2003, at 5, 5 ("The unending quest of historians for understanding the past—that is, 'revisionism'—is what makes history vital and meaningful."). Such analysis shares nothing with "revisionist histories" that deny the Holocaust and other atrocities. HENRY ROUSSO, THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944, at 151 (Arthur Goldhammer trans., Harvard Univ. Press 1991) (1987) ("Revisionism, however,

to bolster theories of Article II and the unitary executive.[15] Expansive theories of executive power have sometimes been derided as lawless or even arrogant.[16] Yet I suggest that some of the Bush Administration's supporting precedents were facially plausible even though they were ultimately rejected.[17] Because few modern lawyers would defend *Korematsu* itself, presidential advisers relied on other *Korematsu*-era cases that embodied the same stance toward presidential power without *Korematsu*'s racist taint.[18] In effect, however, *Korematsu*-era precedents were a constitutional time capsule from the distant and forgotten past. When the Bush Administration had occasion to invoke such authorities, they had become antiquated, ineffective, and even dangerous.

From this Article's viewpoint, the diminution of *Korematsu*-era precedents' doctrinal force is a major theme in recent jurisprudence. Since 2004, the Supreme Court has issued a historically unmatched number of decisions limiting executive war powers.[19] Each of these cases has been decided narrowly, on specific legal grounds, with little effort to explicitly contradict *Korematsu*-era precedents or upset the constitutional status quo.[20] Nonetheless, I propose that the Court's recent decisions undermine the *Korematsu* era's most basic principle: that courts are institutionally unable to second-

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usually refers to a normal phase in the evolution of historical scholarship, and I prefer to call those who would deny the existence of the Holocaust 'negationists' . . . .").

[15] *Compare* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 48, 57–59, 124–25 (2007) (criticizing the origins and application of the unitary executive theory), *with* JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 419–21 (2009) (defending such theories).

[16] *E.g.*, DAVID LUBAN, *The Torture Lawyers of Washington*, *in* LEGAL ETHICS AND HUMAN DIGNITY 162, 162 (2007); David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1741 (2007) (reviewing RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006)); W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 70 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/29/LRColl2009n29Wendel.pdf ("The right way to criticize John Yoo, Jay Bybee, Stephen Bradbury, and other lawyers in the Bush [Office of Legal Counsel] is with reference to the value of legality. In these terms, their advice was an unmitigated fiasco.").

[17] *See infra* Part II.

[18] *See supra* note 8 (collecting examples of reliance on *Korematsu*-era cases). To be clear, I do not argue that Bush Administration lawyers would have changed their substantive arguments if *Korematsu*-era precedents had been more fully understood. *Cf.* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 212 (2007) ("[T]he [Bush] administration's conception of presidential power had a kind of theological significance that often trumped political consequences."). At most, presidential lawyers might have had to make their arguments to a better informed audience with better fortified resistance.

[19] *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

[20] *See infra* Part II.B (discussing these holdings in detail); *cf.* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 105–13 (2008) (offering a like-minded analysis of GWOT cases decided before 2008).

guess presidential claims of military necessity. Even as the modern Court has focused on doctrinal technicalities, it has repeatedly set aside military claims about what is necessary to keep our country safe. My approach suggests that these rulings mark an important repudiation of the *Korematsu* era, which might thereby guard against future executive abuse.

Part III explores how this Article's arguments against the *Korematsu* era might affect modern legal culture. Correcting abusive executive policies—whether or not they include racial classifications—requires more than shame and regret over past wrongs. Vigilance against future repetition is important, and attorneys have a crucial role to play. In the twenty-first century, one set of lawyers designed and approved policies concerning presidential war powers, another group of lawyers litigated to overturn those policies, and yet a third set of lawyers decided who should prevail.[21] Future war powers controversies will probably follow a similarly law-intensive pattern.

Recent repudiations of *Korematsu*-era attitudes could offer an important defense against future presidential excess, but the Court's subtle language illustrates that "[n]ot every epochal case has come in epochal trappings."[22] It can be hard to draw broad lessons from war powers cases because—compared to other constitutional topics—such issues arise in fitful clusters and under enormous political pressure. Every war powers crisis seems different from the last, and responsive Presidents will use every available means to undermine limits on their authority.[23]

With a different President and several new Justices, the next decade could influence how future generations of lawyers and judges comprehend separation of powers and wartime prerogatives. And if the GWOT precedents' meaning is up for grabs, now may be just the time to recognize and explain the Court's rejection of the *Korematsu* era. As a matter of legal cul-

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[21] *See* GOLDSMITH, *supra* note 18, at 69 ("[T]he [Bush] administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it had no choice."); *id.* at 81 ("The post-Watergate hyper-legalization of warfare . . . had become so ingrained . . . that the very idea of acting extralegally was simply off the table, even in times of crisis. The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal."); KAREN J. GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 44 (2009) ("The legal cloud hanging over the Guantanamo mission in these early days was not due to a deficit of lawyers or legal analysis. . . . Arguably, U.S. government lawyers had never had as much impact on policy as they did during the first two or three years of the war on terror.").

[22] United States v. Lopez, 514 U.S. 549, 615 (1995) (Souter, J., dissenting).

[23] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."); *cf.* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 30–53 (2004) (discussing the concept of "political time" in analyzing presidential conduct); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 17–32 (1993) (schematizing historical instances of presidential power and authority).

ture, *Korematsu*'s shift from a generally applicable war powers case to a narrower case about race demonstrates how the fade of doctrinal memory can operate. If we cannot even today understand the GWOT cases as renouncing *Korematsu*'s essence, presidential lawyers in the future will more easily dismiss such precedents as idiosyncrasies, old cases that should not govern new crises. The characteristic infrequency of such crises means that each one will typically involve different facts. By contrast, if the United States were to suffer an attack in the short run, this decade's jurisprudence might be the only chance to avoid past mistakes. In either event, it is not too early to discuss modern steps to reject the *Korematsu* era; such analysis should begin before collective forgetting is complete.

In American law, great judicial decisions are important because they reflect much more than their strict doctrinal holdings. Iconic cases like *Korematsu*, *Marbury*, *Dred Scott*, *Lochner*, *Erie*, and *Brown* are unquestionably important, but their interpretations prompt endless debate and struggle.[24] Although the meanings of these iconic cases are partly determined by other judicial decisions, legal commentators and academics can indirectly shape doctrinal interpretation as they educate and train each new crop of judges and presidential lawyers. These latter advisers- and jurists-in-training will someday determine the authoritative meaning of *Korematsu* and the GWOT as well. This Article's historical perspective aspires to help current and future generations in confronting their own debates over how judicial and presidential powers interact during wartime.

I. THE *KOREMATSU* ERA

My first step is to introduce the *Korematsu* era and analyze how the period as a whole earned its disfavored status. This Article's terminological model is the *Lochner* era, in which a single case represents a group of decisions that in turn embody distinct principles of judicial activity. For the *Lochner* era, the ideas at stake were extreme solicitude for private property and judges' failure to respect governmental policy judgments.[25] This Part

[24] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see* J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 878 (1993) ("The struggle over meaning is the struggle over the forms and contours of thought . . . . Those who shape and control these grooves, those who succeed in fashioning the tools of understanding of a time and place, have enormous power over human beings."); J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, *in* LEGAL CANONS 3, 3–32 (J.M. Balkin & Sanford Levinson eds., 2000) (discussing iconic cases' place in the constitutional canon); Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22, 23 (1993) ("[A]ny serious theory of constitutional interpretation must be able to explain why *Brown* was right. In this sense, *Brown* is part of the canon of constitutional law.").

[25] From *Lochner* through 1937, the Court struck down approximately two hundred economic regulations. STONE ET AL., CONSTITUTIONAL LAW 749 (6th ed. 2009); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 561 (1923) (invalidating a minimum wage law for women); Hammer v. Dagenhart,

identifies comparably thematic principles for *Korematsu*-era cases. Section A challenges the conventional account of *Korematsu* as principally concerning governmental racism and mass internments. Although *Korematsu* of course involved indefensible discrimination, its context and its precursor *Hirabayashi* clarify that *Korematsu* was not just a referendum on unconstitutional racism; instead, it was more preoccupied with assertions of executive power and military necessity. Section B supports this revisionist interpretation by collecting other cases from the 1940s and 1950s that reflected *Korematsu*'s deference toward executive power but did not involve racial classifications. Section C suggests that late twentieth-century events undermined the doctrinal authority of *Korematsu*-era precedents and that such cases qualify as disreputable "negative precedents" regardless of *Korematsu*'s racism.

A. A Revisionist History of Korematsu v. United States

Prior to the GWOT, American law schools had taught *Korematsu* for decades as a case principally about race,[26] and it is easy to see why. As with slavery and Jim Crow, the decision to intern more than 70,000 United States citizens based on their Japanese ancestry burns at the modern conscience and illustrates the evils of racial discrimination.[27] At first glance, *Korematsu*'s dissenting opinions seem to channel present-day outrage.[28] And the majority's dicta concerning racial discrimination have led some modern courts to cite *Korematsu* as a precursor of "strict scrutiny" in equal protection—despite the fact that only Justice Murphy's dissent even mentioned the words "equal protection."[29]

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247 U.S. 251 (1918) (invalidating a federal child labor law); *supra* notes 10–11 (collecting sources that analyze *Lochner*'s meaning).

[26] *See supra* note 7 (collecting authorities that exemplify this interpretation of *Korematsu*).

[27] MULLER, AMERICAN INQUISITION, *supra* note 7, at 21.

[28] The three *Korematsu* dissents state current orthodoxy. 323 U.S. at 225–26 (Roberts, J., dissenting) ("[*Korematsu*] is not a case of keeping people off the streets at night as was *Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community . . . . On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty . . . ." (citation omitted)); *id.* at 233 (Murphy, J., dissenting) ("This exclusion of all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast area on a plea of military necessity . . . goes over the very brink of constitutional power and falls into the ugly abyss of racism." (internal quotation marks omitted)); *id.* at 243 (Jackson, J., dissenting) ("[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.").

[29] *Id.* at 235 (Murphy, J., dissenting); *cf.* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (applying equal protection to the federal government for the first time); Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 820 (4th Cir. 1995) (citing *Korematsu* as requiring the most rigid scrutiny in cases involving racial classifications); Donatelli v. Mitchell, 2 F.3d 508, 513 (3d Cir. 1993) (citing *Korematsu* as au-

This section claims that standard race-focused interpretations of *Korematsu* have overshadowed the decision's relevance to presidential power and military necessity. I do not suggest that *Korematsu* must be either a race case or a war powers case; of course it is both. What I propose is an important shift in emphasis, stressing an aspect of *Korematsu* that is often clouded by the visceral reaction to the decision's racial discrimination.

1. Korematsu*'s Doctrinal History*.—Despite *Korematsu*'s notoriety, some of its history is known only by experts.[30] My first project is to show that the Justices who decided *Korematsu* perceived that case differently than many modern observers do. In the 1940s, although race was important for some members of the Court, claims of military necessity overwhelmed the majority's hesitation, and even the dissenting Justices were less committed to modern equal protection than is commonly recognized.[31] This specific contextual evidence about *Korematsu* is an important starting point for reinterpreting the *Korematsu* era as a whole.

After the devastation of Pearl Harbor in December 1941, fears spread about other attacks that might be supported by spies and saboteurs within the United States.[32] President Roosevelt responded in February 1942 by authorizing the creation of military areas "from which any or all persons may be excluded" and in which "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions [designated officials] may impose."[33] To implement this order, Lieutenant General DeWitt split the entire Pacific Coast into military areas.[34] Congress then criminalized violations of any military-area regulations with a maximum punishment of $5000 and one year in prison.[35]

Beginning on March 27, 1942, DeWitt ordered a "curfew" for alien Germans and Italians, and for *all persons* of Japanese ancestry throughout much of Arizona, California, Washington, and Oregon.[36] This was no ordinary curfew to keep people off the streets. DeWitt's order was closer to

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thority for the fact that strict scrutiny has generally been applied to equal protection claims involving racial classifications); *infra* notes 61–66 and accompanying text (discussing *Korematsu*'s marginal relevance as an equal protection case).

[30] *See* FERREN, *supra* note 12, at 236–59 (discussing details of the Justices' motivations and judicial philosophies in *Korematsu* that seldom appear in standard accounts); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 372 (2009) ("[N]o work of scholarship has really attempted to come to grips with what motivated the justices to decide *Korematsu* as they did . . . .").

[31] *See infra* notes 49–60.

[32] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 188–92 (1998).

[33] Exec. Order No. 9066, 3 C.F.R. 1092, 1093 (Cum. Supp. 1943) (issued Feb. 19, 1942).

[34] Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 2, 1942).

[35] Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173; *cf.* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 38–39 (1983) (collecting ample evidence that Congress knew its legislation would be used to enforce racist policies of military exclusion).

[36] Public Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942).

house arrest, for it required regulated persons to be home from 8:00 p.m. to 6:00 a.m. and to be in their workplace, within five miles of home, or traveling between work and home at all other times.[37]

Not six months after Pearl Harbor, DeWitt began ordering persons of Japanese ancestry to "evacuate" military zones, though that word was a euphemism as well.[38] Every family of Japanese ancestry had to report to Civil Control Stations or Assembly Centers, and appearance at such facilities was typically followed by indefinite confinement at Relocation Centers in Idaho, Utah, Arkansas, Wyoming, Arizona, Colorado, and remote parts of California.[39] For the large population of Japanese-Americans on the Pacific Coast, DeWitt's orders must have seemed more like racially targeted imprisonment than evacuation.

The Supreme Court issued two decisions evaluating these governmental policies. In 1943, *Hirabayashi* upheld a defendant's conviction for violating DeWitt's curfew, and *Korematsu* in 1944 upheld a defendant's conviction for violating DeWitt's reporting requirement.[40] Both cases involved exactly the same claims of military necessity and exactly the same legal authorities.[41] Indeed, the government's brief in *Korematsu* explicitly incorporated by reference much of the factual evidence that had been presented the year before in *Hirabayashi*.[42]

The President's core claim in both cases was that a racially homogenous wartime enemy was supported by a set of aliens and citizens in the

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[37] *Id.*

[38] DeWitt issued 108 such orders. IRONS, *supra* note 35, at 70.

[39] Korematsu v. United States, 323 U.S. 214, 230 (1944) (Roberts, J., dissenting) ("[A]n Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order . . . ."); *id.* at 243 (Jackson, J., dissenting) ("[T]he only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps."). As a technical matter, the *Korematsu* majority limited its holding to DeWitt's "reporting" requirement, avoiding passing judgment on the broader "relocation" program. *Id.* at 221–23 (majority opinion).

[40] *Id.* at 223–24 (majority opinion); Hirabayashi v. United States, 320 U.S. 81, 105 (1943).

[41] *See Korematsu*, 323 U.S. at 217–18 ("In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant conferment to the home from 8 p.m. to 6 a.m. . . . But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."); *id.* at 218–19; *see also Hirabayashi*, 320 U.S. at 94–95 (accepting Executive Order No. 9066 as necessary "for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by Japanese forces, from the danger of sabotage and espionage").

[42] Brief for the United States at 11, *Korematsu*, 323 U.S. 214 (No. 22) ("The situation leading to the determination to exclude all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 was stated in detail in the Government's brief in this Court in *Hirabayashi v. United States* . . . . *That statement need not be repeated here*." (emphasis added)).

United States who could not be individually identified.[43] To meet such dire asserted threats, the military claimed it was necessary to subject a racially determined mass of potential suspects to curfews, reporting, and evacuation. The Court upheld such executive decisions, which Congress had approved ex ante, by a unanimous vote in *Hirabayashi* and by a six-vote majority in *Korematsu*.[44]

To modern observers, *Hirabayashi* and *Korematsu* seem astonishingly misguided. Both involved explicit racial discrimination, and the government had no credible argument that such discrimination was needed to secure the homeland.[45] Twenty-first-century doctrine and legal culture typically require very strong justifications to support racial classifications.[46] Because the policies in *Hirabayashi* and *Korematsu* lacked such support, their racial discrimination would be unconstitutional today, and some modern analysts have not looked much further into the Court's analysis.[47]

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[43] *Id.* at 12 ("There was a basis for concluding that some persons of Japanese ancestry, although American citizens, had formed an attachment to, and sympathy and enthusiasm for, Japan. It was also evident that it would be impossible quickly and accurately to distinguish these persons from other citizens of Japanese ancestry." (footnote omitted)); Brief for the United States at 35, *Hirabayashi*, 320 U.S. 81 (No. 870) ("[T]he group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once.")

[44] *Hirabayashi*, 320 U.S. at 83. In *Korematsu*, Justices Black, Stone, Reed, Douglas, Rutledge, and Frankfurter made up the majority, and Justices Roberts, Murphy, and Jackson wrote dissents. 323 U.S. at 215, 225, 233, 242.

[45] Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 133–40 (2006) (explaining the egregiously racist and misguided nature of the government's arguments about military necessity); Rostow, *supra* note 6, at 520–22; Eric L. Muller, Hirabayashi*: The Biggest Lie of the Greatest Generation* 4 (Univ. of N.C. Legal Studies, Research Paper No. 1233682, 2008), *available at* http://ssrn.com/abstract=1233682 ("Archival records now make clear that . . . talk of a threatened Japanese invasion was a massive distortion of the actual military situation . . . . There was . . . no danger of a Japanese invasion of the West Coast. . . . [T]op military officials shared [this information] with members of Congress in early February of 1942 . . . ."). *See generally* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 317–19 (1997) (noting Justice Black's defense of *Korematsu* in 1967: "I would do precisely the same thing today, in any part of the country . . . . [The Japanese] all look alike to a person not a Jap . . . . I saw nothing wrong in moving them away from the danger area.").

[46] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *see also* REHNQUIST, *supra* note 32, at 207 ("Under today's constitutional law, . . . any sort of 'racial' classification by government is viewed as 'suspect,' and an extraordinarily strong reason is required to justify it. But the law was by no means so clear in 1943 and 1944 . . . .").

[47] *Cf.* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 239 (1997) ("*Korematsu* has not been overruled—we have not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity—but each part of the decision, questions of both factual review and legal principles, has been discredited or abandoned."); Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 88 (1996) (explaining that later equal protection cases quoted language from *Korematsu* in support of strict scrutiny analysis).

This race-based interpretation of *Korematsu*, which was nearly universal before 9/11, may seem familiar and almost comfortable because it links World War II internment with other extreme examples of premodern racism such as lynchings, peonage, and explicitly racist exclusions of voters and jurors—all of which are now shelved in the dusty past.[48] Yet this racial focus risks an anachronism that misrepresents the past and disserves the present. As we shall see, this is a field where reinterpreting *Korematsu* as the Court decided it in 1944 may also improve constitutional analysis today.

Simple vote counting shows that the *Korematsu* Court itself did not view the case as involving straightforward racial discrimination. Several Justices who were sensitive to racial issues in other cases—including Douglas, Rutledge, Black, and Stone—were majority votes for the government in *Korematsu*.[49] And two Justices with far less progressive records on race—Roberts and Jackson—were among *Korematsu*'s dissenters.[50] This indicates that these Justices did not find the cases' racial elements to be decisive; other doctrinal factors were driving their determinations.

Modern scholars have largely ignored the difficult and decisive issue confronting the Court: what to do with the Court's year-old decision in *Hirabayashi*, which had relied on identical claims of military need to uphold an identically racist curfew.[51] In *Hirabayashi*, all nine Justices endorsed the

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[48] *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 197–98 (2008) (peonage); GOLUBOFF, *supra* note 10, at 56–71 (peonage); KLARMAN, *supra* note 10, at 8–9, 14–16 (disfranchisement and exclusion from juries); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 218–19 (2001) (lynchings); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877–1913, at 55–57 (1971) (disenfranchisement); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7–12 (2002) (Jim Crow segregation).

[49] *See* Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 1218, 1222 (1969) (Black, J., opinion in chambers) (criticizing delayed desegregation because "there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute"); Heart of Atlanta Motel v. United States, 379 U.S. 241, 280 (1964) (Douglas, J., concurring) (insisting on a broad constitutional "right to be free of [racially] discriminatory treatment"); United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (Stone, C.J.) (suggesting that racial discrimination warrants "searching judicial inquiry"); FERREN, *supra* note 12, at 387 (quoting Judge Louis Pollak's prediction, as Justice Rutledge's former clerk, that Rutledge "would have moved" against racial discrimination in public schools "if he'd had the chance").

[50] *See* Screws v. United States, 325 U.S. 91, 139 (1945) (Roberts, J., dissenting) (characterizing the beating to death of a black man by police officers as a "relatively minor offense"); Grovey v. Townsend, 295 U.S. 45, 54–55 (1935) (Roberts, J.) (upholding an all white democratic primary); William O. Douglas, Conference Notes on *Brown* at 4 (1952) (on file with the Library of Congress, William O. Douglas Papers, Box 1150, Folder "Original Conference Notes") (noting Justice Jackson's desire to uphold segregated schools); Tom C. Clark, Conference Notes on *Brown v. Bd. of Educ.* at 3–4 (1952) (on file with the Tarlton Law Library, Univ. of Tex., Austin, Tom C. Clark Papers, Box A27, Folder 4) (noting that Justice Jackson argued that nothing in the text of the Constitution or in the Court's prior decisions demonstrates that segregated schools are unconstitutional).

[51] *Hirabayashi* was vital during *Korematsu*'s conference vote. FERREN, *supra* note 12, at 249; IRONS, *supra* note 35, at 338; Frank Murphy, Conference Notes (1944) (on file with Bentley Historical Library, Univ. of Mich., Frank Murphy Papers, Roll 129, No. 20). Initially Justices Stone, Black, Frank-

sweeping principle that governmental officials could adopt public safety measures "in the crisis of war and of threatened invasion, . . . based upon the recognition of facts and circumstances which indicate that *a group of one national extraction* may menace that safety more than others" notwithstanding the fact that "in other and in most circumstances racial distinctions are irrelevant."[52] This simple holding established that presidential claims of wartime necessity could displace ordinary norms against racism. And the Court in World War II might have fairly doubted whether, as distant East Coast judges, they could ever know what kind of military response would be necessary to counter Japanese threats or how much racism might be appropriate as opposed to excessive.

No Justice in *Korematsu* suggested that *Hirabayashi* was incorrect or should be overruled. On the contrary, *Korematsu*'s majority fiercely asserted that the two cases could not be distinguished, and the dissenters offered no serious counterargument.[53] For the entire Court in *Hirabayashi* and the majority in *Korematsu*, these decisions were primarily about whether Presidents could keep America safe by any means necessary; they were not about how racial groups should generally be treated.[54]

The Court's focus on military need explains not only the majority opinion in *Korematsu* but also the dissents. For the three dissenting Justices, something had dramatically changed during the year that separated *Hirabayashi* and *Korematsu*. Whatever drove that change, however, it certainly was not a radical shift in the Justices' constitutional philosophies of race. Instead, the passing months had mainly clarified the true scope of danger to American domestic security and the government's ebbing credibility in ar-

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furter, and Reed voted to affirm Korematsu's conviction; Justices Roberts, Murphy, Jackson, and Douglas voted to reverse. Because Justices speak at conference in order of seniority—and eight members of the Court were evenly divided—the final decision fell to Justice Wiley Rutledge. FERREN, *supra* note 12, at 249. Justice Stone gently prodded, "If you can do it for a curfew, you can do it for exclusion," and Justice Rutledge told his colleagues: "I had to swallow *Hirabayashi*. I didn't like it. At that time, I knew if I went along with that [curfew] order then I had to go along with detention for a reasonably necessary time. Nothing but necessity would justify it . . . ." THE SUPREME COURT IN CONFERENCE (1940–1985), at 690 (Del Dickson ed., 2001). Rutledge voted to affirm, and Douglas later switched to join the majority. *See* Korematsu v. United States, 323 U.S. 214, 215, 225, 233, 242 (1944).

[52] Hirabayashi v. United States, 320 U.S. 81, 101 (1943) (emphasis added).

[53] *Korematsu*, 323 U.S. at 214, 217–18.

[54] *Id.* at 223 ("Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu was not excluded from the Military Area because of hostility to him or his race.* He *was* excluded because we are at war with the Japanese Empire . . . ." (first emphasis added)); *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."); *see* FERREN, *supra* note 12, at 249.

guing about such subjects. Threats of invasion and sabotage had dissipated in 1944, and a military report released in January had embarrassed DeWitt's justification for his actions.[55] That report was so disgraceful that Justice Murphy's dissent quoted it extensively and a journalist used it to wage an extensive attack on the government's factual claims.[56]

By 1944, the government itself had admitted that some prisoners in relocation centers were entirely loyal thereby revealing that its decision to detain Japanese-Americans was unjustifiably broad.[57] The internment period was also distressingly long, having lasted for two years with no sign of stopping. From the perspective of military necessity, the government's drastic and unending policy of mass internment was much harder to defend in 1944 than its seemingly temporary house arrest was in 1943.

The uniquely decisive question in *Hirabayashi* and *Korematsu* was how much the Court should defer to the President's assertions of military necessity. Such military judgments had been explicitly supported by Congress and were hard to falsify, but they were also increasingly hard to believe. The government's arguments in both cases relied on President Roosevelt's perceived credibility and competence, which may have led some Justices to uphold constitutionally troublesome policies in deference to urgent claims about national security.[58]

Notwithstanding *Hirabayashi*'s force under stare decisis as a unanimous year-old decision, and despite the fact that there was no change in the Court's membership, *Korematsu*'s conference vote was still only five to

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[55] J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943); *see also* IRONS, *supra* note 35, at 278–84 (discussing governmental and public reactions to the report).

[56] *Korematsu*, 323 U.S at 235–40 (Murphy, J., dissenting); *see* DEWITT, *supra* note 55, at 34 ("The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized', the racial strains are undiluted."); JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 81 (1993) ("'A Jap's a Jap,' [DeWitt] reiterated in public testimony in April 1943. 'You can't change him by giving him a piece of paper.' Indeed in General DeWitt's view, the menace posed by the Japanese could only be eliminated by destroying the Japanese as a race.").

[57] *See Ex parte* Endo, 323 U.S. 283, 294 (1944); Gudridge, *supra* note 7, at 1947. For a surprising discussion of Japanese-Americans who were released from relocation camps during the war, see Charlotte Brooks, *In the Twilight Zone Between Black and White: Japanese American Resettlement and Community in Chicago, 1942–1945*, 86 J. AM. HIST. 1655 (2000).

[58] *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 85 (2001) ("The idea of a powerful executive, exerting leadership on a variety of fronts, seemed more natural in a world where totalitarian states were both common and threatening."); L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 678, 681 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)) (arguing that a successful leader like President Roosevelt can transform the existing constitutional order). When *Korematsu* was decided in 1944, President Roosevelt had just earned an unprecedented fourth presidential term, was en route to winning the United States' largest foreign war, and had selected seven of the nine sitting Justices. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1942–1945, at 782–97 (1999); STONE ET AL., *supra* note 25, at lxxxvi–lxxxvii.

four.[59] If the two cases had both been decided in 1944, with an extra year of information and skepticism, one cannot guess what would have happened.[60] It is quite clear, however, that *Korematsu*'s majority saw the case as concerning wartime necessity and not general principles of racial discrimination. Even the *Korematsu* dissenters' choice to discard *Hirabayashi* is more understandable from the perspective of war rather than race.

2. Korematsu*'s Modern Relevance.*—This Article's revisionism concerning *Korematsu*'s original meaning also explains the decision's continued significance. Even as *Korematsu*'s salience to issues of racial equality has declined, the decision remains important as a war powers precedent. If *Korematsu* is to be studied by modern commentators—as I think it should be—the relevance of this iconic case should shift to reflect such doctrinal developments.

Conventional interpreters sometimes cite *Hirabayashi* and *Korematsu* as a matter of ordinarily authoritative (positive) precedent to prove either (i) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"[61] or (ii) that antiracist principles of equality constrain the federal government and not just the states.[62] Regardless of these arguments' historical anachronism,[63] *Brown* and its progeny have now superseded the doctrinal importance of *Hirabayashi* and *Korematsu* on such topics.[64] There were decisions even before 1943 holding that equal protection prohibits racist denials of civil rights.[65] But *Brown* and its successors made these early precedents doctrinally superfluous. Likewise, the question of whether equal protection should be "reverse incorporated" against the federal government was once highly provocative, but that issue was not ad-

[59] *See* FERREN, *supra* note 12, at 249; IRONS, *supra* note 35, at 338; Murphy, *supra* note 51.

[60] *Cf.* REHNQUIST, *supra* note 32, at 222 (questioning whether the Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), might have upheld Hawaii's martial law if that case had been decided in 1943 rather than 1946); *infra* Part II.B.5 (discussing the significance of delayed adjudication in modern GWOT cases).

[61] Hirabayashi v. United States, 320 U.S. 81, 100 (1943); *accord* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (citing *Hirabayashi* as evidence that classifications based on national origin are inherently suspect); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (citing *Korematsu* in holding that racial classifications are subject to strict scrutiny).

[62] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–16 (1995).

[63] *See supra* Part I.A.1 (challenging *Korematsu*'s doctrinal history as a case primarily about racial classifications).

[64] *See, e.g.*, *Adarand*, 515 U.S. at 215–18; Loving v. Virginia, 388 U.S. 1, 9–12 (1967); *McLaughlin*, 379 U.S. at 191–92; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[65] *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); Strauder v. West Virginia, 100 U.S. 303, 305–08 (1880).

dressed in *Korematsu*; instead, it was resolved a full decade later in *Bolling v. Sharpe*, a companion to *Brown*.[66]

Most often, *Korematsu* is studied as a discredited (negative) precedent that exemplifies how doctrine can be abused in the service of racial prejudice.[67] Yet even as an illustration of how racial issues should *not* be treated under the Constitution, *Korematsu* merits only secondary prominence. The Court's opinions in *Dred Scott v. Sandford*, the *Civil Rights Cases*, and *Plessy v. Ferguson* all incorporate governmental racism more directly than *Korematsu*,[68] and the most robust evidence of racial oppression lies predominantly outside federal courts in lynching, de facto segregation, voter intimidation, employment abuse, and suchlike.[69] Thus, although the internment cases are a horrible instance of American racism, their segment of that narrative is incomplete and unrepresentative. *Korematsu* also sheds little light on current debates over racial profiling, affirmative action, disparate impact, and the treatment of nonracial groups like homosexuals.[70] In sum, if *Korematsu* were studied today simply for its contribution to equal protection jurisprudence, its doctrinal importance would be mild indeed.

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[66] Bolling v. Sharpe, 347 U.S. 497, 500 (1954). "Reverse incorporation" is the constitutional doctrine by which equal protection—which appears only in the Fourteenth Amendment as applicable to the states—is applied to the federal government. For discussion of the scholarly controversy over reverse incorporation, see Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon:* Bolling v. Sharpe*,* Korematsu*, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879 (2006). Part I.A.1, *supra*, explains why I disagree with Rubin's orthodox conclusion that *Korematsu* "utilizes principles of equal protection" and is a direct precursor to *Bolling*. *See* Rubin, *supra*, at 1891–92. For further evidence that *Korematsu* and *Hirabayashi* were not understood at the time as adopting reverse incorporation, consider cases between 1944 and 1954 that cited *Korematsu* and *Hirabayashi* yet nevertheless declined to hold that equal protection restrained federal and state governments equally. *E.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418 (1948) ("It does not follow . . . that because the United States regulates . . . in part on the basis of race and color classifications, a state can adopt one or more of the same classifications . . . ."); Hurd v. Hodge, 334 U.S. 24, 28–36 (1948) (noting that *Korematsu* and *Hirabayashi* had been litigated "on the assumption" of reverse incorporation, without resolving that constitutional issue, and declining also to resolve it in 1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 37 n.16 (1947) (citing *Korematsu*, *Hirabayashi*, and *Endo* as evidence that racial classifications are undesirable as a matter "of national policy" rather than as a matter of constitutional obligation). The Court had no reason to be so coy in 1948 if (as many modernists assume) the issue of reverse incorporation had already been decided in 1943 and 1944.

[67] *See supra* text accompanying notes 3, 7 (collecting examples from casebooks and commentary); *see also Adarand*, 515 U.S. at 236; *id.* at 244 n.2 (Stevens, J. dissenting); *id.* at 275 (Ginsburg, J., dissenting).

[68] Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[69] *See supra* text accompanying note 48 (collecting sources about premodern racism).

[70] *See, e.g.*, Johnson v. California, 545 U.S. 162, 168 (2005) (considering racial jury selection); Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (addressing affirmative action in law school admissions); Romer v. Evans, 517 U.S. 620, 631–35 (1996) (considering sexual orientation discrimination); Washington v. Davis, 426 U.S. 229, 232–36 (1976) (discussing a test's racially disparate impact on the hiring of police officers).

Despite *Hirabayashi*'s and *Korematsu*'s limited doctrinal relevance with respect to equal protection, they have persistent weight in the field of war powers and military necessity; indeed, United States history after World War II has only expanded such significance. The dominant framework for executive power today is Justice Jackson's concurrence in *Youngstown*, which set out a three-category framework for executive power based on its relationship to legislative authority.[71] The foundational *Youngstown* principle requires Presidents ordinarily to seek congressional authorization as support for their wartime activities. When a President acts consistently with "express or implied authorization," executive constitutional power is "at its maximum."[72] When a President acts without congressional support or opposition, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[73] And when a President acts contrary to congressional instructions, "his power is at its lowest ebb."[74]

More than any other case, *Korematsu* exemplifies the constitutional problems that arise when Congress and the President act together, i.e., when presidential authority is "at its maximum."[75] We shall see that the Court's recent GWOT case, *Boumediene v. Bush*, raised precisely this *Korematsu* problem of how much deference courts should give to legislatively approved claims of military necessity in evaluating presidential conduct that might otherwise be flatly illegal.[76]

If *Korematsu* merits widespread study and currency in American legal culture, a change in emphasis seems appropriate. The Court's incidental language about "most rigid scrutiny" and "legal restrictions . . . [upon] a single racial group" should not distract modern readers from *Korematsu*'s original and still essential holding about military power.[77] To be sure, some readers may doubt whether *Korematsu* can ever be understood apart from its searing racism—the pull of conventional wisdom may be too strong. The meaning of iconic decisions, however, is not always static. The foregoing study of *Korematsu* and *Hirabayashi* has shown that their meaning has already changed in two ways: from authoritative to discredited precedents, and from cases about wartime national security to cases about racial discrimination.[78] Reorienting *Korematsu* toward its original roots may thus be more feasible than ahistorical conventionalism would generally suppose.

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[71] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[72] *Id.* at 635.

[73] *Id.* at 637.

[74] *Id.*

[75] *Id.* at 635–37.

[76] 553 U.S. 723, 732–33 (2008); *see infra* Part II.B.4.

[77] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[78] *See supra* Part I.A.1.

B. Korematsu*'s Companions: Identifying the* Korematsu *Era*

Armed with a revised view of *Korematsu*'s and *Hirabayashi*'s common doctrinal core, this section identifies three cases decided a few years later that also applied strong deference to presidential assertions of military necessity in wartime.[79] Although my list is not exhaustive, I propose that these three decisions illustrate a distinctive judicial approach to presidential war powers that merits discussion as an aggregated era.[80]

1. Ex Parte Quirin.*—Ex parte Quirin* concerned the trial by military commission of eight men who were accused of spying and conspiring to spy in violation of the laws of war and federal statutes.[81] The defendants were seven German citizens and one American citizen who traveled to the United States on Nazi submarines in June 1942.[82] One team landed on a beach on Long Island, New York; the other landed on a beach near Jacksonville, Florida. Both groups carried explosive materials and uniforms from the German Marine Infantry—which were promptly discarded and buried under the sand. Within a week, two defendants had voluntarily surrendered to the FBI; one week later, all eight had confessed and were in the United States' custody.

President Roosevelt chose not to prosecute the *Quirin* defendants in a civilian court because of the small penalties for their unrealized conspiracy, and he did not prosecute in a court-martial because of applicable burdens of proof and strict evidentiary rules.[83] Instead, the President signed an order naming particular officials to adjudicate the defendants' case in a military commission and also naming the prosecutors and defense counsel who would participate.[84]

The defendants challenged the legality of this military commission process, and on July 29 and 30, the Supreme Court heard nine hours of oral argument in their case.[85] On July 31, the Court announced a unanimous per curiam judgment supporting the government, with full opinions to issue at a later date.[86] On August 3, the military commission convicted the defendants and sentenced them to death. Six of the eight were executed that weekend, while the others who had voluntarily turned themselves in—hoping to be

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[79] Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

[80] For analogies to other doctrinal eras, see *supra* text accompanying note 10.

[81] 317 U.S. at 20–23.

[82] The following factual account is based on LOUIS FISHER, CONG. RESEARCH SERV., RL 31340, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT (2002) [hereinafter FISHER, *QUIRIN*]; MICHAEL DOBBS, SABOTEURS: THE NAZI RAID ON AMERICA (2004); LOUIS FISHER, PRESIDENTIAL WAR POWER 206–07 (2d ed., rev. 2004); David J. Danelski, *The Saboteurs' Case*, 21 J. SUP. CT. HIST. 61 (1996).

[83] FRANCIS BIDDLE, IN BRIEF AUTHORITY 328–31 (1962).

[84] Military Order of July 2, 1942, 3 C.F.R. 1308 (Cum. Supp. 1943).

[85] DOBBS, *supra* note 82, at 240–44.

[86] *Quirin*, 317 U.S. at 1.

celebrated as heroes for betraying the Nazis—received life sentences and were much later deported to Germany.[87]

The Court issued an opinion explaining the result in *Quirin* twelve weeks after the defendants were executed.[88] The Court held that: (i) Congress had authorized the President to convene military commissions, (ii) the Fifth and Sixth Amendments do not apply to military commissions that punish war crimes, and (iii) extant statutory law did not bar the government from using stripped-down adjudicative procedures.[89] The Court described its deferential role as follows: "[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the *clear conviction* that they are in conflict with the Constitution or laws of Congress constitutionally enacted."[90]

Despite obvious factual differences between *Quirin* and *Korematsu*, both decisions analyzed presidential conduct that Congress had approved, and both cases allowed the Executive to depart from otherwise basic legal norms. Whereas *Korematsu* enforced racist detention policies based on alleged military necessity, *Quirin* upheld a military commission that was not tethered by ordinary due process.[91] On both occasions, the Court sacrificed basic legalist commitments (e.g., due process and antiracism) in deference to presidential claims of wartime exigency.

2. In re Yamashita*.*—*Yamashita* involved the military commission trial of Lieutenant General Tomoyuki Yamashita for his subordinates' war crimes—including the torture, rape, killing, and mutilation of innocents—which were committed as the United States invaded the Philippines and de-

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[87] *See* DOBBS, *supra* note 82, at 263.

[88] *Quirin*, 317 U.S. at 1 (issued Oct. 29, 1942).

[89] *Id.* at 26–28, 38–47.

[90] *Id.* at 25 (emphasis added); *accord id.* at 45–46 ("We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war."); *see also* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 33–37 (2002) (noting that executive officials in the GWOT have used *Quirin* to justify the use of military tribunals).

[91] FISHER, *QUIRIN*, *supra* note 82, at 8 ("The commission could . . . discard procedures from the Articles of War . . . whenever it wanted to. . . . 'Of course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that.'" (quoting the prosecuting Judge Advocate General)); Morris D. Davis, *The Influence of* Ex Parte Quirin *and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. COLLOQUY 121, 124 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/34/LRColl2008n34Davis.pdf ("[I]t took only seven weeks for the President to create and convene a military commission, for prosecutors and defense counsel to prepare their cases, to litigate a joint trial for eight men, for an appeal to the district court to be filed and denied, for the Supreme Court to hear oral arguments and render a decision, and for six men to be executed and buried.").

stroyed Yamashita's control over his men.[92] One of MacArthur's aides explained that Yamashita should be criminally punished for "negligence in allowing his subordinates to commit atrocities."[93] The commission was composed of five military officials, none of whom was a lawyer.[94] The United States initially alleged sixty-four war crimes committed by Yamashita's soldiers, but three days before trial, the prosecution charged fifty-nine additional atrocities.[95] Defense counsel's request for a continuance to address the new allegations was denied.[96] The prosecution's evidence from 286 witnesses and 423 exhibits was almost all hearsay, and virtually none of it showed any direct link between Yamashita and the charged war crimes.[97] Nevertheless, on December 7, 1945—the fraught anniversary of Pearl Harbor—Yamashita was convicted and sentenced to death by hanging.[98]

Yamashita challenged the military commission's lax evidentiary rules on several grounds, each of which the Supreme Court summarily rejected. First, Yamashita noted that the statutory Articles of War forbade deposition evidence in capital cases before "any military court or commission" and also banned hearsay evidence before "military commissions and other military tribunals."[99] But the Court found that enemy combatants were not listed as "persons" governed by such rules.[100] Second, the Geneva Conventions required prisoners of war to be tried "only by the same courts and according to the same procedure" as would apply to the detaining government's own troops.[101] Yet the Court applied this requirement only to crimes by prisoners of war while in detention and not to crimes committed before such prisoners were captured.[102] Third, Yamashita claimed that his trial violated constitutional due process, but the Court granted the Executive irrefutable deference: "[T]he commission's rulings on evidence and on the mode of conducting these proceedings . . . *are not reviewable by the courts,*

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[92] *In re* Yamashita, 327 U.S. 1, 5 (1946); *id.* at 29 (Murphy, J., dissenting). The following account of events is based on FERREN, *supra* note 12, at 301–21, and John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUP. CT. HIST. 54, 58–59 (2003).

[93] FERREN, *supra* note 12, at 4 (quoting Major General R.J. Marshall).

[94] Ferren, *supra* note 92, at 57.

[95] *Yamashita*, 327 U.S. at 57 (Rutledge, J., dissenting); FERREN, *supra* note 12, at 308.

[96] *Yamashita*, 327 U.S. at 58.

[97] *Id.* at 50–51; FERREN, *supra* note 12, at 307–08 ("The commission thus condemned the general to death . . . with findings based substantially on untrustworthy, unverified, unauthenticated evidence not questioned . . . by cross-examination . . . ." (internal quotation marks omitted)); *id.* at 6 ("The trial . . . lasted for nineteen days of testimony by 286 witnesses—including not only eyewitness testimony but also hearsay upon hearsay, and even uncross-examined affidavits—spelling out the gruesome details. Only two witnesses offered testimony directly connecting General Yamashita to the brutality.").

[98] *Yamashita*, 327 U.S. at 5 (majority opinion).

[99] *Id.* at 18–19.

[100] *Id.* at 19.

[101] *Id.* at 20–21.

[102] *Id.* at 21–22.

but only by the reviewing military authorities. . . . [I]t is unnecessary to consider what, in other situations, the Fifth Amendment might require . . . ."[103] In essence, Yamashita raised a number of challenges to his capital trial's basic procedural adequacy by military commission, but the Supreme Court set these concerns categorically aside.

A dissent by Justice Rutledge listed several ways that Yamashita's capital prosecution deviated from criminal law traditions, including the military commission's ex post facto theory of "commander liability," insufficient notice, imposition of strict criminal liability, inadequate time for defense, and evidence without confrontation.[104] For Rutledge, whether such shortcomings were "taken singly . . . as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment[] . . . , a trial so vitiated cannot withstand constitutional scrutiny."[105] And although Rutledge acknowledged that military commissions deserve judicial deference in contexts of true "military necessity" or "battlefield" authority, he found such deference inapplicable to Yamashita's trial, which occurred after hostilities ended and without any ongoing threat.[106] As Rutledge explained, "The difference between the Court's view of this proceeding and my own comes down in the end to . . . [the Court's judgment] that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed . . . by the executive authority or the military . . . ."[107] Just as with *Quirin*, *Korematsu*, and *Hirabayashi*, the Court's decision in *Yamashita* created a zone of judicially unsupervised executive activity and thereby abandoned otherwise indispensable legal values.

3. Johnson v. Eisentrager.—*Eisentrager* concerned the postwar habeas petitions of German citizens whom the United States had detained at an American military facility in Germany.[108] An American military commission in China had convicted these petitioners of aiding enemies of the United States in violation of the laws of war.[109] The *Eisentrager* petitioners claimed that their trial and imprisonment violated the United States Constitution and the Geneva Conventions.[110] The *Eisentrager* Court, however, denied even having jurisdiction to hear the case because the petitioners were not American citizens and were not tried, held, or imprisoned within United States territory.[111]

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[103] *Id.* at 23 (emphasis added).
[104] *Id.* at 43–45 (Rutledge, J., dissenting).
[105] *Id.* at 45.
[106] *Id.* at 45–46.
[107] *Id.* at 81.
[108] Johnson v. Eisentrager, 339 U.S. 763, 765–66 (1950).
[109] *Id.* at 766.
[110] *Id.* at 767.
[111] *See id.* at 790–91.

As a technical side note, the Court said that the military commissions under review in *Eisentrager* imposed "no prejudicial disparity" as compared with courts-martial "that would try an offending soldier of the American forces of like rank."[112] In principle, however, *Eisentrager* barred all claims of overseas enemy aliens, and this raised deeper questions. What if, in some future case, detainees were held without any trial, conviction, sentence, or apparent release date? What if future military commissions used procedures and evidentiary rules that were no better than a cheater's coin flip? What if even death sentences were someday imposed based on tortured confessions, fabrication, racism, or bloodlust? *Eisentrager*'s logic would justify denying habeas jurisdiction regardless of how egregious governmental misconduct might be so long as the victims were extraterritorial aliens:

> The . . . enemy alien is constitutionally subject to summary arrest, internment and deportation . . . . Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy . . . . Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.[113]

In dissent, Justice Black objected that the *Eisentrager* majority was "fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."[114] Black continued, "Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy."[115] Like other *Korematsu*-era cases, *Eisentrager*'s restriction of habeas jurisdiction opened a large field of unchecked executive action where presidential assertions of military necessity could overcome otherwise applicable limits.

C. The Korematsu *Era's Flaws*

The foregoing cases about executive detention and military commissions have a common thread of extreme deference to asserted military necessity; in my view, this approach to presidential power and limited judicial

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[112] *Id.* at 790. *But see* MICHAEL T. GEARY, SWEET LAND OF SECURITY: AMERICA'S RESPONSES TO TERROR FROM THE REVOLUTION THROUGH TODAY'S "WAR ON TERROR" 8 (2007) (asserting that military commissions' reputation "for providing justice is questionable, while their reputation for delivering revenge is indisputable"); H. Wayne Elliott, *Military Commissions: An Overview*, *in* ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES 121, 124 (David K. Linnan ed., 2008) (explaining that it is more difficult for the government to fulfill the requirements of courts-martial than to fulfill the procedurally flexible rules of military commissions).

[113] *Eisentrager*, 339 U.S. at 775.

[114] *Id.* at 795 (Black, J., dissenting).

[115] *Id.* at 797–98.

oversight is what defines the *Korematsu* era. The next step is to explain why *Korematsu* and its contemporaries remain problematic even when the era is detached from issues of governmental racism. For most readers, the very name *Korematsu* prompts negative reactions, yet some commentators might endorse a *Korematsu*-era commitment to extraordinary presidential power without *Korematsu*'s cultural taint.[116] Accordingly, this section will sketch four historical trends that have made the *Korematsu* era's approach to presidential action less persuasive as time has passed.

First, subsequent history has shown that the Executive Branch's own misleading and deceptive conduct infected some of these *Korematsu*-era cases. In *Hirabayashi* and *Korematsu*, the government defended its curfew and internment policies by exaggerating information about domestic espionage and by concealing material information from the Court.[117] These tactics mark a low point in the history of federal litigation, leading one expert on the period to call the Japanese-American cases "the biggest lie of the greatest generation."[118] The government's concealment and misconduct caused a federal district court to grant Korematsu *coram nobis* in subsequent litigation.[119]

The government was similarly dishonest in *Quirin*, where it factually misled the public in order to conceal the conspirators' voluntary surrender and the corresponding weakness of American counterintelligence.[120] Indeed, the government decided to use a secret military commission partly to avoid embarrassing disclosures about how easily the conspirators entered and traveled in the United States and to hide that several conspirators did not seek to harm the American public.[121] These cases illustrate that, effec-

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[116] *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 3–10 (2007) (arguing that the government should have wide latitude to restrict liberties in emergencies); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at viii–xi (2005) (advocating broad executive authority in wartime); John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 49, 52–53, 56–57 (2006).

[117] IRONS, *supra* note 35, at 285 (explaining that the Department of Justice possessed "substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention [of the Japanese] were incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report . . . ." (quoting John Burling) (internal quotation mark omitted)).

[118] Muller, *supra* note 45, at 1.

[119] Korematsu v. United States, 584 F. Supp. 1406, 1419–20 (N.D. Cal. 1984). *Coram nobis* is an extremely rare writ that eviscerates a prior court's judgment based on factual errors "of the most fundamental character, that is, such as rendered the [prior] proceeding itself irregular and invalid." United States v. Mayer, 235 U.S. 55, 69 (1914).

[120] DOBBS, *supra* note 82, at 189–206.

[121] Of the eight saboteurs, only two showed any mentionable interest in pursuing their "mission." *See id.* at 124. Two men had turned themselves in, two discussed "ways out" of their predicament, and one appeared content to live carefree and harmless in the United States. *Id.* at 140–44, 154–55, 177–86.

tively unchecked, past administrations have bent or broken the factual record in cases that concerned national security threats.

To speak in more general terms, the President's credibility will always be crucial in cases like *Korematsu*. Courts will never have perfect information about security threats or what is needed to stop them; typically, judges can only consider the facts that a President provides and either doubt or believe their veracity. In the words of Jackson's *Korematsu* dissent:

> The limitation under which *courts always will labor* in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. . . . So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. *And thus it will always be* when courts try to look into the reasonableness of a military order.[122]

The historical record from World War II is replete with examples of the Executive Branch abusing this trust. The fact that President Roosevelt misled the public and that his Solicitor General misled the Court about military threats and countermeasures during World War II has understandably damaged the credibility of later Presidents making similar arguments in modern contexts.[123]

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[122] Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting) (emphasis added).

[123] *E.g.*, Hamdi v. Rumsfeld, 337 F.3d 335, 375 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc) ("[O]ne need not refer back to the time of the Framers to understand that courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu* . . . . In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the Executive's conviction of Korematsu for simply remaining in his home . . . . Of course, history has long since rejected the *Korematsu* holding. Indeed, Congress itself has specifically repudiated *Korematsu*, recognizing that 'a grave injustice was done to' those 'of Japanese ancestry by th[e] actions . . . carried out without adequate security reasons . . . .'" (alteration in original) (quoting 50 U.S.C.A. app. § 1989a(a) (West 1990))); GOLDSMITH, *supra* note 18, at 184–85 (noting with disapproval that certain academics have characterized the Bush Administration's "mendacious reaction to 9/11" as "akin to past presidential overreactions to perceived threats," including "the Japanese internment").

Such credibility issues surfaced dramatically in *Hamdi*'s oral argument before the Supreme Court. *See* Transcript of Oral Argument at 54–55, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) ("MR. DUNHAM: May it please the Court. [Principal Deputy Solicitor General Paul Clement] is a worthy advocate and he can stand up here and make the unreasonable sound reasonable. But when you take his argument at core, it is, 'Trust us.' And who is saying trust us? The executive branch. . . . [T]he Government['s] saying trust us is no excuse for taking away and driving a truck through the right of habeas corpus and the Fifth Amendment that no man shall be deprived of liberty except upon due process of law."), *quoted and discussed in* Neil S. Siegel, Review Essay, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1679 n.198 (2005) (reviewing STONE, *supra* note 6); STONE, *supra* note 6, at 555 ("As the former ambassador James Goodby has written, in the Bush administration fear has too often 'become the underlying theme of domestic and foreign policy.' The 'bottom line has been . . . "You are

Second, although some mid-century observers viewed *Korematsu*-era cases as pragmatic and modest, subsequent history has made such cases' security concerns seem nearsighted when weighed against countervailing harms to other values.[124] For example, Americans in the late twentieth century could hardly envision threats that might require prolonged executive detention or military commissions.[125] Even ten years after 9/11, students of *Korematsu* often need reminders about how dire the Japanese threat seemed in 1942, including the fact that Japanese bombs fell on North American soil and popular fears of a West Coast invasion.[126] The United States' long period of homeland safety has (to the dismay of national security professionals) limited Americans' ability to imagine the threats of wholesale invasion and sabotage that the Court discussed in *Korematsu*.[127]

By contrast, twentieth-century legalism has repeatedly emphasized values like procedural regularity and fairness, and federal courts have routinely enforced such principles.[128] In countless cases, courts and commentary have assumed that rule-of-law norms must not bend to political pressure.[129] Such practiced inflexibility, combined with the generational in-

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scared—trust us."'" (quoting James Goodby & Kenneth Weisbrode, *Bush's Corrosive Campaign of Fear*, FIN. TIMES (Nov. 19, 2003))). The modern Court's treatment of presidential credibility problems is discussed *infra* Part II.B.

[124] *Compare* Clinton Rossiter, *Martial Rule in World War II: The Case of the Japanese-Americans*, *in* THE SUPREME COURT AND THE COMMANDER IN CHIEF 40, 54 (Clinton Rossiter ed., 1976) ("The government of the United States, in a case of military necessity proclaimed by the President, and a fortiori when Congress has registered agreement, can be just as much a dictatorship, after its own fashion, as any other government on earth. The Supreme Court of the United States will not, and cannot be expected to, get in the way of this power."), *with* sources cited *supra* notes 6–7.

[125] *See* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285–88 (2002).

[126] *See, e.g.*, REHNQUIST, *supra* note 32, at 188; Clark G. Reynolds, *Submarine Attacks on the Pacific Coast, 1942*, 33 PAC. HIST. REV. 183, 191 (1964).

[127] FEITH, *supra* note 1, at 69 ("Because of our historical good fortune, Americans have long enjoyed a high degree of public safety."); *see* GOLDSMITH, *supra* note 18, at 187 (noting democracies' difficulty in "fighting a long war with few obvious public signs of the threat" because public vigilance declines rapidly).

[128] *E.g.*, Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring that warnings be given concerning criminal defendants' rights to counsel and against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (requiring state courts to provide counsel for criminal defendants who cannot afford an attorney); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (excluding evidence gained by an unconstitutional police search).

[129] *See, e.g.*, FEITH, *supra* note 1, at 69 ("We have become accustomed to thinking that our civil liberties are not only sacred but unshakeable. But a community's freedom is affected by circumstances. . . . Our Constitution and the judges that interpret it often seem to say that our freedoms are absolute, but when danger becomes oppressive, people will recall the quip that the Constitution is not a suicide pact."); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741, 746–47 (1982) (arguing that courts' basic interpretive authority derives from their commitment to uphold and advance the rule of law); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1364–65 (2004); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (explaining

frequency of serious security threats, has tended to reaffirm modernist judgments that the Court's *Korematsu*-era priorities were skewed.

Third, the end of World War II coincided with a worldwide legal movement to limit war and executive power. In the international sphere, this process found expression in the United Nations Charter's prohibition on the use of international military force, the development of humanitarian law designed to limit armed conflict's destructiveness, military alliances designed to deter aggression, and the United Nations Security Council, which holds "primary responsibility for the maintenance of international peace and security."[130] Such formal instruments and institutions served as confluent rallying points for political and nongovernmental power, and they are now a standard element of many countries' military decisions, including those of the United States.[131]

In the domestic sphere, legal restraints on executive power swelled after Watergate and Vietnam.[132] Perceived executive abuse in the 1970s spurred legal efforts to channel and limit political discretion, drawing political and cultural attacks on the President from Congress, social movements, and university campuses.[133] Such traditions made it easier to credit the

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how rule-of-law norms embolden judges to "stand up to what is generally supreme in a democracy: the popular will").

[130] U.N. Charter art. 24, para. 1; *see* GOLDSMITH, *supra* note 18, at 53–64.

[131] *See, e.g.*, Treaties Memo, *supra* note 8, at 38.

[132] *See* Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L.J. 2179, 2182–83 (1998) ("Vietnam and Watergate precipitated waves of political reform from 1968 through 1978, starting with party presidential nomination processes and moving to congressional power structures and decisionmaking processes, ethics, and campaign finance laws. . . . The powers of the president were checked in areas ranging from war powers to impoundment." (footnotes omitted)). The predicate for such restraints appeared as early as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[133] *See* War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006); SAVAGE, *supra* note 15, at 18–19; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 177–207 (Mariner Books 2004) (1973); Zelizer, *supra* note 4, at 19 (explaining how President Nixon's efforts to suppress the *Pentagon Papers*' publication in 1971, efforts to prevent release of White House tapes in 1973, and covert programs to intimidate protesters spurred legislative restrictions on presidential power); *id.* at 21 (quoting CIA director William Colby, who argued that newly elected "Watergate Babies" in Congress were "exultant in the muscle that they had used to bring a President down, willing and able to challenge the Executive as well as its own Congressional hierarchy, intense over morality in government, [and] extremely sensitive to press and public pressures" (alteration in original) (quoting KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI 48 (1996)) (internal quotation marks omitted)); GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 312 (2001) ("By 1968 and 1969 partisans of [the] antiwar movement were challenging not only the rationale for the war but the moral integrity of the American state and the American nation."); *id.* at 317–18 ("In the process of turning against America, antiwar protesters transformed many universities . . . . They demanded that universities sever ties . . . to the Cold War and other imperial projects. . . . The implications of this university transformation were far-reaching, for it occurred in institutions of enormous intellectual and strategic importance."); *cf.* DANIEL T. RODGERS, AGE OF FRACTURE 4–5 (2011) ("The 1960s were a moment of break, but the regrouping around a different set of premises and themes . . . was the work of the era that followed. . . . In political and institutional fact and

American trope that no one, not even the President, is above the law and not even in times of crisis.[134] Justice Jackson's iconic *Youngstown* opinion further suggests that the status of presidential wartime activity varies based on its relationship to congressional will as applied and interpreted by courts.[135] All of these heightened constraints on executive power and military activity have combined to make *Korematsu*-era attitudes regarding the scope of presidential authority seem out of step with the modern march of legalism.[136]

Finally, alongside these substantive limits on presidential and military power, the institutional role of federal courts expanded. The federal judiciary emerged after World War II as an ardent protector of individual rights and an active overseer of governmental entities.[137] From *Brown* to *Mapp v. Ohio* to *New York Times v. Sullivan* to *Griswold v. Connecticut*, an assortment of landmark decisions augmented courts' importance.[138] Given the judiciary's prominence in overseeing school districts, speech in parks, police work, contraception, electoral districts, and the death penalty,[139] modern analysts confront wartime executive abuse with the almost reflexive question: "Where were the courts?"[140]

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in social imagination, the 1930s, 1940s, and 1950s had been an era of consolidation. In the last quarter of the century, the dominant tendency of the age was toward disaggregation.").

[134] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[135] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[136] *See generally* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 142–43 (2001) ("[I]n the decade after the war, . . . [o]nly judges who were not beholden to the majority, it seemed, could protect discrete, insular, and powerless minorities and their rights. . . . Once nearly all Americans came to define social justice in terms of protection of minorities from majoritarian power, however, some consensus about the judiciary's role became inevitable.").

[137] GOLDSMITH, *supra* note 18, at 65.

[138] Griswold v. Connecticut, 381 U.S. 479 (1965); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[139] *E.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129–30 (2009) (allowing religious statutes in a public park); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710–11 (2007) (invalidating race-based school assignment and transfer policies); Roper v. Simmons, 543 U.S. 551, 555–56 (2005) (invalidating the juvenile death penalty); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring that criminal defendants be "read" their rights); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating a state ban on birth control); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (reviewing electoral district boundaries).

[140] An ample literature discusses judicial role in cases affecting international affairs. *E.g.*, THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 90–97 (1992); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 313–14 (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 69–91 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 146–48 (1990).

None of the foregoing analysis of the *Korematsu* era's flaws is as simple as my summary would indicate, nor does it apply equally to every *Korematsu*-era case. In the aggregate, however, post-war histories of executive abuse, cultural risk assessment, substantive legalism, and judicial enforcement help explain why *Korematsu*-era decisions have lost favor with scholars, the judiciary, and the public during the past six decades. By the end of the twentieth century, conventional reactions to the Court's *Korematsu*-era decisions ranged from ignorance and desuetude (*Yamashita*, *Quirin*, *Eisentrager*) to disapproval of a distant, ugly past (*Hirabayashi*, *Korematsu*).[141] Few analysts considered what such cases might mean for modern circumstances, but that obscurity changed with the GWOT.

II. THE WAR ON TERROR

A. President Bush and the Korematsu *Era*

The twenty-first century brought new attention to *Korematsu*-era case law and spurred new debate over its lasting force. The Bush Administration's major legal decision after 9/11 was to characterize the United States as a nation struck by acts of war rather than by international organized crime.[142] Confronting a populace desensitized by "wars" on drugs, poverty, crime, and cancer, President Bush quickly compared the 9/11 attacks to Pearl Harbor and equated the new terrorist threat with that older "great cause" of World War II.[143] In speeches, policy directives, memos, and ultimately legal briefs, the Bush Administration defended national security tactics that no President had used for decades, and executive advisers cited World War II's history as the principal support for their positions.[144] This

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[141] *See, e.g.*, Muller, *supra* note 7, at 1334; *supra* notes 3, 7 and accompanying text (discussing casebook and law review data).

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

[143] *See supra* text accompanying note 2 (collecting sources that compare the 9/11 attacks and Pearl Harbor). For descriptions of other politically declared "wars," see Carl M. Brauer, *Kennedy, Johnson, and the War on Poverty*, 69 J. AM. HIST. 98 (1982); David M. Cutler, *Are We Finally Winning the War on Cancer?*, J. ECON. PERSP., Fall 2008, at 3; John J. DiIulio, Jr., *A Limited War on Crime That We Can Win*, BROOKINGS REV., Fall 1992, at 6; James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY, May 1972, at 63; and Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995 (2003).

[144] *See* sources cited *supra* notes 2, 8; *see also* Brief for the Respondents at 17, 44–45, 65, 68, Boumediene v. Bush, 555 U.S. 723 (2008) (No. 06-1195) (citing *Eisentrager*, *Quirin*, and *Yamashita* to defend military tribunal convictions); Brief for Respondents at 9, 11, 13–14, 19, 21, 24, 27, 31–34, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) (citing *Eisentrager*, *Yamashita*, and *Quirin* to support trials by military commission); Supplemental Brief for Respondents at 4, Hamdi v. Rumsfeld,

phenomenon, and its connection to the *Korematsu* era, is most manifest with respect to executive detention and noncitizens' prosecutions in military commissions.

Consistent with the Authorization for Use of Military Force (AUMF), American forces in October 2001 began fighting against the Taliban, al Qaeda, and other forces in Afghanistan.[145] Military and intelligence operations captured numerous prisoners who could not be imprisoned locally due to security risks.[146] In November, President Bush authorized the Secretary of Defense to detain certain categories of aliens and prosecute a subset of them in military commissions for violating the laws of war.[147] In December, Secretary Donald Rumsfeld announced plans to hold prisoners at Guantánamo Bay, and the first detainees arrived fifteen days later.[148] In March 2002, Rumsfeld outlined procedures for military commission trials.[149]

Memos from the Office of Legal Counsel (OLC) and other executive lawyers indicate that all of these choices by the Bush Administration relied heavily on *Korematsu*-era precedents.[150] For example, a key authority supporting detention at Guantánamo Bay was *Eisentrager*, which was believed to eliminate federal habeas review because Guantánamo Bay—like American prisons in post-World War II Germany—held alien prisoners outside the territory of the United States.[151] Executive lawyers claimed that such detention was exempt from judicial oversight, and this argument had potentially foreseeable consequences for later interrogations and detention in Abu

542 U.S. 507 (2004) (No. 03-6696) (arguing that the Second Circuit's writ of habeas corpus was "fundamentally at odds" with *Quirin*); Brief for the Respondents at 13–14, 17–19, 25–26, 37, 38, 49, *Hamdi*, 542 U.S. 507 (No. 03-6696) (citing *Eisentrager*, *Quirin*, and *Yamashita* to support executive detention); Brief for the Respondents in Opposition at 3, 6–16, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334) (citing *Quirin* and *Eisentrager* as authority for executive detention); Brief for the Respondents at 4, 28–30, *Rasul*, 542 U.S. 466 (No. 03-334) (citing *Quirin*, *Yamashita*, and *Eisentrager* to restrict the Court's habeas authority); Brief for the Petitioner at 14–15, 30–36, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (citing *Quirin* and *Eisentrager* to justify the detention of enemy combatants); Reply Brief for the Petitioner at 9–10, 12–14, 16, *Padilla*, 542 U.S. 426 (No. 03-1027) (citing *Quirin* and *Eisentrager* to support the executive detention of enemy saboteurs).

[145] Pub. L. No. 107-40, 115 Stat. 224 (2001); Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 2 PUB. PAPERS 1211, 1211–12 (Oct. 9, 2001).

[146] *See, e.g.*, GREENBERG, *supra* note 21, at 5–6.

[147] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 3 C.F.R. 918, *reprinted in* 10 U.S.C. § 801 (2006).

[148] *See* GREENBERG, *supra* note 21, at 20, 68–80; Katharine Q. Seelye, *U.S. to Hold Taliban Detainees in 'The Least Worst Place,'* N.Y. TIMES, Dec. 28, 2001, at B6.

[149] Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (July 1, 2003) (codified at 32 C.F.R. §§ 9.1–9.12 (2010)) (stating the effective date of the regulation as March 21, 2002).

[150] *See supra* note 8 (collecting sources).

[151] *See* Habeas Memo, *supra* note 8, at 29 ("The basis for denying jurisdiction to entertain a habeas petition filed by an alien held at [Guantánamo] rests on *Johnson v. Eisentrager*, 339 U.S. 763 (1950).").

Ghraib and elsewhere.[152] Presidential advisers argued that the government's actions were substantively proper, yet the first line of defense with respect to extraterritorial aliens was that federal courts should not consider their claims at all.[153]

Executive lawyers crafted policies about military commissions under the aegis of *Quirin* and *Yamashita*, which had held that courts should be permissive in evaluating such tribunals' composition and procedures.[154] Modern military commissions offered defendants greater procedural protections than those offered in the tribunals convened in the *Korematsu* era.[155] Thus, the Bush Administration argued that federal courts should not meddle with assertedly exclusive presidential decisionmaking when it determined that the procedures offered in modern military commissions were too stringent.[156] Administration lawyers understandably declined to cite *Hirabayashi* and *Korematsu* directly, yet they invoked other *Korematsu*-era cases as foundational support for presidential war powers, thereby detaching ideas about broad executive authority and judicial deference from explicit racial classifications.[157]

B. The Court's Newfound Skepticism

It was perhaps foreseeable that the Bush Administration's commitment to expansive presidential power would inspire reliance on *Korematsu*-era precedents.[158] The Court's response, however, was less predictable. Seven Justices were appointed by Republican Presidents, five had directly supported President Bush's election in litigation against Al Gore, and the Supreme Court's own building had seemed vulnerable to terrorist attack.[159] Given President Bush's claim to unique information and judgment regarding national security, supported by progovernment precedents from the

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[152] *Id.* at 33–34 ("[W]e believe that the rationale for holding that there is no jurisdiction to entertain a habeas petition from an alien held at [Guantánamo] is very strong and is the correct result under *Eisentrager*."); *see* GREENBERG, *supra* note 21, at 219 (discussing commonalities between Guantánamo and the subsequent lack of professionalism and unified command at Abu Ghraib).

[153] *See* Habeas Memo, *supra* note 8, at 29–30.

[154] *See* Military Commissions Memo, *supra* note 8, at 12–13.

[155] *See* Goldsmith & Sunstein, *supra* note 125, at 282–84.

[156] *See* Military Commissions Memo, *supra* note 8, at 3–5.

[157] *See supra* note 8 (collecting citations to *Korematsu*-era cases in executive memos).

[158] *See* George W. Bush, GOP Nomination Acceptance Address (Aug. 3, 2000), *available at* http://www.2000gop.com/convention/speech/speechbush.html ("We have seen a steady erosion of American power and an unsteady exercise of American influence. . . . [The Clinton] administration had its moment. They had their chance. They have not led. We will."); *see also* SAVAGE, *supra* note 15, at 9 ("[Vice President Dick] Cheney made no secret of his agenda of expanding—or 'restoring'—presidential power. He repeatedly declared that one of his goals in office was to roll back what he termed 'unwise' limits on the presidency that were imposed after the Vietnam War and the Watergate scandal.").

[159] Bush v. Gore, 531 U.S. 98, 111 (2000); STONE ET AL., *supra* note 25, at lxxxviii–lxxxix; Linda Greenhouse, *The Day Anthrax Came to the Supreme Court*, 77 N.Y.U. L. REV. 867, 867–68 (2002).

1940s and 1950s, it was quite extraordinary that the Court delivered an unmatched string of presidential losses in the GWOT war powers cases.

Although recent scholarship has produced important analysis of these twenty-first-century decisions,[160] their full meaning in connection with the *Korematsu* era has not been explored. In comparing old cases with new ones, this section suggests that modern GWOT cases, despite their superficial technicalities, pose a much deeper challenge to the continuing endurance of *Korematsu*-era principles regarding executive power than is commonly thought. The Court's analyses and results display a significant departure from the *Korematsu* era's basic assumptions, which could support greater judicial skepticism in future national security litigation.

1. Rasul *and* Eisentrager.—The Supreme Court did not pass judgment on the Bush Administration's detention policies until June 28, 2004. A pair of cases that day, *Rasul v. Bush* and *Hamdi v. Rumsfeld*, began the most remarkable losing record that any American President has suffered in the realm of executive war powers.[161]

Rasul concerned habeas petitions from fourteen Guantánamo detainees who claimed that their uncharged detentions and the conditions of those detentions violated the Constitution, treaty obligations, and customary interna-

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[160] *E.g.*, PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 253–62 (2005) (describing the Court's response to assertions of executive power); Peter Berkowitz, *Introduction* to TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES, at x, xiii–xix (Peter Berkowitz ed., 2005) (describing the lack of consensus in applying law to the GWOT); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2107–27 (2005) (discussing the AUMF's application to the GWOT); Fallon & Meltzer, *supra* note 6, at 2045–49 (discussing *Hamdi*, *Hamdan*, *Rasul*, and *Padilla*); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 355–58 (2010) (evaluating the Court's GWOT decisions); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2073–74 (2005) (criticizing a conflict of laws approach to *Rasul*); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2019–30 (2005) (analyzing constitutional rights' geographic reach after *Rasul*); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203, 2206–07, 2211–12 (2007) (differentiating past judicial deference from the current focus on civil liberties); Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1601 (2006) (arguing against quick presidential action even in light of perceived crises "exemplified by the War on Crime and the War on Terror"); Mark Tushnet, *Introduction* to THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 1, 2 (Mark Tushnet ed., 2005) (describing two generations of scholarship concerning war and the Constitution); David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1329 (2008) (reviewing POSNER & VERMEULE, *supra* note 116) ("Most observers of American history look back with regret and shame on our nation's record of respecting civil liberties in times of crisis.").

[161] Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); *see* Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 1975–76 (2009) (describing *Hamdi*, *Rasul*, and the ensuing "battle" between the Court and the political branches).

tional law.[162] The Court did not address these claims on the merits; instead, it focused on whether there was jurisdiction even to consider such arguments.[163]

Over strong governmental protest, *Rasul* held that federal statutes granted habeas jurisdiction because the petitioners' ultimate custodians were "within [a district court's] jurisdiction" in the District of Columbia.[164] The detainees' location in Guantánamo was jurisdictionally irrelevant.[165] The Court also rejected the government's claim that federal habeas statutes do not apply extraterritorially. The United States' indefinite lease and complete control over Guantánamo rendered the naval base "within the territorial jurisdiction of the United States."[166] According to the Court, Guantánamo detainees were not "extraterritorial" at all, and thus possessed jurisdictional opportunities much like prisoners held in the fifty states.[167]

A major challenge for the *Rasul* majority was how to reconcile its decision to grant alien detainees habeas jurisdiction in Guantánamo Bay with *Eisentrager*'s denial of habeas jurisdiction to alien detainees in postwar Germany. The Court ostensibly distinguished *Eisentrager* on technical grounds, but the two cases were so normatively opposite that they seemed irreconcilable.[168] Whereas *Eisentrager* had denied jurisdiction over a broad swath of executive activity based on military necessity,[169] *Rasul* declared that judicial supervision over executive detention was immensely important "in wartime as well as in times of peace."[170] The President's ability to invoke *Korematsu*-era deference was correspondingly reduced.

The majority's decision to unceremoniously shelve *Eisentrager* caused Justice Kennedy to concur separately.[171] Yet Kennedy's analysis contradicted *Korematsu*-era doctrine just as much as the majority's did. Justice Kennedy sought to transform the clear jurisdictional rule from *Eisentrager*—no habeas for extraterritorial aliens—into a web of interdependent fac-

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[162] 542 U.S. at 470–72.

[163] *Id.* at 485.

[164] *Id.* at 478–79 (quoting 28 U.S.C. § 2241(a) (2006)) (internal quotation marks omitted).

[165] *See id.*

[166] *Id.* at 480 (internal quotation marks omitted).

[167] *Id.* at 480–81.

[168] *See id.* at 485–89 (Kennedy, J., concurring in the judgment) (arguing that the majority should have followed *Eisentrager*'s reasoning but distinguishing *Rasul* from *Eisentrager* on factual grounds).

[169] Johnson v. Eisentrager, 339 U.S. 763, 774 (1950) ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."); *id.* at 779 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.").

[170] *Rasul*, 542 U.S. at 474.

[171] *Id.* at 485 (Kennedy, J., concurring in the judgment).

tors that determine whether aliens outside the United States can have habeas jurisdiction.[172] Moreover, he used this pseudo-*Eisentrager* "framework" to declare that Rasul's indefinite detention without trial was "a weaker case of military necessity" than had appeared in *Eisentrager*.[173] Kennedy cited no proof for this military comparison, and he discarded the government's protest to the contrary.[174] Instead of accepting the military's own judgments, as the *Korematsu*-era Court had done, he mused that uncharged wartime detention might "be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for . . . military exigencies becomes weaker."[175] All of this nuanced line drawing is antithetical to *Korematsu*-era principles. The very notion that Article III judges should decide whether military detainees should be formally charged—much less whether they should be informally detained for weeks and months as opposed to years—contradicts everything that the World War II precedents' uncompromising adherence to executive factual and policy judgments once stood for.[176]

Rasul's policy significance has attracted great academic discussion,[177] yet the ruling's doctrinal effect on *Korematsu*-era principles has escaped attention. In part, such oversight stems from the Court's nominally minimalist style.[178] *Rasul* addressed two profound constitutional issues: whether the President can detain individuals in a "legal black hole" and how courts should treat claims of wartime necessity.[179] Instead of taking these issues head on, the Court's opinion stressed its narrow statutory context and thus did not acknowledge or justify its broad shift in judicial deference. As a result, *Rasul*'s full precedential and structural consequences remained unclear until the Court returned to Guantánamo detainees' habeas petitions in *Boumediene v. Bush*.[180]

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[172] *Id.* at 485–86.

[173] *Id.* at 488.

[174] *See id.*; Brief for the Respondents at 1–4, *Rasul*, 542 U.S. 466 (No. 03-334) (arguing that military necessity justified the indefinite detention of enemy combatants).

[175] *Rasul*, 542 U.S. at 488.

[176] *Cf. id.* at 495 n.4 (Scalia, J., dissenting) ("Justice Kennedy's approach provides enticing law-school-exam imponderables in an area where certainty is called for.").

[177] *See, e.g.*, HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR 87 (2007); Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1122–23 (2005); Fallon & Meltzer, *supra* note 6, at 2058–61; Roosevelt, *supra* note 160, at 2019–30.

[178] For extensive discussion of the Court's minimalism, see Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005), and Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005).

[179] *See Rasul*, 542 U.S. at 475–80 (majority opinion); *id.* at 488 (Kennedy, J., concurring in the judgment). For the quoted phrase, see Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

[180] *See infra* Part II.B.4 (discussing Boumediene v. Bush, 553 U.S. 723 (2008)).

2. Hamdi *and* Korematsu*.—Hamdi* represented another serious blow to *Korematsu*-era principles. Yaser Esam Hamdi was a United States citizen captured in Afghanistan and held in a South Carolina military brig.[181] Because Hamdi was a citizen held within the United States, there were none of *Rasul*'s questions about habeas jurisdiction or the extraterritorial force of federal laws.[182] Instead, the issue was whether and how federal courts could second-guess the President's factual claim that Hamdi was an "enemy combatant" who could be held without charges until hostilities ceased.[183] After extensive litigation in the district court, the government proffered a military bureaucrat's sworn statement that Hamdi had been "affiliated" with a Taliban military unit, had "received weapons training," and had carried arms against American allies in Afghanistan.[184] Hamdi argued that he was an aid worker at the wrong time and place. When the case reached the Supreme Court, the government's brief decried Hamdi's argument as "constitutionally intolerable"[185]—raising the ominous possibility that the President might somehow refuse to "tolerate" a ruling against the government.

Hamdi did not produce a majority opinion, but eight Justices rejected the *Korematsu*-era principle that courts should leave disputes over alleged enemy combatants to unsupervised presidential judgment.[186] Justice O'Connor wrote for a four-vote plurality that, although Congress in the AUMF had authorized military detention of enemy combatants in Afghanistan, constitutional due process required stronger evidence and better procedures than the government had used in detaining Hamdi.[187] O'Connor memorably declared that "a state of war is not a blank check" authorizing presidential abuse.[188] On the other hand, she also opined that—contrary to constitutional requirements in other contexts—the military could detain United States citizens based on hearsay evidence, evaluated by a panel of military officials employing a presumption in favor of the government.[189]

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[181] Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

[182] *Id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that even the government conceded the Court's jurisdiction to hear Hamdi's habeas claim).

[183] *Id.* at 524 (plurality opinion).

[184] *Id.* at 512–13; *see also* Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (discussing the government's initial refusal to proffer any supporting documents to the district court).

[185] Brief for the Respondents at 46–47, *Hamdi*, 542 U.S. 507 (No. 03-6696).

[186] Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 958 (2010) ("[T]he Supreme Court split in its rationale in *Hamdi v. Rumsfeld*, but agreed almost unanimously on the key point: eight Justices rejected the government's position that it had an unreviewable right to detain 'enemy combatants' without a hearing." (footnote omitted)); *see also Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision.").

[187] *Hamdi*, 542 U.S. at 517, 532–33 (plurality opinion).

[188] *Id.* at 536.

[189] *Id.* at 533–34.

Despite O'Connor's concessions to military necessity, her opinion concluded—without any apparent factual basis—that giving detainees basic notice and a hearing was "unlikely . . . [to] have the dire impact on the central functions of warmaking that the Government forecasts."[190] Although this reasoning represented an arguably mild defeat for the government, and although it affirmed the political branches' general responsibility for war making, O'Connor's opinion explicitly rejected the government's broadest claims concerning military necessity.[191] By contrast, *Korematsu*-era deference would have insisted that judges know nothing at all about detention policies' "impact on the central functions of warmaking" in Afghanistan and the GWOT.[192]

Four Justices thought that O'Connor's mild repudiation of *Korematsu*-era deference did not go far enough. Justice Souter's opinion, which Justice Ginsburg joined, attacked *Korematsu* directly. The Non-Detention Act (NDA) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[193] Souter explained that the NDA was enacted in 1971 precisely because "Congress meant to preclude another episode like the one described in *Korematsu v. United States*."[194] With respect to modern times, even though Hamdi's detention was not race-based and even though GWOT detainees are far less numerous than Japanese-American detainees in World War II, Souter used the NDA as a legal–historical link between these two distant periods.

For the NDA to be an effective safeguard against presidential abuse, Souter wrote that the statute must require a "clear statement of authorization to detain" instead of "vague congressional authority" like the AUMF.[195] Souter bolstered his conclusion with arguments about constitutional structure that contradict *Korematsu*-era deference to the Executive:

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[190] *Id.* at 534.

[191] *See supra* notes 187–88 and accompanying text; *cf.* Rasul v. Bush, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) (rejecting the government's argument for indefinite detention without legal process). For O'Connor's endorsement of moderate judicial deference, see *Hamdi*, 542 U.S. at 531, where she claims that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking" should be left to the "politically accountable" branches and notes "the reluctance of the courts 'to intrude upon the authority of the Executive in military and national security affairs.'" (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988)).

[192] *Hamdi*, 542 U.S. at 534. Even though Justice O'Connor grounded the President's detention authority in her interpretation of "longstanding law-of-war principles," she also suggested that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel," *id.* at 521, thereby opening to challenge all detention policies in the decidedly nonstandard GWOT. *See* John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 632 (2005).

[193] 18 U.S.C. § 4001(a) (2006).

[194] *Hamdi*, 542 U.S. at 543 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[195] *Id.* at 543–45.

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.[196]

As Souter observed, the history of presidential excess in World War II vividly confirms that one need not imagine bad executive motives to justify barriers against extrajudicial detention.[197] Many commentators have not given due attention to Souter's historical approach because it rested on statutory grounds and because it described *Korematsu*'s errors with a light touch.[198] In my judgment, however, Souter's analysis of war powers is the most compelling in at least five decades.

Justice Scalia, joined by Justice Stevens, rejected the plurality's constitutional compromise involving due process.[199] Because Congress did not suspend habeas corpus, Scalia insisted that the Constitution required citizens like Hamdi to be either prosecuted in a civilian court or set free.[200] Scalia's main doctrinal hurdle, however, was the *Korematsu*-era *Quirin* precedent, which had allowed a United States citizen to be detained and ultimately electrocuted without any civilian prosecution or suspension of habeas.[201] Scalia attacked *Quirin* as "not this Court's finest hour," as misinterpreting the Constitution's original and Reconstruction-era meaning, and as not controlling *Hamdi*'s result.[202] Scalia's broad assault on *Quirin*

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[196] *Id.* at 545; *see also* GOLDSMITH, *supra* note 18, at 71 (quoting an executive lawyer's objection that, if the OLC ruled a particular way, "the blood of the hundred thousand people who die in the next attack will be on *your* hands"); *id.* at 189 ("[The government's] internal skittishness is not something we can wish or will away. For generations the Terror Presidency will be characterized by an unremitting fear of devastating attack, an obsession with preventing the attack, and a proclivity to act aggressively and preemptively to do so."); 6 JAMES MADISON, *Letters of Helvidius No. 1*, *in* THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906) ("Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded." (emphasis omitted)).

[197] *See Hamdi*, 542 U.S. at 542–45 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (discussing the "cautionary example of the internments in World War II").

[198] For scholarship that draws attention to Souter's argument about constitutional structure, see Cole, *supra* note 160, at 1356; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 93–96; Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 593 (2008) (book review).

[199] *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting).

[200] *Id.* at 572.

[201] *See id.* at 569–72 (discussing *Ex parte* Quirin, 317 U.S. 1 (1942)).

[202] *Id.* at 569–71.

shows that even vigorous proponents of presidential power have raised serious doubts about at least some *Korematsu*-era precedents.[203]

Hamdi's internal divisions make it hard to interpret the Court's ruling, yet we have seen that each of the three opinions that rejected the government's position (encompassing eight of nine Justices) also rejected important elements of the *Korematsu* era. O'Connor's flexible pragmatism implied an institutional commitment to judicial line drawing, especially when core procedural protections are involved. Souter's reference to historical mistakes confirmed his skepticism that even well-intentioned, well-informed Presidents may not be fully trustworthy. And Scalia used historical analysis to deprecate the unanimous *Korematsu*-era precedent of *Quirin* on which the Bush Administration had relied most deeply. Although *Hamdi*'s holding was arguably permissive regarding the President's power to detain United States citizens, the Justices' reasoning showed that a doctrinal transformation might be in the works.[204]

3. Hamdan *and* Yamashita*.—Hamdan v. Rumsfeld*, the Court's first military commissions case, was (like *Rasul* and *Hamdi*) subtle in rejecting the *Korematsu* era.[205] Military commissions at Guantánamo Bay began in August 2004, using procedures, decisionmakers, and appellate mechanisms

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[203] *Id.* For discussion of *Quirin*'s use as precedent, see Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 868–69 (2006), and Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 310–14 (2005). Justice Scalia has vigorously supported presidential power in other cases as well. *See Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) ("The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. . . . For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort."); *cf.* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) ("Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' . . . [T]his does not mean *some of* the executive power, but *all of* the executive power.").

[204] Some scholars early in the twenty-first century tended to view the GWOT cases narrowly, as exemplifying little more than the "*Youngstown* principle" that is discussed *supra* in notes 71–74 and accompanying text. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699–704 (2008) (explaining that, with few exceptions, "recent scholarship still shares the conventional post-*Youngstown* orientation"); *see also* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 28 (2004) (describing Jackson's opinion in *Youngstown* as "the foundation of the constitutional inquiry"); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1028 (2008) ("By September 11, 2007, the U.S. Supreme Court had issued four decisions in 'war on terror' cases . . . . Each of these decisions focused primarily on issues of process, while more substantive questions were left lurking in the background." (footnotes omitted)).

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

that were much more defendant-friendly than the military commissions that had been upheld in *Quirin* and *Yamashita*.[206] Nonetheless, the Court in *Hamdan* ruled that the commissions' procedures were inadequate and had to be revised.[207]

The Court initially considered a jurisdictional objection concerning the Detainee Treatment Act of 2005 (DTA)[208] that would resurface in later GWOT litigation.[209] As a congressional response to *Rasul*, the DTA explicitly withdrew habeas jurisdiction for Guantánamo detainees and allowed detainees to challenge military commissions' activities only in the D.C. Circuit after a final judgment had issued and administrative remedies had been exhausted.[210] Hamdan did not follow these procedural rules, and the government argued that federal courts therefore lacked jurisdiction.[211] The Supreme Court disagreed, holding the DTA inapplicable to habeas petitions like Hamdan's that were pending when the statute became law.[212]

On the merits, the Court criticized procedures that were to be used in Hamdan's military commission, including the presiding officer's discretion to "close" certain proceedings and to hide from Hamdan and civilian counsel certain evidence against him.[213] The Court also discussed potential flaws in the military commission's evidentiary rules and appellate review.[214]

According to the Court, these procedures violated the Uniform Code of Military Justice (UCMJ), which imposed a "principle of procedural parity" and presumptively required "uniformity" between unlawful enemy combatants' military commissions and courts-martial for United States military personnel.[215] As I have discussed elsewhere, *Hamdan*'s analysis is difficult to defend using ordinary rules of statutory interpretation.[216] Instead, the

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[206] *See* News Release, U.S. Dep't of Def., Office of the Assistant Sec'y of Def., No. 820-04 (Aug. 24, 2004), *available at* http://www.defense.gov/releases/release.aspx?releaseid=7667; Goldsmith & Sunstein, *supra* note 125, at 284.

[207] Hamdan v. Rumsfeld, 548 U.S. 557, 617–33, 635–36 (2006).

[208] Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

[209] *Hamdan*, 548 U.S. at 572–75; *see infra* Part II.B.4 (discussing a similar jurisdictional issue).

[210] 119 Stat. at 2741–43; *see Hamdan*, 548 U.S. at 572–75 (discussing the DTA).

[211] Brief for Respondents at 7, *Hamdan*, 548 U.S. 557 (No. 05-184) ("The DTA removes jurisdiction over a broad class of actions by Guantanamo detainees, including this action, and establishes an exclusive review mechanism for challenging the *final* decisions of [Combatant Status Review Tribunals] or military commissions in the District of Columbia Circuit. The DTA establishes a statutory rule of abstention that eliminates all jurisdiction over petitioner's pre-trial complaints about his military commission.").

[212] *Hamdan*, 548 U.S. at 575–76.

[213] *See id.* at 613–35.

[214] *Id.* at 614–16.

[215] *Id.* at 619–20.

[216] *See* Green, *supra* note 45, at 162–64; Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1112–13 (2006); Cass R. Sunstein, *Clear Statement Principles and Na-*

Court anchored its "uniformity principle" in military commissions' long historical role as what experts have called "our common-law war court."[217] Citing authority from the Civil War, the Progressive Era, Korea, and Vietnam, the Court described the uniformity principle as a "background assumption"[218] even though it did not explicitly appear in any binding legal rules.

For purposes of this Article, two aspects of *Hamdan* need comment. First, the Court's conclusions about military commissions relied on its own assessment of military need, much like Kennedy's analysis in *Rasul* and O'Connor's approach in *Hamdi*.[219] The *Hamdan* majority explained that "[t]he military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity."[220] In Hamdan's particular case, however, the Court rejected presidential claims that military necessity required special adjudicative processes.[221] The Court's seemingly narrow holding left open whether future Presidents might someday offer persuasive arguments for stripped-down military procedures. But as with other GWOT cases, the very notion that federal courts could supervise and reject a President's assertion of military necessity completely undercut *Korematsu*-era deference.

A second important issue is the Court's mention of *Yamashita* as a "glaring historical exception" to *Hamdan*'s uniformity doctrine.[222] Contrary to *Hamdan*'s newly minted "principle of procedural parity,"[223] General Ya-

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tional Security: Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 4–5, 28, 44. *But see Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring in part).

[217] *Hamdan*, 548 U.S. at 690 (Thomas, J., dissenting) (quoting Madsen v. Kinsella, 343 U.S. 341, 346–47 & n.10 (1952) (quoting Judge Advocate General Enoch H. Crowder)); *In re* Yamashita, 327 U.S. 1, 20 n.7 (1946) (same); *see Hamdan*, 548 U.S. at 593 (majority opinion) (noting that military commissions are legally authorized "under the Constitution and the common law of war . . . with the express condition that the President and those under his command comply with the law of war"); *id.* at 595 (plurality opinion) ("The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists."); *id.* at 598 ("All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions . . . ."); *id.* at 602 ("Congress . . . incorporated by reference the common law of war" with respect to military commissions (internal quotation marks omitted)); *id.* at 613 (majority opinion) ("The UCMJ conditions the President's use of military commissions on compliance . . . with the American common law of war . . . .").

[218] *Hamdan*, 548 U.S. at at 617–25.

[219] Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004); Rasul v. Bush, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring).

[220] *Hamdan*, 548 U.S. at 590.

[221] *Id.* at 624 ("*[I]t is not evident to us* why [the danger of terrorism] should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial." (emphasis added)); *id.* at 632–33 ("At a minimum, a military commission 'can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice.' As we have explained, *no such need has been demonstrated here*." (quoting *id.* at 645 (Kennedy, J., concurring in part)) (emphasis added) (citations omitted)).

[222] *Id.* at 617–20.

[223] *Id.* at 617.

mashita's military commission—like that of Quirin and other World War II defendants—used less protective procedures than courts-martial that tried American soldiers.[224] Yet Yamashita's conviction was upheld by a vote of six Justices to two, and he was later executed by hanging.[225] If the modern Court had accepted *Yamashita* as good law, then all subsequent "parities" or "uniformities" between military commission procedures and courts-martial might have been interpreted as mere choices of military policy, rather than the binding legal requirement applied by the Court in *Hamdan*.[226] *Yamashita* thus threatened to unravel *Hamdan*'s "uniformity" doctrine to its very core.

The *Hamdan* majority replied by bluntly announcing that *Yamashita*'s precedential force had "been seriously undermined by post-World War II developments."[227] Citing ancillary changes to the UCMJ and international law, *Hamdan* concluded that "[t]he most *notorious* exception to the principle of uniformity . . . has been stripped of its precedential value."[228] The doctrinal importance of these statements has not been fully appreciated; at the time, they represented the Court's most direct repudiations of *Korematsu*-era precedent.

4. Boumediene *Beyond* Youngstown.*—Boumediene v. Bush* is the most recent case to analyze wartime military commissions, and its rejection of *Korematsu*-era principles has clarified and strengthened the Court's other twenty-first-century precedents.[229] Immediately after *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA).[230] The statute again restricted habeas jurisdiction, providing that federal courts could review alien enemy combatants' detentions only through D.C. Circuit review of final decisions by administrative Combatant Status Review Tribunals, Administrative Review Boards, and military commissions.[231] To avoid a replay of *Hamdan*, Congress stated that the MCA's habeas-stripping provision should apply to both pending and future litigation about detainees' rights.[232] *Boumediene*'s habeas petitions came from aliens who were held at

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[224] *In re* Yamashita, 327 U.S. 1, 18–20 (1946) (discussing differences between procedural requirements for military commissions and tribunals for American service personnel).

[225] *Id.* at 5, 26, 41; FERREN, *supra* note 12, at 1; Ferren, *supra* note 92, at 54.

[226] *See Hamdan*, 548 U.S. at 710 (Thomas, J., dissenting).

[227] *Id.* at 618 (majority opinion); *cf. supra* notes 124–41 and accompanying text (discussing late twentieth-century changes within American legalism and international law).

[228] *Hamdan*, 548 U.S. at 620 (emphasis added).

[229] Boumediene v. Bush, 553 U.S. 723 (2008).

[230] Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

[231] *Id.* § 3(a)(1); David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 357 (2007).

[232] MCA § 7(b); *see Boumediene*, 553 U.S. at 831 (Scalia, J., dissenting); *supra* notes 209–12 and accompanying text (discussing *Hamdan* and the DTA).

Guantánamo Bay without charges as enemy combatants.[233] Instead of following the MCA's procedures, the petitioners claimed that the statute itself was an unconstitutional suspension of habeas corpus.[234]

In accepting petitioners' arguments, the Court took a significant step beyond its other twenty-first-century precedents. The Court in *Rasul*, *Hamdi*, and *Hamdan* had never required the Court to contradict joint decisions by the President and Congress about military necessity under "*Youngstown* Category One." Instead, the Court's early GWOT cases used unorthodox statutory interpretation to characterize the President as defying Congress's will, and then sided with Congress.[235] By contrast, the *Boumediene* Court faced repeated judgments by Congress and the President that Guantánamo detainees should not receive habeas relief.[236] Both political branches had crafted special review procedures to accommodate ongoing military conflicts,[237] and this raised the "*Korematsu* problem" in its purest form: When Congress and the President bend legal norms to accommodate asserted military necessity, how can any court second-guess that judgment? Justice Jackson's *Youngstown* framework accords this kind of joint action the highest deference, and the *Korematsu* era arguably stood for the view that courts could not second-guess the political branches in such contexts.

Yet that is indeed what happened. *Boumediene* parroted Kennedy's *Rasul* concurrence, this time as a matter of constitutional rather than statutory interpretation, and this time supported by five Justices instead of just one.[238] Adopting Kennedy's view of *Eisentrager* as a multifactor web, the Court evaluated whether detainees should receive habeas relief by determining whether such proceedings would cause "practical obstacles."[239] The Court brushed aside the President's claims about military practicalities and held that habeas review would impose only ordinary "incremental expenditure[s] of resources."[240] The Court found "no *credible* arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[241] Based on the

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[233] *Boumediene*, 553 U.S. at 732 (majority opinion).

[234] *Id.* at 732–33.

[235] *See supra* Part II.B.1–3.

[236] *Boumediene*, 553 U.S. at 831 (Scalia, J., dissenting); *see* DTA, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.); MCA § 7(b).

[237] *See* 109 CONG. REC. H7537–49 (daily ed. Sept. 27, 2006).

[238] *Compare Boumediene*, 553 U.S. at 755, 762, 766, 769 (majority opinion, authored by Kennedy, J.) (citing Justice Kennedy's *Rasul* concurrence as authoritative precedent), *with* Rasul v. Bush, 542 U.S. 466, 485 (Kennedy, J., concurring) (expressing statutory analysis and conclusions that no other Justice joined).

[239] *Id.* at 766.

[240] *Id.* at 769. *But see* Brief for the Respondents at 5, *Boumediene*, 553 U.S. 723 (No. 06-1195) (arguing that detainee litigation was "consuming enormous resources and disrupting the operation of the Guantanamo Bay Naval Base").

[241] *Boumediene*, 553 U.S. at 769 (emphasis added).

Court's own unflinching factual judgment, the majority concluded that "there are few practical barriers to the running of the writ" and that, "[t]o the extent barriers arise, habeas corpus procedures likely can be modified" by federal district courts themselves.[242]

To be clear, the government's briefs had indeed offered "arguments" disputing these points; the problem was judicial disbelief that these assertions were "credible."[243] The *Boumediene* majority thus retained judicial supervision of military detainees at a judicially determined level of rigor even though both political branches had made a deliberately different choice. Such skeptical review of presidential authority, at its constitutional apex in *Youngstown*'s Category One, would have been quite unacceptable in the *Korematsu* era.

Boumediene expressed two other attacks on *Korematsu*-era deference. First, the Court held that habeas jurisdiction was especially important because the President did not use quasi-judicial procedures to determine which detainees could be held indefinitely.[244] "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[245] This language invoked the legalist shift that undermined the *Korematsu* era, and it elided the fundamental *Korematsu*-era distinction between wartime and peacetime adjudication.[246] For *Boumediene*'s majority, the petitioners were no longer just enemy aliens or combatants on a global battlefield. They were also "persons" who had been "imprison[ed]" by the Executive.[247] And like other detained persons, they presumptively deserved constitutional procedures to test their confinement's legality in federal court.

Second, the *Boumediene* majority explicitly denied "undermin[ing] the Executive's powers as Commander in Chief."[248] On the contrary, the Court claimed that "the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch"[249]—as though the President should somehow be grateful for the Court's detailed supervision. In the *Korematsu* era, judicial intervention to preserve fundamental fairness and constitutional structure was celebrated in dissenting opinions if at all.[250] *Boumediene* and

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[242] *Id.* at 770.

[243] *Id.* at 769. *But see* Brief for the Respondents, *supra* note 240, at 5–6, 10–11.

[244] *Boumediene*, 553 U.S. at 783.

[245] *Id.* at 797.

[246] *See supra* notes 124–30 and accompanying text.

[247] *Boumediene*, 553 U.S. at 797; *cf. id.* at 743 ("[T]he Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals . . . ." (citation omitted)).

[248] *Id.* at 797.

[249] *Id.*

[250] *See* Eisentrager v. Johnson, 339 U.S. 763, 795 (1950) (Black, J., dissenting); *In re* Yamashita, 327 U.S. 1, 43 (1946) (Rutledge, J., dissenting); Korematsu v. United States, 323 U.S. 214, 225–26

its twenty-first-century cousins thus represent an institutional realignment that has bolstered federal courts' influence and correspondingly limited *Korematsu*-era precedents.

5. Embarrassing Aftereffects.—Perhaps the most striking departure from the *Korematsu* era does not involve substantive precedent at all; instead, it concerns the modern Court's sense of timing in war powers cases. In *Quirin*, *Hirabayashi*, and *Korematsu*, the Court not only approved the President's wartime actions but did so very quickly.[251] Twenty-first-century cases have modestly restricted presidential action, and they have moved very slowly.[252] Thus, almost ten years after detainees arrived in Guantánamo, and seven years after the Supreme Court considered such detention's legality, it remains uncertain whether those detainees have due process rights, what such rights might require, exactly whom the government may detain in the GWOT, and whether the government has breached any rights that may exist in Guantánamo.[253] Nor has the Court resolved similar questions at other military bases or at CIA dark sites.[254]

(1944) (Roberts, J., dissenting); *id.* at 233–34 (Murphy, J., dissenting); *id.* at 244–45 (Jackson, J., dissenting).

[251] *See* Goldsmith & Sunstein, *supra* note 125, at 264–70 (describing how in *Quirin* the politicians, media, and public largely agreed that "[a]lmost everyone seemed to call for the saboteurs' execution—the sooner the better," and the Supreme Court obliged); Rostow, *supra* note 6, at 489 (noting with respect to *Korematsu* and *Hirabayashi* that "[o]ur war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast has been hasty, unnecessary and mistaken").

[252] *Cf. Boumediene*, 553 U.S. at 800–01 (Souter, J., concurring) ("It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. . . . After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation."); *id.* at 807 n.1 (Roberts, C.J., dissenting) (noting that such delays are as much due to courts' slowness as to the vagaries of democratic politics).

[253] *See id.* at 791–92 (majority opinion); JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL33180, ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 37–38 (2010); *cf.* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 332–33 (2007) (suggesting that Guantánamo detainees may not have a constitutional right to habeas corpus review). The first detainees arrived in Guantánamo in December 2001, and the first GWOT cases were decided by the Court in June 2004. *See supra* notes 148, 161 and accompanying text.

[254] Bagram Air Base in Afghanistan has been likened to "the next Guantanamo" for its current extrajudicial status. Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14; *see* Jonathan Hafetz, *Guantánamo and the "Next Frontier" of Detainee Issues*, 37 SETON HALL L. REV. 699, 700 (2007); *see also* MAYER, *supra* note 1, at 145 ("The CIA . . . had to hold its prisoners somewhere beyond the reach of the American legal system, and that was the impetus for its 'black site' program."). On September 6, 2006, President Bush announced that "he had emptied the black sites and transferred these suspects to Guantánamo Bay." MAYER, *supra* note 1, at 325.

The Court's glacial pace of decisionmaking must seem like "justice denied" to the detainees and their advocates.[255] Yet an unnoticed side-effect of such slowness is that—unlike the *Korematsu* era—the modern Court has seen real-time changes in the President's credibility before making any broad decision to approve or reject his choices.

To be clear, there is no evidence that the Bush Administration misstated facts in litigation concerning the GWOT as the Roosevelt Administration did in *Korematsu*. Yet presidential credibility has remained an important question below the surface of modern case law,[256] and the first round of GWOT decisions witnessed an especially unfortunate juxtaposition. On the morning of April 28, 2004, the government's lawyer in *Rumsfeld v. Padilla* emphatically told the Court that the United States does not torture detainees—not mildly and not ever.[257] That very evening, national television broadcast photographs of terrible abuse at the Abu Ghraib prison.[258]

Outside the courtroom, President Bush's credibility was challenged by military setbacks in Iraq. The United States failed to discover weapons of mass destruction, which had been a principal justification for intervention.[259] Links between Saddam Hussein and al Qaeda proved much weaker

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[255] *See, e.g.*, MAYER, *supra* note 1, at 332 (describing the slow legal process); Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491, 492–94 (2010) (bemoaning the Court's lack of progress); Martinez, *supra* note 204, at 1029 ("After years of litigation, hundreds of detainees continue to languish in *possibly* illegal custody . . . . The Court's decisions are less like landmarks and more like small signposts directing the traveler to continue . . . .").

[256] The political climates during World War II and the GWOT as well as media coverage of the two wars have exacerbated problems with presidential credibility. During the *Korematsu* era, the Court focused on national security; in today's GWOT, the Court has focused on preserving fundamental rights. *See* Goldsmith & Sunstein, *supra* note 125, at 282; Green, *supra* note 45, at 143–44.

[257] *See* Transcript of Oral Argument at 49–50, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) ("MR. CLEMENT: . . . I wouldn't want there to be any misunderstanding about this. It's also the judgment of those involved in this process that the last thing you want to do is torture somebody or try to do something along those lines."); Transcript of Oral Argument at 22–23, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) ("QUESTION: Suppose the executive says mild torture we think will help get . . . information. It's not a soldier who does something against the Code of Military Justice, but it's an executive command. Some systems do that to get information. MR. CLEMENT: *Well, our executive doesn't* . . . ." (emphasis added)). *But cf.* Transcript of Oral Argument at 23, *Padilla*, 542 U.S. 426 (No. 03-1027) ("MR. CLEMENT: . . . You have to recognize that in situations where there is war . . . you have to trust the executive to make the kind of quintessential military judgments that are involved in things like [avoiding and punishing torture by United States officials].").

[258] *See* David G. Savage, *Prison Scandal Could Sway High Court*, L.A. TIMES, May 11, 2004, at A8.

[259] *See* Julian Borger, *Iraq Had No WMD: The Final Verdict*, GUARDIAN (Sept. 18, 2004), http://www.guardian.co.uk/world/2004/sep/18/iraq.iraq1; *see also* Press Release, U.S. Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), *available at* http://intelligence.senate.gov/press/record.cfm?id=298775.

than the Bush Administration had claimed.[260] And the President's "Mission Accomplished" banner in May 2003 came to represent broader concerns about the Administration's flawed planning and execution.[261]

Since 2002, the government has released hundreds of Guantánamo detainees or transferred them to other countries for custody.[262] For some of these individuals, there was never any valid basis for their detention; for others, the facts are less clear.[263] In either event, some released detainees have subsequently condemned the United States' detention and military policies, and some have commenced or recommenced battle against United States troops.[264] Such problems illustrate disturbing imperfections throughout the government's detention and release policies at Guantánamo.

Likewise, the Bush Administration's results in GWOT litigation may have weakened presidential credibility in the Supreme Court. The Bush Administration was partly a victim of its own success. Even after the President's courtroom losses began to accumulate, post-9/11 attacks did not occur, thus suggesting that asserted security risks were not so severe or that the Administration could work around adverse legal rulings. Through this cycle of legal defeats, each successive case, with new assertions about threats and military needs, risked being even further discounted.

The President also suffered credibility problems in specific GWOT cases. For example, the government in *Hamdi* and its companion case, *Padilla*, claimed that national security threats kept prevented the petitioners from being criminally charged in ordinary civilian courts.[265] Indeed, the government argued that even to proffer significant evidence of Hamdi's enemy combatant status might be "constitutionally intolerable."[266]

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[260] *See* Douglas Jehl, *Pentagon Reportedly Skewed C.I.A.'s View of Qaeda Tie*, N.Y. TIMES, Oct. 22, 2004, at A10.

[261] *See* Ken Auletta, *Fortress Bush: How the White House Keeps the Press Under Control*, NEW YORKER (Jan. 19, 2004), http://www.newyorker.com/archive/2004/01/19/040119fa_fact_auletta?currentPage=all. For a somewhat grim overview of the Bush Administration's involvement with Iraq, see Fredrik Logevall, *Anatomy of an Unnecessary War: The Iraq Invasion*, *in* THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT, *supra* note 4, at 88.

[262] *See* Josh White, *18 More Detainees Leave Guantanamo*, WASH. POST, Apr. 20, 2005, at A22.

[263] *See* Thomas B. Wilner, Op-Ed., *We Don't Need Guantanamo Bay*, WALL ST. J., Dec. 22, 2008, at A19 ("We now know . . . that many Guantanamo detainees never fought against anyone; they were simply turned over by Northern Alliance and Pakistani warlords for bounties of up to $25,000. . . . We can reduce Guantanamo's population significantly simply by sending home detainees who had no business being imprisoned in the first place. And we should.").

[264] *See* James Risen, *35 Guantánamo Detainees Are Given to Pakistan*, N.Y. TIMES, Sept. 19, 2004, § 1, at 35.

[265] *See* Brief for the Respondents at 44–45, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (declaring that "penological" and national security interests required limitations on Hamdi's access to courts); Brief for the Petitioner at 4, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (arguing that Padilla "represents a continuing, present and grave danger to the national security of the United States" (internal quotation marks omitted)).

[266] *Hamdi*, 542 U.S. at 525.

Yet when the Court ordered the government to provide basic notice and process, the government did not choose to detain the purportedly dangerous Hamdi and Padilla as enemy combatants. Instead, Hamdi was released to full freedom in Saudi Arabia once he agreed to renounce his citizenship, never return to the United States, and waive any legal claims concerning his detention and interrogation.[267] After a period of notable foot-dragging, the government ultimately charged Padilla in civilian court with criminal conspiracy and thereby mooted all issues concerning his uncharged executive detention.[268] A federal district court convicted and sentenced Padilla to more than seventeen years in prison, which showed both that he was guilty of terrorist activity and also that he could have been criminally prosecuted without resorting to uncharged, indefinite military detention.[269]

Similarly, in *Hamdan*, even though the government claimed an urgent need for military commissions, such exigency seemed harder to credit when two years passed before Hamdan's prosecution began.[270] In 2008, Hamdan was tried under congressionally prescribed procedures, was convicted of giving material aid to terrorists, and was acquitted of conspiracy to participate in terrorism.[271] He was sentenced to sixty-six months, minus sixty-one months of time served.[272] Hamdan was later transferred to Yemen to serve the last few weeks of his sentence.[273] The government made no effort to detain Hamdan as an uncharged enemy combatant (like the Guantánamo detainees in *Rasul* and *Boumediene*, for example) even though the Court's *Hamdan* opinion explicitly mentioned that as an option.[274] Once again, the President's assertions of military danger and desperate need for self-preservation vanished like mirages into sand.[275]

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[267] *See* Donna Abu-Nasr, *Ex-detainee Deported to Saudi Arabia*, CHI. TRIB., Oct. 12, 2004, § 1, at 10.

[268] *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005).

[269] *See* Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1; Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST, Aug. 17, 2007, at A1.

[270] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

[271] *See* William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

[272] *See* Carol J. Williams, *Terror Convict Back to Yemen*, CHI. TRIB., Nov. 25, 2008, § 1, at 10.

[273] *Id.*

[274] *Hamdan*, 548 U.S. at 635 ("We have assumed, moreover, the truth of the [Government's implicit] message . . . that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm.").

[275] Some scholars have argued that society is better off pursuing even exaggerated images of danger because there are enormous costs if any threat proves to be real. *See* RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 139–50 (2006); RICHARD A. POSNER, PREVENTING

A final credibility issue arose in *Boumediene*, which extended habeas jurisdiction and provided judicial review to Guantánamo detainees.[276] Here, the credibility problem was not with President Bush's lame-duck Administration but with its champions on the Court and campaign trail. Scalia's dissenting opinion in *Boumediene* issued especially unfortunate rhetoric: "[T]oday's opinion . . . will make the war harder on us. It will almost certainly cause more Americans to be killed."[277] Presidential aspirant John McCain was similarly dire: "The United States Supreme Court yesterday rendered a decision which I think is one of the worst decisions in the history of this country. . . . [O]ur first obligation is the safety and security of this nation and the men and women who defend it. This decision will harm our ability to do that."[278]

Now three years later, there is no evidence of *Boumediene*'s deadly impact, nor is there reason to hold one's breath: *Boumediene* explicitly declined to grant Guantánamo Bay detainees any due process rights or to detail what those rights (if they exist) might require, nor did the Court order the release of even one detainee.[279] On the contrary, Chief Justice Roberts claimed in dissent that any differences between constitutional habeas review (which *Boumediene* demanded) and MCA review (which Congress had prescribed) might be immeasurably small.[280] Such picayune, lawyerly, and uncertain consequences make Scalia's and McCain's scenes of bloodshed very hard to fathom. Instead, historical evidence from the *Korematsu* era and the twenty-first century makes such threats of dead soldiers and impending terrorism seem like misguided wolf-crying. In defending presidential claims of military necessity, Scalia and McCain tied their own

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SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 108–09 (2005). Such discussions of risk analysis tend to be theoretical in nature, and they are not supported by the historical episodes discussed in this Article. Phrased differently, it is theoretically possible that courts could go too far in restricting presidential prerogatives, thereby putting the country in significant danger. But it is quite difficult to find examples of that scenario in the real world.

[276] Boumediene v. Bush, 553 U.S. 723, 771, 787 (2008).

[277] *Id.* at 827–28 (Scalia, J., dissenting).

[278] *CNN Newsroom* (CNN television broadcast June 13, 2008) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0806/13/cnr.03.html).

[279] *Boumediene*, 553 U.S. at 733 (majority opinion) ("We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."); *id.* at 798 (Souter, J., concurring) ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention."); *cf. id.* at 785 (majority opinion) ("[W]e make no judgment whether the [Combatant Status Review Tribunals], as currently constituted, satisfy due process standards . . . .").

[280] *Cf. id.* at 801–02 (Roberts, C.J., dissenting) ("The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. . . . The majority . . . compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-case basis. . . . How the detainees' claims will be decided . . . is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces . . . .").

credibility to arguments against meddlesome judicial intervention. Here, as in the *Korematsu* era, that institutional wager has proved to be quite risky. When it comes to Supreme Court cases at least, history has shown that Presidents exaggerate, and judicial skepticism is warranted far more than anyone would prefer.

Although it is clear that the military in World War II distorted the threat of Japanese-American sedition, the full risks of the GWOT are only partly knowable from public sources. Sixty years from now, historians will know more about the United States' threats, countermeasures, and truthfulness in the GWOT. Regardless of those revelations, the modern Court's plodding slowness has certainly permitted the crisis mentality of 9/11 to dissipate and has allowed presidential steps and missteps to unfold as an ongoing aspect of litigation about military need and executive credibility. Such delays contradict the Court's *Korematsu*-era approach, and they may have also influenced the Court's twenty-first-century results.

III. ENDING THE *KOREMATSU* ERA?

Thus far, I have proposed that the *Korematsu* era is a vital category of Supreme Court precedent whose assumptions about institutional war powers have been undermined by recent case law. This Part explores implications for future controversies over presidential authority. There are always risks in seeking present-minded guidance from historical research. In law, as in finance, past performance does not guarantee future results.[281] Nonetheless, this Part describes patterned experience from World War II and the GWOT that may carry lasting importance.

Even this project of seeking present-day guidance is inspired by the past. Consider a passage from Justice Jackson's *Korematsu* dissent: "[The majority] argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States* when we sustained [DeWitt's military] orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry."[282] Jackson did not respond as readers might expect. He did not distinguish *Hirabayashi* and *Korematsu*, nor did he otherwise justify his year-old, progovernment vote.[283] Instead, Jackson said of *Hirabayashi* simply: "I think we should *learn something* from that experience."[284] On the assumption that studying the past affects how we perceive the present, this Part considers what World War II and the GWOT

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[281] *Cf.* GORDON S. WOOD, THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY 71 (2008) ("History does not teach lots of little lessons. Insofar as it teaches any lessons, it teaches only one big one: that nothing ever works out quite the way its managers intended or expected. History is like experience and old age: wisdom is what one learns from it.").

[282] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (citation omitted).

[283] *See supra* Part I.A.1.

[284] *Korematsu*, 323 U.S. at 246 (emphasis added).

indicate about the institutional role of courts and the cultural role of law regarding wartime detention and military commissions.

A. "To Preclude Another Episode like the One Described in Korematsu*"*[285]

One lesson concerns how to prevent "another *Korematsu*." Under a conventionally narrow interpretation, it seems impossible that wholesale racist internment of American citizens could happen again, so the notion of preventing "another" *Korematsu* is correspondingly absurd.[286] By contrast, this Article's broad view of *Korematsu*-era deference to executive war powers raises problems that exist today and are likely to recur. Under this approach, the crucial *Korematsu* question is how courts can uphold legalist values in a wartime context when judicial competence is severely limited. Examples of executive abuse may take any number of forms, including governmental racism, uncharged detention, procedurally deficient trials and punishment, and other unforeseen, fundamental inequities. But can courts do anything at all to stop them?

Experiences from World War II and the GWOT confirm that national security issues and their effect on fundamental rights may be too important for Presidents to decide alone.[287] Twentieth-century history illustrates that security crises impose predictably massive pressure on Presidents and other officials who struggle to keep their country strong and citizens safe without shredding constitutional liberties. After surprise attacks like Pearl Harbor and 9/11, the government must respond quickly and decisively. Mistakes will occur, individuals will be mistreated, and any belief that future Presidents will ignore political pressures to defend the nation is as naïve as thinking that future crises will not arise at all.[288]

The "*Youngstown* principle," that Presidents must typically seek congressional approval to support wartime activities, is an important prophylactic against executive abuse. But the *Korematsu* era shows that *Youngstown*'s political safeguards may not be enough.[289] Congressional

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[285] Hamdi v. Rumsfeld, 542 U.S. 507, 542 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[286] Racist internment is inconceivable for almost countless reasons. Modern technologies allow relatively quick verification of data about personal identities thereby reducing any need to detain large numbers of innocents for long periods of time. Modern politics and sociology have rendered the entire concept of racial classifications problematic because issues of multiraciality overlap with problems of visually interchangeable, variable, and indistinct "races." Finally, the legal world of *Brown* has raised the stakes of racial subordination to an exceedingly high level, making it extremely unlikely that any neoracist internment plan could be upheld.

[287] *See, e.g.*, *supra* Part II.B.2.

[288] *Cf.* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS OF THE TWENTY-FIRST CENTURY 404 (2008) ("[I]n addition to stockpiling vaccines, we need to stockpile rules . . . to anticipate such a crisis, for that step too is a way of decreasing our vulnerabilities.").

[289] Note that all of this Article's *Korematsu*-era cases involve both Congress and the President working together. *See supra* Part I.A–B.

judgment can be swayed by the same political winds that buffet Presidents, and Presidents can influence the timing and scope of legislative authorization to suit their political objectives.[290] Congressional action may occur before important facts are known, as happened with the AUMF and the MCA.[291] And after a crisis, Congress may grant Presidents extremely broad authority, as when Congress in 1942 criminalized all violations of military orders that might be issued at some later date.[292]

The *Korematsu* era highlights courts' importance in these contexts. Judges cannot evaluate military reactions in real time, and they will always lack adequate information and expertise. Yet ex post oversight of executive detention requires Presidents to explain what they have done before nonexpert judges in the face of lawyers' counterarguments, and this supervision can limit abuse. If a President uses congressionally authorized war powers wisely and credibly, then subsequent litigation should be relatively easy to win. After all, judges are chosen by Presidents, and many Justices have their own experience in the Executive Branch.[293] Such jurists understand their institutional limitations, and they appreciate a strong, secure America just like anyone else who wishes to stay safe and alive. Presidents should expect any reasonable argument about national security or military necessity to receive a fair, if not generous, hearing before such tribunals .

By contrast, twentieth- and twenty-first-century litigation suggests that problems arise when Presidents push their authority beyond what, in retrospect, was actually necessary, and this overreaching is when courts can play a tempering role. As Souter wrote, "The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each."[294] Without impugning particular Presidents' motives or competence, history shows that the balance between such crucial values should not always be decided by the Executive without oversight from Congress and the courts as well.

B. "Tools Belong to the Man Who Can Use Them"[295]

Another lesson from sixty years of wartime case law concerns the role of judicial precedent itself in guiding presidential action. Two viewpoints

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[290] *See* Paul C. Light, *The President's Agenda: Notes on the Timing of Domestic Choice*, 11 PRESIDENTIAL STUD. Q. 67, 67 (1981).

[291] *See supra* Part II.B.5.

[292] Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

[293] Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. & POL'Y REV. 457, 460–61 (2007) (discussing the Executive Branch experiences of Chief Justices Roberts, Rehnquist, and Burger, as well as of Justices Scalia, Thomas, and Alito).

[294] Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[295] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (Jackson, J., concurring) (attributing the quotation to Napoleon).

merit notice, each having roots in opinions by Justice Jackson. On one hand, consider his explanation in *Korematsu* for why courts must not approve illegal executive action:

> A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[296]

This "loaded weapon" rhetoric is an orthodox element in analyzing *Korematsu* as a racist morality play. The passage is cited to show that Supreme Court precedents really matter and that racist errors retain their menacing power for generations.[297] Students are reminded that *Korematsu* was never directly overruled, thereby inviting the vivid nightmare that the Court's ruling lies even now as a loaded weapon just waiting for some reckless President to grab and fire.[298]

Jackson's weaponized approach to precedent, however, is terribly flawed. As we have seen, the first and decisive precedent supporting World War II's racist policies was *Hirabayashi* and not *Korematsu*. Thus, it was Jackson's own majority vote in 1943 (*Hirabayashi*) that helped to "load" the doctrinal weapon over which his dissent fretted in 1944 (*Korematsu*).[299] Jackson's willingness to disregard *Hirabayashi* a year later in *Korematsu* only illustrates the obvious truth that no judicial decision can decree a legal principle "for all time."[300] Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds adequate reasons to do so, and this is effectively what happened to *Korematsu* and *Hirabayashi* in the wake of *Brown*, the Civil Rights era, and other modern history.[301] To use Jackson's language again, *Korematsu* was a "repetition" of *Hirabayashi*'s racism for "expand[ed]" purposes,[302] yet such doctrinal expansion from racist curfew

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[296] 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

[297] *See* IRONS, *supra* note 35, at 366.

[298] Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1425 (1999) (book review) ("This nation may again see a race-based evacuation or internment. But *Korematsu*, although fallen from favor, has never been overruled—the weapon is still loaded and lying about." (footnote omitted)).

[299] *Compare* Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943), *with Korematsu*, 323 U.S. at 246.

[300] *Korematsu*, 323 U.S. at 264.

[301] *See supra* Part I.A.2.

[302] *Korematsu*, 323 U.S. at 246.

to racist reporting only pushed these two cases further toward their pariah status.[303] I argue that similar revision and rejection has started (and should continue) in the context of presidential authority during wartime.

A second perspective on judicial precedent concerns Jackson's *Youngstown* concurrence, which rejected President Truman's effort to seize steel mills and maintain output for the Korean War.[304] Jackson's famous opinion ends with less famous self-referential pessimism about judicial authority itself:

> I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[305]

This kind of "no illusion" realism about presidential authority characterizes judicial limits on the President as contingent on Congress's political wisdom and responsiveness. Here, one finds no bold talk from Jackson about precedents as "loaded weapons" or stalwart shields. On the contrary, if taken seriously, Jackson's *Youngstown* opinion implies that judicial decisions about presidential wartime activities are insignificant: When Congress asserts its institutional prerogatives and uses them wisely, the Executive might be restrained, but the Court cannot do much to shift that political balance of power.

Jackson's hard-nosed analysis may seem intellectually bracing, but it understates the real-world power of judicial precedent to shape what is politically possible.[306] Although presidential speeches occasionally declare a willingness to disobey Supreme Court rulings, actual disobedience of this sort is rare and would carry grave political consequences.[307] Even President

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[303] *See* Muller, *supra* note 45, at 1–2. The transition away from racism largely occurred during the decade immediately following *Korematsu*'s "loaded weapon" in 1944. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (invalidating segregated public education in the District of Columbia); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (invalidating state systems of segregated public education); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (invalidating racially segregated graduate-school classrooms); Sweatt v. Painter, 339 U.S. 629 (1950) (invalidating racially separate law schools); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (invalidating racist law school admissions policy).

[304] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

[305] *Id.*

[306] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 296 (2007) ("Though chosen by presidents and confirmed by senators, the justices have been able to gain authority over the president and the Congress. They have asserted the right to say what the Constitution means, and political leaders have generally chosen to respect that right. Judicial supremacy is not intrinsic to the constitutional scheme, but it has often emerged out of it.").

[307] *See* IRONS, *supra* note 35, at 153–54 (noting the surpassing rarity "in the history of the United States of armed revolt by the military against duly constituted judicial authority").

Bush's losses in the GWOT cases did not spur serious consideration of noncompliance despite broad support from a Republican Congress.[308] Likewise, from the perspective of *strengthening* presidential power, *Korematsu*-era decisions emboldened President Bush in his twenty-first-century choices about Guantánamo and military commissions.[309] Thus, the modern historical record shows that judicial precedent can both expand and restrict the political sphere of presidential action.

The operative influence of judicial precedent is even stronger than a court-focused record might suggest, as the past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government.[310] From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers now occupy such high-level governmental posts that almost no significant policy is determined without multiple layers of legal review.[311] And these executive lawyers are predominantly trained to think—whatever else they may believe—that Supreme Court precedent is authoritative and binding.[312]

A middle ground seems necessary between Jackson's "loaded weapon" and "no illusion" theories of precedent. Although Supreme Court decisions may often influence the scope of presidential war powers, such practical influence is neither inexorable nor timeless. A more accurate theory of war powers precedents would have to explain why the historical reservoir of *Korematsu*-era decisions supporting broad executive power continues to matter today, and it would also have to show how modern lawyers, judges, and scholars can eviscerate the force of such rulings under the proper circumstances.

This Article seeks to apply such a middle-ground theory of precedent to the *Korematsu* era. Everyone knows that *Korematsu* is wrong, yet like other legal icons—*Marbury*, *Dred Scott*, *Lochner*, *Erie*, and *Brown*—its exact operative content is debatable. *Korematsu* was once an authoritative precedent and is now discredited; this Article would revise *Korematsu*'s

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[308] George W. Bush, The President's News Conference with Prime Minister Silvio Berlusconi of Italy in Rome (June 12, 2008) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=77487#axzz1OYDV0okv) ("First of all, [*Boumediene* is] the Supreme Court decision. We'll abide by the Court's decision. That doesn't mean I have to agree with it."); George W. Bush, The President's News Conference with Prime Minister Junichiro Koizumi of Japan (June 29, 2006) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=256#axzz1OYDV0okv) ("I will protect the people and, at the same time, conform with the findings of the Supreme Court [in *Hamdan*].").

[309] *See supra* Part II.A.

[310] *See* GOLDSMITH, *supra* note 18, at 64–70; Goldsmith & Sunstein, *supra* note 125, at 285–88.

[311] *Cf.* GOLDSMITH, *supra* note 18, at 91 ("[I]n the 1990s, the number of CIA lawyers rose and rose, and today stands at well over one hundred. The number of lawyers in the Defense Department grew even more steeply . . . and today stands at over ten thousand . . . .").

[312] *Cf. id.* at 81, 90 ("Roosevelt's political conception of legal constraints had largely vanished, and by 2001 had been replaced by a fiercely legalistic conception of unprecedented wartime constraints on the presidency.").

negative precedent even further, transforming it from an isolated decision about racial oppression to a broad analysis of interlocked judicial and presidential power.

Under a "loaded weapon" theory of timelessly fixed precedential meaning, my project might be impossible; and under Jackson's "no illusion" theory of politics, all precedential analysis wilts in the presence of political conflict.[313] Between those extremes, however, if *Korematsu* is indelibly wrong but its scope and substance are changeable, then interpreting the decision's meaning could be important. A culturally situated view of iconic cases suggests that *Korematsu*'s significance is a matter of doctrinal and historical exegesis, and any interpretation's success must be measured by its influence on the current generation of scholars and commentators, who will in turn guide the next cohort of lawyers and judges.[314] If our judges and executive lawyers of the future can be persuaded that *Korematsu* is not just a case of racist internment but represents an entire era of excessive judicial deference to military necessity, then that precedential and cultural truth may influence the next generation's case law and presidential advice. This is how iconic precedents function, and it is also why they are still worth fighting over. To apply Jackson's language one last time, the influential and malleable role of iconic precedents is another "something" "we should learn" from the *Korematsu* era and the GWOT.[315]

IV. EPILOGUE: WHAT THE *KOREMATSU* ERA MEANS NOW

Iconic war powers precedents offer special interpretive challenges because such cases arise only infrequently from clustered factual circumstances that differ greatly from any other group of cases. The result is an uncommon risk that each generation of lawyers may forget or misread the wisdoms and follies of the past. This is what happened before 9/11. Lawyers, judges, scholars, and commentators had not adequately appreciated the Court's unfortunate history surrounding World War II. As old issues resurfaced concerning detention and military commissions, executive lawyers

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[313] *See supra* notes 307–11 and accompanying text.

[314] Balkin & Levinson, *supra* note 24, at 30 ("Law professors exercise their control [over the legal canon] primarily through influence over their students and their fellow academics and through their work as legal advisors and advocates. This influence is not insignificant: . . . the way in which constitutional law is taught may affect the development of the constitutional doctrine."); Balkin, *supra* note 11, at 682 ("[N]ew decisions and new events place older cases in new perspective. They change our attitudes both about the meaning of older decisions and their canonical status. Over time, the dialectic of new theories interacting with new cases and new events reshapes the constitutional canon and our attitudes about particular decisions from the past."); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1501 (1996) (describing how lawyers understand cases as "mental models" that are shared within legal communities and that "implicitly proclaim[] 'this is how we do things' (or, if the conversation should skip to a higher plane, 'this is the right thing to do')").

[315] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

and federal courts of appeals used *Korematsu*-era precedents (though not *Korematsu* itself) as "positive" precedents instead of "negative" ones. This was a mistake, as the modern Court has repeatedly held. This Article seeks to bolster safeguards against presidential abuse and, at long last, to limit the *Korematsu* era's influence. But like everything else, such scholarship operates in a world of contingent circumstances where pens and ideas are only sometimes mightier than swords and the politics of war.[316]

If my thesis is correct that the modern GWOT cases have undermined the *Korematsu* era's institutional assumptions, the episodic nature of war powers cases creates pressure to solidify that interpretation quickly. Elections have delivered a President with an arguably different view of presidential power.[317] And several new Justices now occupy the high bench—with the especially notable departures of Justice Stevens, who personally witnessed the *Korematsu* era as a young man,[318] and Justice Souter, whose *Hamdi* concurrence showed exceptional insight in analyzing past examples of war powers. Our current cluster of wartime decisions might soon draw to a close, and if that happens, issues of executive detention and military commissions may once again drift out of focus.

All too soon, it may be hard to remember the political pressures heaped on the Court in 2004, when it said "no" for the first time to a popular, self-declared wartime President. As memories fade, the modern Court's remarkable steps in rejecting *Korematsu*-era deference might be similarly forgotten or misconstrued. *Rasul* might become a case "just" about federal habeas statutes, *Hamdi* "just" a set of divided opinions about enemy combatants, *Hamdan* "just" an interpretation of the UCMJ, and *Boumediene* "just" a constitutional decision about Guantánamo Bay. For anyone who wishes to celebrate the *Korematsu* era's end, the time to determine the recent war powers cases' meaning is now. Otherwise, the Court's subtle language and narrow holdings may allow future executive lawyers to deflect recent precedents and revive *Korematsu*-era principles that the 9/11 era has firmly and quietly laid to rest.

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[316] Of course, law and politics are not always adverse to one another. *See* Timothy Naftali, *George W. Bush and the "War on Terror," in* THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT, *supra* note 4, at 59, 87 ("A broad coalition of legalists and pragmatic realists, both within all three branches of the U.S. government and outside government, played a significant role in rolling back perceived excesses [in the GWOT] . . . . This quiet rebellion . . . is not yet fully understood and deserves more study as more documents become available . . . .").

[317] *But cf.* Zelizer, *supra* note 4, at 36–37 ("[T]here is still minimal evidence that Obama will substantially roll back the gains in presidential power. Of note, it has been extremely rare for presidents in the postwar period to voluntarily relinquish power.").

[318] Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 234–46 (2008).

APPENDIX A
TEXTBOOKS DISCUSSING *KOREMATSU*

Year (Author)	*Is any* Korematsu-*era case other than* Korematsu *discussed in text?*	*Is* Korematsu *included in sections discussing race?*	*Is* Korematsu *included in sections discussing executive power?*
1985 (Gunther)[319]	N	Y	N
1991 (Gunther)[320]	N	Y	N
1996 (Stone)[321]	N	Y	N
1996 (Brest)[322]	N	Y	N
1997 (Gunther)[323]	N	Y	N
2000 (Brest)[324]	N	Y	N
2001 (Gunther)[325]	N	Y	N
2001 (Stone)[326]	N	Y	N
2004 (Gunther)[327]	Y	Y	Y
2005 (Chemerinsky)[328]	Y	Y	N
2005 (Stone)[329]	Y	Y	Y
2009 (Chemerinsky)[330]	Y	Y	N

[319] GERALD GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985).
[320] GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991).
[321] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3d ed. 1996).
[322] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3d ed. 1996).
[323] GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).
[324] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (4th ed. 2000).
[325] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001).
[326] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (4th ed. 2001).
[327] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004).
[328] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2005).
[329] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005).

APPENDIX B

Lexis Search Terms (entered in database "Law Reviews, CLE, Legal Journals & Periodicals, Combined")	*Results between 09/11/1991 and 09/11/2001*	*Results between 09/11/2001 and 08/11/2010*
(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and (executive detention or wartime detention or military commission or military tribunal)	238	1635
atl3(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and (executive detention or wartime detention or military commission or military tribunal)	117	1002
atl4(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and (executive detention or wartime detention or military commission or military tribunal)	98	843
atl5(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and (executive detention or wartime detention or military commission or military tribunal)	78	749
(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and atl5(executive detention or wartime detention or military commission or military tribunal)	88	908
atl5(Korematsu or Hirabayashi or Eisentrager or Quirin or Yamashita) and atl5(executive detention or wartime detention or military commission or military tribunal)	42	531

[330] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009).