CHAPTER 8

Epilogue: Watchful Care over the Loaded Weapon

A. Civil Liberties and National Security in Times of Conflict and War: An Overview

To what extent, if at all, should U.S. courts defer to a government's plausible yet possibly unfounded "claim of urgent need"[987] to justify the denial of fundamental liberties? This final chapter brings into contemporary focus Justice Jackson's ringing dissent in Korematsu v. United States. He warned that the majority's deference to the government's unsubstantiated claim of military necessity established a legal principle that sanctioned racial discrimination under the possibly false mantle of national security—a principle that, he memorably wrote, "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need."[988] His prescient warning lies at the heart of Chapter 8.

At the outset, consider the following view of *Korematsu*'s ostensible principle of judicial deference to executive branch claims of military necessity or national security:

> [The U.S. Supreme Court] has not overruled or formally discredited the *Korematsu* decision or its principle of judicial deference to government claims of military necessity. Nor has the Court announced in principle that the demanding standards of review now normally applicable to government restrictions of constitutionally protected liberties are unaltered by the government's claim of military necessity or national security.[989]

With this in mind, contemplate the uncertain role of U.S. courts in scrutinizing national security restrictions of civil liberties.

> At best, the decisions on these issues reflect an acceptance of the Court's role as guardian of constitutional liberties during times of war and upheaval, with notable exceptions. At worst, they reflect ambiguity and vacillation. Indeed, reminiscent of *Korematsu*, the Supreme Court's recent opinions . . . have fueled perception of a trend towards diminished government accountability for national defense and national security restrictions of civil liberties.[990]

This Epilogue to the Japanese American internment and redress chapters presents three selected case studies, in order to consider the relevance of Justice

Jackson's "loaded weapon" warning in *Korematsu* to present-day national security and civil liberties clashes. The pivotal events for any contemporary discussion of these issues, of course, are the horrific September 11, 2001 ("9/11") attacks on the World Trade Center in New York, the Pentagon in Washington D.C., as well as the related plane crash in Pennsylvania. Over 2,000 people died during the course of these attacks, catalyzing the United States' global response known as the "war on terror." However, significant incidents unfolding shortly before 9/11 are also important to this final exploration of the lessons of the internment. These still-recent episodes also illustrate the enduring quality of racial stereotypes historically associated with Asian Americans, and harken back to important insights in earlier chapters: deeply embedded racial associations that Asian Americans are more prone than other groups to disloyalty, espionage and lack of patriotism. Moreover, at critical junctures, the judiciary evinces a willingness to defer to government claims of national security to justify harsh treatment of allegedly disloyal Asian Americans—claims that then prove to be largely fabricated.

The chapter therefore begins with a significant contemporary case study of how these racially charged perceptions influenced the 1998-2001 prosecution—some say persecution—of Chinese American scientist Dr. Wen Ho Lee on charges of nuclear weapons spying for China. This case also illustrates a troubling repetition of the government's discredited litigation choices in the previous wartime internment cases. And the U.S. Justice Department's apparent racial targeting, deception and public dissembling in Dr. Lee's case were magnified by the federal judiciary's initial deference to the government's incantations of national security. The combined effect was to stigmatize, incarcerate in solitary confinement and badly mistreat an innocent American, in a way that replicated the mistakes made during the internment era. A chagrined federal judge later apologized to Dr. Lee in open court for government misconduct that "embarrassed the nation"[991] in the name of national security.

Following this initial section is a second case study, focusing on the U.S. government's national security reactions to 9/11. It examines the post-9/11 treatment of persons of Arab ancestry or Islamic faith in America. A brief note on racial and religious profiling illuminates civil liberties challenges raised by the government's so-called "war on terror." The following case study explores the extent to which the executive branch has employed race, religion and national origin as proxies for criminal or terrorist "predisposition" and as justifications for the denial of basic liberties. This middle section also describes continual government rhetoric and plans for a possible post-9/11 internment.

The chapter concludes its examination of Justice Jackson's warning through a third case study of so-called "enemy combatants" held by the United States at its Guantánamo Bay prison. Detained without charges, access to counsel or trial, these detainees sought hearings in American courts to show that they were not threats to the nation's security. The Bush Administration asserted that the executive branch's determination of these detainees' enemy combatant status was final and that the judiciary should decline even to hear their pleas. Fred Korematsu's 2004 *amicus* brief to the U.S. Supreme Court in *Rasul v. Bush*[992] detailed the long history of government curtailment of civil liberties for specious national security reasons, resulting in damage to American democratic ideals. The brief also culled lessons

about the importance of careful judicial scrutiny from his own case—the original 1944 decision and the 1984 *coram nobis* ruling.

The three case studies in this Epilogue are written from particular vantage points. They deliberately situate the legacy of the Japanese American internment and redress within the current politicized, dynamic interplay between Congress and the courts on the correct balance between national security and civil liberties. This chapter thus takes up Justice Jackson's "loaded weapon" warning and challenges readers with the following queries:

> *Will today's judiciary draw upon yesterday's internment case lessons to demand that the government justify its "loaded weapon" assertion of national security when curtailing fundamental liberties?*
>
> *Or will the courts again defer to the executive branch during times of public fear, and decline to exercise "watchful care"*[993] *over civil liberties of citizens and non-citizens?*
>
> *And what might influence the approach courts embrace?*

B. Pre-9/11 Racial Profiling of Asian Americans

1. The Wen Ho Lee Prosecution

This opening case study details the government's prosecution of an Asian American scientist, Dr. Wen Ho Lee. Just before 9/11, the Clinton Administration and the public readily treated Dr. Lee as the dangerous "other"—as an Asian threat to national security. Initially, the Administration convinced the federal court to accept its unsupported assertion that Dr. Lee committed nuclear weapons espionage. The truth, later revealed, was entirely different. The government's overall response to the potential threat of espionage in the 1990s appears in some ways to be disturbingly similar to its response to West Coast Japanese Americans in the 1940s, and might be viewed as a modern-day version of the racial profiling that occurred during World War II.

Note: Overview of the Wen Ho Lee Prosecution

> Dr. Wen Ho Lee, I believe you were terribly wronged by being held . . . under demeaning, unnecessarily punitive conditions. *I am truly sorry* that I was led by our Executive Branch of government to order your detention. . . . *I was led astray last December by the Executive Branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States attorney . . . . [T]he top decision makers in the Executive Branch . . . embarrassed our entire nation and each of us who is a citizen of it.*
>
> —Federal District Judge James A. Parker[994]

Shortly before 9/11, the Clinton Administration tracked down and incarcerated Dr. Wen Ho Lee in an attempt to refute criticisms that it was "soft on China."[995] As

it turned out, the Justice Department fabricated its claim against Dr. Lee of nuclear weapons espionage. Two years later, U.S. District Judge James Parker, a conservative Reagan appointee, expressed dismay at the Administration's deception. After the judge had harshly treated Dr. Lee during the initial phase of the prosecution, he then apologized. This note illustrates the judicial tendency first to defer to executive branch assertions that national security is at stake and then, in retrospect, to apologize for manifest injustice. What follows is an overall account of the misguided prosecution.

A. THE PROSECUTION OF WEN HO LEE: "SPY (OR LIE) OF THE CENTURY?"

In early 1999, the Justice Department broadly asserted that Dr. Lee surreptitiously transmitted to China the design of the W-88 miniaturized nuclear warhead—then considered the "crown jewels" of America's nuclear secrets. Drawing upon the government's public charges, the media characterized Dr. Lee as the "spy of the century," an "evil China spy," "the Dragon" and "the worst spy since the Rosenbergs"—someone who supposedly was "far more damaging to the national security than Aldrich Ames."[996]

The government, however, never charged Dr. Lee with espionage, and FBI investigators later admitted there was no evidence to support such a charge. The Justice Department ultimately prosecuted Dr. Lee for a single felony count of transferring legacy codes from a classified computer system to his unsecured office computer to facilitate work at home—a common occurrence. For example, former CIA director John M. Deutch committed similar, if not more serious, security violations but was never prosecuted.[997]

Secretary of Energy Bill Richardson publicly announced Dr. Lee's firing from the Los Alamos National Laboratories in March 1999 for failing to report both his computer security breach and for contact with Chinese scientists during a public conference. Judge Parker ordered that Dr. Lee, then 65 years old and in declining health, be shackled and chained and kept in solitary confinement without bail for nine months in Santa Fe County Detention Center under so-called "special administrative measures."[998] Those special measures mandate harsh conditions for the most dangerous federal prisoners and resulted in Dr. Lee being subjected to minimal communication, lack of vital medication and near-deadly food poisoning.[999]

The government justified Dr. Lee's detention by dissembling. The FBI had interrogated Dr. Lee before he was fired from the laboratory and reported to headquarters that Dr. Lee was not a spy.[1000] Dr. Lee had unequivocally denied passing nuclear weapons secrets to the Chinese government and had passed various polygraph tests. Nevertheless, FBI agents misled Dr. Lee, the court and the public into believing that he had failed the polygraph tests—the prosecution's first deception.

The government's second fabrication was to characterize Dr. Lee as a severe national security threat engaged in tampering with the U.S. "crown jewels" of nuclear secrets. In fact, the files downloaded by Dr. Lee were merely classified as "Protect as Restricted Data," not "Secret" or "Confidential" as the Justice Depart-

ment falsely asserted.[1001] To bolster its public charge, the government later upgraded the classification of the files to "Secret and Confidential."

The third prosecution deception lay in linkage of Dr. Lee's Chinese ethnicity to untrustworthiness—the taint of racial disloyalty. With conservative attacks coming from many directions—alleging that the Clinton Administration was soft on China and that the President's Chinese American supporters violated campaign finance laws—the Administration engaged in what in retrospect seems to be opportunistic racial scapegoating.[1002]

At the same time the government targeted Dr. Lee, it learned that former CIA director Deutch similarly mishandled classified information by using his unsecured home computer to store sensitive government security information. Deutch used that same computer to access the Internet, including e-mail from a Russian scientist. This double standard was so obvious that it drew the attention of Republican Senator Charles Grassley, a member of the Judiciary Committee.[1003]

Chalking Deutch's activities up to "sloppiness,"[1004] however, the CIA rejected any similarity between Deutch's and Lee's cases, and the Justice Department declined to prosecute Deutch. Although Asian American groups charged that Deutch's security violations were more serious than Lee's and that Deutch received special treatment, CIA investigators never even questioned Deutch. And in January 2001, just before leaving office, President Clinton preemptively pardoned Deutch.[1005]

In December 1999, Dr. Lee filed a civil lawsuit against the FBI and the Departments of Justice and Energy, alleging that they engaged in racial profiling, violated his privacy and falsely portrayed him as a Chinese spy. The U.S. Attorney's sworn affidavit in response claimed that Dr. Lee was more likely to commit espionage for China because he was "overseas ethnic Chinese."[1006] This logic seems based on the fallacy of disloyalty by reason of race. This specious logic is even more questionable in Dr. Lee's case because Taiwan (Dr. Lee's country of origin) and China are hostile adversaries.[1007] In a spectacular public disclosure, Robert S. Vrooman, former Chief of Counterintelligence at Los Alamos, charged that the government singled out Dr. Lee for prosecution because of his ethnicity. Vrooman spoke out after Energy Department Secretary Richardson recommended that he and others be disciplined for ostensibly failing to properly conduct the spying investigation. He asserted that the prosecution was "screwed up because there was nothing there—it was built on thin air."[1008] He later concluded in his testimony that "the [real reason for] the failure to look at the rest of the [Los Alamos] population is because Lee is ethnic Chinese."[1009]

Vrooman's public acknowledgment of racial scapegoating revealed the government's revival of the "yellow peril" fears of deviousness and inscrutability that have branded Asian Americans as forever foreign.[1010] This racial scapegoating based upon a foreigner stereotype did not escape notice by national media outlets such as the L.A. Times.[1011]

B. THE COX REPORT: A NATIONAL ASSESSMENT (OR EMBARRASSMENT)?

Soon after Dr. Lee's firing, a special committee headed by Representative Christopher Cox reported that China had gained crucial design information on all U.S. nuclear weapons. Many observers contend that the widely publicized report of this Congressional Select Committee contained several fallacies: it (1) made sweeping assertions about espionage among Chinese in America; (2) drew connections between illegal Chinese American campaign contributions and Chinese espionage;[1012] and (3) concluded, without supporting details, that Chinese American scientists, businessmen and students were recruited as spies.

The report definitively identified Chinese American nuclear espionage:

> Espionage played a central part in the [Peoples Republic of China's] acquisition of classified U.S. thermonuclear warhead design secrets. In several cases, the PRC identified lab employees, invited them to the PRC, and approached them for help, sometimes playing upon ethnic ties to recruit individuals.[1013]

Soon after its release, both the CIA and prominent nuclear weapons experts rejected the Cox Report's key findings. Harold Agnew, a former director of the Los Alamos laboratory, observed that the allegedly stolen "crown jewels" would actually have "limited value" for the Chinese government.[1014] Lewis Franklin, a career intelligence expert on Sino-Soviet missile and space programs, opined that the Cox committee members "are quite wrong . . . . [T]hey allege technology theft at the launch sites in China for which their [*sic*] is no evidence."[1015] Scientists and scholars from Harvard, Stanford and Lawrence Livermore National Laboratory sharply criticized the Cox Report, refuting its major conclusions in a 99-page published report of their own.[1016] Some of these scientific experts concluded that the government scapegoated Dr. Lee in pursuit of a broader political agenda.[1017]

In its inquiry into the handling of Dr. Lee's prosecution, the Energy Department conceded that

> [g]iven its slap-dash quality, its flawed rationales, its complete mischaracterization of the predicate, and its queer mash of intense review of some pertinent records and complete ignorance of other venues of compromise, once Wen Ho Lee was "tagged" with the patina of suspicion, the AI [administrative inquiry] was all but over. [Dr. Lee] would be "it."[1018]

Stephen Schwartz, publisher of the *Bulletin of the Atomic Scientists*, identified what appears to have been a major reason for targeting Dr. Lee. He editorialized that the timing of Dr. Lee's espionage story galvanized previously lagging support for legislation promoting the swift deployment of ballistic missile defenses.[1019]

C. MEDIA (IR)RESPONSIBILITIES

Reminiscent of the media's portrayal during the 1940s of Fred Korematsu as a "Jap Spy,"[1020] an alarmist press presumed Dr. Lee's guilt. Sensationalist coverage in a series of articles published by the New York Times found Dr. Lee guilty unless proven innocent.[1021] Asian American communities reacted to what they perceived as harsh and unfair media treatment by actively demanding facts.[1022] In August 2000, the American Civil Liberties Union and Asian Law Caucus, with the support of

other Asian American organizations,[1023] filed *amicus curiae* briefs in Dr. Lee's civil lawsuit, charging the government with racial profiling and demanding that it publicly disclose relevant documents. These and other civil rights groups staged multi-city protests to raise national awareness about Dr. Lee's prosecution and racial scapegoating.

Partly in response to public outcry, the New York Times eventually changed its tone from alarming to atoning. In September 2000, its editors publicly apologized, acknowledging that in place of a tone of journalistic detachment, the Times had been sensationalistic.[1024]

2. Case Closed—Or Is It? *Korematsu* Revisited

In September 2000, after nine months in solitary confinement and after vilification as a spy so dangerous that he could not be granted bail, the government set Dr. Lee free. The Justice Department had charged Dr. Lee with 59 counts of downloading secret computer information. Ultimately, Dr. Lee pled guilty only to one count of unlawful gathering of information, and the court sentenced him to time served. He was never charged with spying or passing nuclear secrets.

After the its initial public posturing and denunciations of Dr. Lee, the government's prosecution began to collapse on multiple fronts in July 2000. First, over vehement Justice Department opposition, Judge Parker "allowed Wen Ho Lee's lawyers to subpoena internal government documents that might shed light on whether racial profiling lay at the heart of Dr. Lee's prosecution."[1025]

Second, as the trial approached, the government's factual case disintegrated. Reports surfaced that the government suppressed four internal FBI investigative memos stating that Dr. Lee was not guilty of espionage. In addition, a principal FBI investigator in the case, Robert Messemer, acknowledged that: (1) he had misstated relevant facts to federal Judge Parker about Dr. Lee's danger to national security, which had been the basis for the judge's decision to deny bail and approve Dr. Lee's placement in solitary confinement; (2) contrary to Messemer's earlier sworn testimony, Dr. Lee never said he was downloading the information to aid his search for overseas employment; and (3) Dr. Lee had passed his first polygraph test in which he was questioned about spying for China. In fact, independent experts had confirmed to the FBI that Dr. Lee's polygraph score was one of the highest possible for honesty.

Third, nuclear scientists confirmed that the information Dr. Lee downloaded was not the "crown jewel" of the U.S. nuclear weapons program. Rather, 99 percent of that information was already in the public domain and the remainder was not of great importance. And finally, as also discussed, Judge Parker unsealed the affidavits of Charles Vrooman, the original investigator in charge, and another investigator. These affidavits recited under oath that the government had engaged in racially discriminatory targeting of Dr. Lee.

With these emerging facts, the government's justifications under the mantle of national security crumbled. And its denial of stark racial profiling met with judicial as well as public disbelief. With the impending public disclosure of internal Justice Department documents on racial profiling, the government negotiated the plea

agreement. At the hearing on the plea agreement, Judge Parker rebuked the government and apologized to Dr. Lee:

> I am angered over having been misled into believing the sixty-year old nuclear scientist was a danger to national security . . . . I sincerely apologize to you, Dr. Lee, for the unfair manner in which you were held in custody by the executive branch.[1026]

Judge Parker announced from the bench that he wished he were not bound by the plea agreement to refrain from pursuing the "real reasons" for Dr. Lee's harsh treatment:

> I am also sad and troubled because I do not know the real reasons why the Executive Branch has done all of this. We will not learn why because the plea agreement shields the executive branch from disclosing a lot of [apparent racial profiling] information that it was under order to produce that might have supplied the answer.[1027]

Dr. Lee himself believed he understood the reasons:

> As I sat in jail, I had to conclude that no matter how smart you are, no matter how hard you work, a Chinese person, an Asian [American] person like me, will never be accepted. We will always be foreigners. Bill Richardson said my treatment, my incarceration, had nothing to do with racial profiling. What a liar—it had everything to do with discrimination.[1028]

Despite the prolonged public relations campaign against Dr. Lee in Congress and by the Justice Department in court, in the end the government could not point to any evidence that Dr. Lee passed nuclear secrets to China. Nor could it show that he had engaged in any form of nuclear espionage or was otherwise disloyal to the United States. U.S. Attorney General Janet Reno nevertheless refused to apologize:

> I think Dr. Lee had the opportunity from the beginning to resolve this matter, and he chose not to, and I think he must look to himself . . . . I regret deeply that Judge Parker feels that way, but I know what I've had to do based on the evidence and the law; I know what I've had to do to address the national security issues and to address information that is of real concern to this nation and what we tried to do up front. *I'm not embarrassed.*[1029]

Notes & Questions

1. Through the lens of the internment: One way to characterize the Wen Ho Lee investigation and prosecution is that good faith fears for the nation's security turned into overzealous government prosecution. Another, perhaps more compelling, way is to examine the Wen Ho Lee controversy through the lens of the internment cases. The parallels include racially discriminatory profiling by government officials; empty charges of espionage; prolonged incarceration without trial and without evidence of national security necessity; the suppression of exculpatory evidence; media innuendo of Asian American disloyalty; the reemergence of racial stereotypes in the public imagination; an initially deferential judge and retrospective U.S. embarrassment.

What has the country learned about race, rights, liberty and reparation from *Korematsu, Hirabayashi* and *Yasui*?

2. Looking backward to move forward: The DeWitt and Cox Reports: Viewing the Wen Ho Lee prosecution through the lens of the internment cases illuminates a significant theme: civil liberties under threat may be subject (as Justice Jackson had warned) to "the hand of any authority that can bring forward a plausible claim of urgent need."[1030] Understanding this larger theme entails critical inquiry into historical events that appear to reveal ongoing patterns of presidential and Congressional dissembling on national security.

With the falsity of the Cox Report in mind, recall the original reasoning for the mass incarceration of Japanese Americans during World War II—that individual loyalty hearings would be ineffective because it would be impossible to "separate the sheep from the goats."[1031] Hence, the validity of imprisoning an entire race of people on the West Coast was supposedly a military necessity. Also recall that when the War Department first obtained the bound copy of the original final version of the DeWitt Report, which was to be presented to the U.S. Supreme Court as the evidentiary basis for the internment, it demanded that General DeWitt alter his Report to falsify the actual reason for his internment orders. DeWitt reluctantly agreed to delete his originally stated rationale—the irrefutable assumption of racial disloyalty. He replaced this, however, with false assertions that Japanese Americans committed espionage and sabotage (which the FBI, Office of Naval Intelligence and Federal Communications Commission had independently refuted). And he falsely recounted that there was insufficient time[1032] to determine disloyalty individually (a direct contradiction to his actual assessment). The original final version of the DeWitt Report was then recalled and all copies (except one) were deliberately burned along with all drafts and notes. As discussed previously in Chapter 5, the secretly altered version of Dewitt's Final Report submitted to the U.S. Supreme Court contained "intentional falsehoods"[1033] on the centrally relevant issue of military necessity during wartime and formed an important basis for the subsequent *coram nobis* litigation.

Now recollect the Cox Report's false statements about Chinese American espionage. Do the Cox and DeWitt Reports similarly assume racial disloyalty? The Cox Report maintained that Chinese Americans were susceptible to recruitment as spies for the PRC, implying their inherent loyalty to a motherland[1034] many had never seen. Does this not resemble the DeWitt Report's assertion that Japanese Americans had "strong bonds of common tradition, culture and customs"?[1035] In what ways was the pre-9/11 Wen Ho Lee prosecution comparable to the internment of the Japanese Americans during World War II? In what ways was it significantly different?

3. Executive branch dissembling: At U.S. Attorney General Janet Reno's request, federal prosecutor Randy Bellows investigated the Wen Ho Lee prosecution. The Justice Department's redacted Bellows Report concluded that: (1) Dr. Lee was never seen as a high priority national security threat by the FBI; (2) at every level of FBI management, there was failure to properly supervise the prosecution; and (3) the FBI "investigated the wrong crime" for three years—the investigative pool should have been far broader than Dr. Lee alone.[1036] The review team also

concluded that "[t]his was an investigation that from its first moments, indeed from its very first moments, went awry and never, in any real sense, recovered equilibrium. It was an investigation riven with problems."[1037] The executive branch's dissembling was central to the Wen Ho Lee prosecution.

4. Critical legal advocacy and grass-roots activism: Fred Korematsu, Gordon Hirabayashi and Minoru Yasui reopened their cases in 1983 with strong organized grass-roots support. Community organizers, advocacy groups, lawyers and students spread word of the renewed challenge to the legality of the internment—in schools, community halls, churches and on the pages of local and national media. They raised funds for the litigation through $5 to $50 donations, and raised national consciousness about the false legal justifications for the internment and about redress. And they garnered support from civil rights organizations across the country.

Similar organizing and advocacy compelled Attorney General Reno to initiate an in-house investigation of Dr. Lee's prosecution. The legal and social justice advocacy of Asian American advocacy groups, science associations and civil rights organizations also appeared to have persuaded Judge Parker to order the release by the Department of Energy and Department of Justice of documents relating to possible racial profiling.[1038]

In challenging Dr. Lee's prosecution, grass-roots organizing apparently played a significant role in persuading a Republican-appointed federal judge to inquire into the social and political undertow of the controversy. It underscored "the strategic importance of critical legal advocacy and organized public pressure in persuading otherwise deferential judges to call the executive to account for apparent national security abuses of civil liberties."[1039]

Consider how advocacy groups generated in courts of law and public opinion a sense of what was actually going on in Dr. Lee's prosecution.

- **Human rights organizations.** In 2000, Amnesty International, the world's largest human rights organization, protested Judge Parker's order of solitary confinement. It petitioned Attorney General Reno, stating that Dr. Lee's court-ordered treatment contravened Rule 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. In addition, the American Civil Liberties Union chapters in New Mexico and Northern California filed an *amicus curiae* brief supporting Dr. Lee's successful "motion for discovery of materials related to selective prosecution."[1040]

- **Asian American organizations.** Alberta Lee, Dr. Lee's daughter, worked with various Asian American and social justice groups to challenge Dr. Lee's harsh treatment. The San Francisco protest—"Free Wen Ho Lee!"—added its voice to other demonstrations, teach-ins and public conferences. In 2000, the Asian Law Caucus, the largest and oldest Asian American civil rights organization and co-counsel to Fred Korematsu on his *coram nobis* petition, filed an *amicus curiae* brief declaring that the "public justifications for [Dr. Lee's] arrest and prosecution have echoed historical prejudices and stereotypes used to rationalize past acts of anti-Asian discrimination."[1041]

- **Science organizations.** As discussed, scientists and scholars from Harvard, Stanford and Lawrence Livermore National Laboratory refuted the findings of the Cox Report. In addition, the presidents of the National Academy of Sciences, the National Academy of Engineering and the National Institute of Medicine—three prestigious American scientific academies—sent multiple letters to Attorney General Reno urging that "those responsible for any injustice that [Dr. Lee] suffered be held accountable . . . [and] that safeguards be put in place to ensure that, in future, others do not suffer the same plight."[1042] Other science organizations, including the American Association for the Advancement of Science, the New York Academy of Science and the Committee on the Human Rights of Scientists, also publicly protested Dr. Lee's "inhumane imprisonment."

To what extent might critical advocacy have helped reveal to the court and public what was truly at stake? Might other forms of advocacy have further bolstered Dr. Lee's position? To what extent might this kind of advocacy have generated backlash? Of what sort?

5. Belated media reparations: In June 2006, Dr. Lee belatedly won a tacit victory when he settled his invasion of privacy suit[1043] against the government for $1,645,000. Five news organizations—the Washington Post, the New York Times, the Los Angeles Times, ABC News and the Associated Press—contributed $750,000 to the settlement to avoid contempt sanctions (reporters were fined $500 a day for refusing to obey a judge's order to release names of government sources). According to a journalist association, these payments were unprecedented.[1044]

C. Post-9/11 Racial Profiling and the "War on Terror"

1. An Internment Framework for Post-9/11 Profiling

This second case study turns to events occurring after September 11, 2001. It views them through the various lenses of the wartime Japanese American internment. In a critique of the U.S. Supreme Court's decisions in *Hirabayashi*, *Yasui*, *Korematsu* and *Endo* published in 1945, Yale law professor and later dean Eugene Rostow situated the racial incarceration in the context of governmental actions that punish political belief. He highlighted the danger of acting upon the presumption that the political opinions of some reflect the opinions of an entire ethnic group. Rostow observed that the Court's refusal to find the internment unconstitutional left America with several dangerous precedents:

> . . . (2) political opinions, not criminal acts, may . . . justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency[,] the military . . . can decide what political opinions require imprisonment[] and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury . . . or any of the other safeguards of the Bill of Rights.[1045]

The following note adapts Professor Rostow's observations then to help assess contemporary racially and religiously motivated government actions now. In doing so, it explores the extent to which the following government beliefs and actions are acceptable to the courts and the public in post-9/11 America. These include:

- the vast expansion of executive power in the name of national security and the accompanying curtailment of selected social groups' civil liberties;
- the belief that selected ethnicity, religion and political ideology create an irrebuttable presumption of disloyalty that legitimates indefinite detentions; and
- a broad-scale domestic internment of both citizens and non-citizens during times of public fear.

Note: The Post-9/11 Expansion of Executive Power

After the September 11, 2001 attacks on the World Trade Center and Pentagon, the Bush Administration's Justice Department took steps to prevent future attacks and to seek out those responsible for the deaths of over 2,000 people. The American public offered broad support as President Bush initiated the "war on terror" by declaring "we would go forward to defend freedom and all that is good and just in our world."[1046]

As an integral tool in the war on terror, the Bush Administration created the Department of Homeland Security. The Department initiated many measures designed to protect the American people and American institutions from both domestic and foreign terrorism.[1047] Some security measures, like enhanced airport and public transportation security and certain electronic surveillance, were salutary. Other measures, discussed later, appeared to be tinged with racial and religious scapegoating.

Outside the continental United States, the military detained suspected Arab and Muslim terrorists and incarcerated them indefinitely at Guantánamo Bay, Cuba. The President classified these men as so-called "enemy combatants" and denied them access to legal counsel and to hearings to determine culpability. The President aimed to prevent these detainees from airing their claims of innocence in U.S. courts by characterizing them as the "worst of the worst."[1048] After years of harsh incarceration, the Administration quietly acknowledged that many of these detainees—some of whom the military and CIA tortured—were not dangerous and released them.

Most Americans initially found many government security measures to be not only appropriate, but also essential to ensuring the nation's safety. Some called for greater respect of civil liberties. But others demanded even more aggressive security measures.[1049] When viewed separately, many of the government's actions seemed needed or at least acceptable.

When viewed as whole, however, especially in light of the Bush Administration's push to expand executive powers beyond previous boundaries, some observers contend that a deeply troubling picture emerged.[1050] They worried that the

Administration's post-9/11 new emergency powers created an "imperial presidency."[1051] Others warned of a "hidden agenda behind patriotic anti-terrorism policies."

> President George W. Bush exceeded his executive powers through his adoption of new emergency powers used to counter terrorism. Specifically, . . . the Bush Administration used the USA Patriot Act and executive orders to expand the scope of executive authority beyond what is set forth within the Constitution and without an act of Congress . . . [and] . . . the USA Patriot Act erod[ed] the separation of powers and threaten[ed] civil liberties . . . . [T]he Bush Administration plans to bring back the imperial presidency. Consequently, the constitutional balance [was] upset in favor of presidential power at the expense of presidential accountability.[1052]

The unprecedented expansion of executive power stands as a dominant theme of the war on terror.

Some contend that the expansion is a temporary necessity. Others criticize the "broad (many would say exorbitant) scope of purportedly inherent executive power" that continues to dominate U.S. national security policy.[1053] To justify its broadly expanded powers, the Bush Administration often misled the nation. For instance, according to data-gathering organizations, the Bush Administration misled others in government and the American public about the national security reasons for the war in Iraq. The Center for Public Integrity ascertained 532 false Bush Administration statements about Iraq's supposed weapons of mass destruction.[1054] For years, former Bush Administration officials defended their statements—but without responding to specifics. Based on the now-public record, commentator David Corn recently summarized the findings: "Bush and Cheney repeatedly issued false statements to guide the nation to war, and they made no concerted efforts to guarantee that they were providing the public with the most realistic depiction of [Iraq's] threat."[1055]

Just after World War II, Professor Rostow identified expansive executive power as one of the central dangers of the Japanese American internment cases. The U.S. Supreme Court in those cases deferred to the executive's assertion that military necessity justified the mass racial incarceration because there was no time for distinguishing loyal from disloyal individuals of Japanese ancestry. As Rostow later observed, internment for presumed disloyalty in the absence of some concrete criminal act is imprisonment on the basis of political opinion. Because disloyal thoughts are difficult to ascertain, the government employed racial profiling to identify those who held dangerous opinions.

Historians have documented the U.S. government's extensive history of criminalizing unpopular political opinion. For example, during wartime, the 1798 Alien and Sedition Acts[1056] as well as the 1917 Espionage Act and 1918 Sedition Act made it illegal to write or publish "any disloyal, profane, scurrilous, or abusive language" about the United States,"[1057] prohibiting virtually all criticism of the government's war effort.[1058]

The American government has also invoked national security to restrict expression of political beliefs in times of peace. J. Edgar Hoover, director of the Federal Bureau of Investigation, compiled investigative files on millions of ordinary Americans that enabled the FBI to track and undermine any person it considered "subversive."[1059] As the prelude to McCarthyism during the Cold War, the Smith Act of 1940 criminalized advocacy for overthrowing the government.[1060] In 1947, President Harry S. Truman issued an executive order that authorized government

investigations of potentially "disloyal persons" and the creation of lists of subversive organizations. And the 1950 Emergency Detention Act sanctioned mass internment—it required registration of all members of "communist front" organizations and authorized "detention centers" if the President declared an "internal security emergency."[1061]

In this historical light, consider the following charges of Bush Administration power abuses and their likely collective impact:

- designation of American citizens and non-citizens as "enemy combatants," many of whom were innocent of wrongdoing—and their subsequent indefinite detention in American and foreign prisons without charges, access to counsel or judicial review;[1062]
- profiling and detention of several thousand innocent Arab and Muslim Americans on national security grounds;[1063]
- sweeping surveillance of Americans based on a broad definition of "terrorist activity" (including the contribution of money for charitable purposes to organizations unknowingly labeled "terrorist" by the government);[1064]
- deployment of new immigration security powers to investigate Arabs, Muslims, South Asians and other persons of color for activities unconnected to terrorism, and the later deportation of many of them for non-security-related reasons;[1065]
- torture of detainees as authorized by the President's Office of Legal Counsel—and the Office of Legal Counsel's later report to Congress and the public that it had changed its opinion on torture while simultaneously signaling to interrogators that they could continue the torture practices in part because there would be no judicial accountability;[1066] and
- Administration-proposed and Congressionally enacted (at times with minimal debate) national security measures expanding executive branch powers while diminishing public oversight and accountability—including the USA PATRIOT Act,[1067] the Detainee Treatment Act[1068] and the Military Commissions Act,[1069] all of which curtailed civil liberties.

According to these charges, the Bush Administration employed its new anti-terrorism powers not only to address legitimate security concerns but also to broadly target Arabs and Muslims in ways that fostered easy public scapegoating. Early critics of apparent government abuses were quickly dismissed as unpatriotic radicals. In late 2002, however, civil liberties groups, backed by media investigative reporting, began to challenge specific Administration initiatives.[1070] The President's response was in essence: just trust us. The executive branch is assumed to make security determinations based on hard facts not preconceived biases; presumably, then, it does not need to explain itself to the courts because the mere assertion of a national security justification for its actions should suffice. But preconceived biases and newly conceived stereotypes appear to have infected public thinking and government policymaking post-9/11.

2. Profiling: Ethnicity and Predicting Terroristic Behavior

After 9/11, claims of wrongful U.S. government and business profiling ranged from simple removals from air flights to horrific detentions and torture. Consider the following stories and their human consequences.

In 2009, two Muslim families attempting to vacation in Orlando, Florida, boarded an AirTran flight at Reagan National Airport in Washington, D.C. Air marshals ordered Atif Irfan, a tax attorney, and his brother, Kashif Irfan, an anesthesiologist, as well as their wives and children, to deplane because another passenger reported overhearing Atif's wife say something "suspicious." Airline personnel called in FBI agents, who questioned and then cleared the families. The family members were simply discussing the safest location on the plane in the event of an accident. But the airline representatives refused to reticket the families and the initial profiling transformed into groundless scapegoating. After much disruption and consternation, with federal agents' assistance, the families eventually rebooked on US Airways. After the families lodged formal complaints, the airline offered refunds and apologized.

The Irfan families' debacle is not an isolated incident. An American-Arab Anti-Discrimination Committee investigation determined that "in the wake of the 9/11 attacks, one of the worst problems facing Arab-American travelers and those perceived to be Arab Americans was their removal from flights after passing through security and boarding the planes due to unfounded concerns from fellow passengers and crew."[1071] Other ethnic and religious groups have been similarly targeted. In 2006, JetBlue Airways and two TSA screeners reportedly refused an Iraqi man access to a flight for wearing a t-shirt with the words "We Will Not Be Silent" in English and Arabic. JetBlue and the TSA representatives eventually settled an ensuing suit in 2009 for $240,000. In 2008, US Airways removed three Sikh musicians from a flight after passengers expressed "anxiety" about the men, who wore turbans. Airline officials provided the rejected passengers, who live in India and speak little English, with $5 food vouchers and rebooked them on a Delta flight the next day. Over a year later, the men received a financial settlement and an apology.

The indignity and inconvenience of apparent profiling incidents like these, which easily slide from initial security checks into disruptive scapegoating, are perhaps best understood as one end of a spectrum. At the other end are instances of deep trauma and persisting harms suffered by innocent people.

Hady Hassan Omar, an Egyptian Muslim immigrant married to a U.S. citizen, is one such person. A young businessman, Omar attempted to fly home from Florida to Arkansas on September 11, 2001, to celebrate his first wedding anniversary. By coincidence, he purchased his airline ticket online at a public computer in a location believed by the FBI to have been used by some of the 9/11 hijackers. For the FBI, this fact and his Muslim religion were enough to justify his arrest, secret detention in isolation in several locations (his wife could not locate him for days), including a maximum-security prison in Louisiana, for 73 days. There, officials kept Omar under constant video surveillance, denied him access to his family and a lawyer, ridiculed him about his religious practices and humiliated him through videotaped, intrusive body cavity searches.[1072]

Convinced that the government might detain him forever, Omar attempted hunger strikes and ultimately decided to commit suicide. At this point, FBI and immigration officials concluded that Omar had no useful information. As one senior law enforcement official explained, "If your subject has a complete breakdown . . . he has lost the will to deceive, and you can be pretty certain that he's not lying." It appears that the government presumed Omar guilty and left him no way to prove his innocence other than suicide. The government ultimately released Omar without filing criminal charges against him. Because of the arrest and detention, and the inferences of terrorist activities, Omar lost his job and eventually his home. He and his family suffered. The government then attempted to deport Omar for a minor immigration infraction.[1073]

The war on terror generated heated debate about whether profiling measures targeting those who are or are assumed to be Muslim, Arab American or of Middle Eastern descent constitute a race- or religion-based presumption of disloyalty that justifies harsh treatment of often completely innocent individuals.[1074] Professors Margaret Chon and Donna Arzt aptly characterized the immediate post-9/11 situation as targeting those "Walking While Muslim."[1075] They and others have identified the emerging formation of a religiously inflected racial category of Arab-Muslim terrorist. For example, Professor Saito observed in connection to the Gulf War in 1991 that

> Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many religious backgrounds, and Muslims come from all over the world . . . , these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.1076

Professors Susan Akram and Kevin Johnson also charted the emergence of this new racial formation since the 1970s. They found that this newly constructed identity of terrorist is not just a racial category, but a "complex matrix of 'otherness' based on race, national origin, religion, culture[] and political ideology[, which] may contribute to the ferocity of the U.S. government's attacks on the civil rights of Arabs and Muslims."[1077] As Professor Leti Volpp observed in reference to Edward Said's seminal work, "We are [now] witnessing the redeployment of [these] old Orientalist tropes . . . [where] the West is defined as modern, democratic, and progressive, through the East being defined as primitive, barbaric, and despotic."[1078]

According to these scholars, through a similar process of social construction, Arab Americans are now conflated with other people of Middle Eastern heritage, with many South Asians and with Muslims, into a collective presumptively disloyal "terrorist" identity.

> The "Arab" is racialized as a terrorist, but the "Arab" racial category is sometimes conflated with the "Muslim" religious category, even though most Arabs in America are not Muslim and most of the world's Muslims are not Arabs. Further complicating matters is the fact that racialized suspicion and even violence extends to persons who are neither Muslim nor Arab but are believed to "look" like Arabs.[1079]

And people who "look" Arab or Muslim include a large number of other communities of color or religion, including South Asian Sikhs and Hindus who have been harassed by both government officials and individuals because of cultural dress or

physical appearance. Latina/os, African Americans,[1080] Filipino Americans and American Indians, too, have been racialized as Arab/Muslim terrorists.[1081]

In 2009, the U.S. Supreme Court decided against Javaid Iqbal, a Muslim Pakistani arrested shortly after 9/11.[1082] According to Iqbal's civil rights lawsuit against U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, the executive branch designated him a "high interest" detainee and subjected him to unconstitutionally harsh conditions, including torture, because of his race, religion and national origin. The Court affirmed the quick dismissal of his suit without discovery, noting that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims" and that the arrests were "likely lawful and justified by [the FBI director's] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."[1083] To infer "purposeful, invidious discrimination" was not, in the Court's opinion, "plausible."[1084] This decision has signaled a new, higher standard of pleading claims in federal court—and importantly, comes out of a legal context of high government officials such as Attorney General Ashcroft raising a qualified immunity shield to claims of civil rights violations.

In 2002, the Justice Department announced that its "first and overriding priority" was "to prevent, detect, disrupt, and dismantle terrorism while preserving constitutional liberties" and that, to that end, it "engaged in an aggressive arrest and detention campaign of lawbreakers with a single objective: To get terrorists off the street before they can harm more Americans."[1085] Professor David Cole explains that because "the Constitution prohibits detaining people on grounds of future dangerousness," Attorney General Ashcroft "resorted instead to *indirect* methods—pretextual law enforcement."[1086] Some believe that these broad measures were effective in ensuring America's safety and so far no major foreign attacks have occurred on U.S. soil after 9/11. But questions remain whether these measures deterred other attacks, who the government targeted and with what consequences for those uninvolved in terrorist activity.

Most of the people summarily incarcerated by the Justice Department in the wake of the 9/11 attacks were non-citizen men of Arab, Middle Eastern or South Asian origin. Immediately after September 11, 2001, and again in 2004, the FBI and immigration authorities interviewed 8,000 individuals.[1087] By May 2003 the government detained 1,100 non-citizens under the Absconder Apprehension Initiative.[1088] And by the end of that year it indefinitely incarcerated another 2,870 pursuant to a "special registration" program for immigrants from "designated countries," all of which, with the exception of North Korea, were in North Africa, the Middle East or South Asia.[1089]

Since the 9/11 attacks, the federal government has detained dozens of individuals under the pretext of using them as material witnesses. Under a 1984 law, such detentions are authorized for witnesses whose testimony is considered critical to an ongoing prosecution and who are considered flight risks.[1090] Although they are only permitted to be held for the time required to testify or be deposed, the government has repeatedly held individuals as material witnesses, at times for longer than six months, without deposing them or calling them to testify. Connections to crimes

have often been tenuous, at best. For example, in 2001, the Department of Justice arrested Abdullah Tuwalah, a student on scholarship at Marymount University in Arlington, Virginia. The government alleged that he had information relevant to a grand jury investigation of Saleh Ali Almari, a former Marymount student whom Tuwalah had met through the university's Arab social club.[1091] Despite his willingness to cooperate, government attorneys never presented Tuwalah to the grand jury. Instead, according to Tuwalah's attorney, the FBI repeatedly subjected Tuwalah to interrogations during which agents accused Tuwalah of knowing "something," but never identified the information he was alleged to know. Finally, after holding Tuwalah for six weeks in detention, the FBI released him.

Furthermore, in May 2004, the U.S. government detained Brandon Mayfield, a Portland, Oregon attorney as a material witness in connection with a terrorist attack in Madrid, Spain. The U.S. government claimed a fingerprint on the terrorists' van matched that of Mayfield, a convert to Islam. Though Spanish law enforcement denied that Mayfield had any connection to the attack, U.S. authorities held him for three weeks before finally releasing him and issuing an apology. Spanish documents, which U.S. agents found and confiscated in Mayfield's home, turned out to be his children's Spanish homework.

Federal officials have denied that they were profiling solely on the basis of race or religion.[1092] But Attorney General Ashcroft appeared to acknowledge that reality in responding to charges of ethnic and religious targeting in the special registration program. He noted "this method is not new," citing plenary federal power over immigration.[1093] Professor Girardeau Spann thus concludes that the "liberty costs" of countering terrorism are, in essence, paid by racial, ethnic and religious minorities.[1094] Rather than make the country safer, many contend that racial, "religious, and national origin profiling . . . distracts our resources from true threats" and makes profiled Americans feel "like they do not belong in their own country."[1095]

3. Presumption of Disloyalty: A Contemplated Post-9/11 Internment

Immediately after 9/11, U.S. officials appeared to float trial balloons to assess the acceptability of domestic internment programs. One test involved the Justice Department's secret detention of thousands of non-citizens (many of them legal permanent residents), who were held indefinitely without charges and interrogated without access to counsel. Suits filed by civil liberties organizations revealed the Justice Department incarcerated over 5,000 possible suspects—some for months, others for years. Only a handful of those detained were charged with terrorism-related offenses.[1096] Along with immigration status, country of origin, religious and/or political association appeared to have played a primary role in creating the presumption of disloyalty. After September 11th, reports surfaced that "Attorney General Ashcroft and the White House are considering creating military detention camps for all U.S. citizens deemed by the administration to be enemy combatants."[1097] Critics of the reported plan pointed to a 1971 federal law that provided that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[1098]

High-level government policymakers also floated the possibility of a mass internment of American citizens on the basis of ethnicity. In July 2002, Peter Kirsanow, a controversial President Bush appointee to the U.S. Civil Rights Commission, suggested that Arab Americans might be interned en masse if the United States suffered another major terrorist attack.[1099] In February 2003, North Carolina Republican Congressman Howard Coble, head of the House Subcommittee on Terrorism and Domestic Security, declared that the internment of Japanese Americans during World War II was "appropriate."[1100]

In 2002, Attorney General Ashcroft announced that the government was considering plans to reinstitute "detention centers" for U.S. citizens deemed to be "enemy combatants" by the executive branch, although he was not contemplating massive World War II-style internment camps.[1101] Indeed, although the government did not open large-scale camps, the executive branch labeled U.S. citizens, including Yaser Hamdi and Jose Padilla, as enemy combatants and detained them for years without charges, trial or direct access to counsel.[1102] It then argued that the 2001 Authorization for Use of Military Force (AUMF) justified the detention of U.S. citizens, whether captured in a war zone or arrested on U.S. soil. Initially, the U.S. Supreme Court allowed what some described as "internments of one."[1103]

As noted above, Civil Rights Commissioner Kirsanow stated in 2002 that the public would demand an Arab American internment if terrorists again struck in America. Kirsanow spoke at a meeting of the Civil Rights Commission in which the Commission heard strong testimony by Arab Americans about government civil liberties violations after September 11th. He reportedly said that in the event of such an attack, Arab Americans can forget about civil liberties, stating that if the perpetrators of any such attack "come from the same ethnic group that attacked the World Trade Center, you can forget about civil rights," and that "not too many people will be crying in their beer if there are more detentions, more stops, more profiling."[1104] Although he did not personally favor an internment, Kirsanow claimed the "groundswell of opinion to banish civil rights"[1105] would be so strong that a racial internment would be difficult to prevent. He concluded that Arab and Muslim Americans should accept government anti-terrorism measures, including blanket detentions, and not complain about civil rights violations.[1106] Six months after the Kirsanow controversy, Congressman Howard Coble expressed approval of the World War II internment of Japanese Americans. Coble's comments carried special weight because he chaired the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

Civil Rights Commissioner Kirsanow's defense of internment was met with a call by the American-Arab Anti-Discrimination Committee for his removal from the Civil Rights Commission. He was not removed, although apparently he did apologize, insisting that his remarks had been taken out of context, and in January 2006, while Congress was in recess, President Bush appointed him to the National Labor Relations Board. Congressman Coble ignored calls for his resignation as chair of the subcommittee on terrorism.[1107]

Notes & Questions

1. Ethnic profiling with a "light touch?" Looking back, which elements of the Japanese American internment are of most concern? Is it the indefinite internment of U.S. citizens along with non-citizens? Or was it the internment of children and elders who posed no threat to national security? Was it the racism inherent in the program, including the inaccurate claim that Japanese Americans as a group were disloyal? Or was it the elusive criterion of loyalty for liberty?

Professor Eric Muller compares the government's questioning of 5,000 young men of Arab ancestry in late 2001 to the questioning and searches of Japanese Americans in their homes in 1941. He says that the more recent "program of interrogation, if it was ethnic profiling at all, was ethnic profiling with a decidedly light touch."[1108] Do you agree with this statement? Why or why not?

To what extent do U.S. officials in the war on terror presume that persons of a particular ethnicity, national origin or religion are more likely to hold disloyal political opinions or associations? And does this presumption legitimate their harsh treatment and even lengthy detention? According to Professor Frank Wu, the debate over racial profiling, which commonly confuses several distinct issues, may be usefully organized into three separate inquiries. The first inquiry is whether the government in fact has used race (or its constitutional equivalents of ethnicity or national origin) in its decision making, including choices about how to target investigations and enforcement resources. The second inquiry is whether the underlying assumptions about race are rational in a simple statistical sense: Is it more likely than not that a member of a particular group will engage in the behavior in question, or at least more likely that a member of this group will do so as compared to a member of that group? The third inquiry is whether, even accepting that a reaction may be rational as an official act under color of law, whether such an act is appropriate. In assessing this last question, there may be important countervailing considerations, such as negative side effects within a community subjected to stereotyping. Or there may be constitutional constraints, usually regarded as taking priority over a utilitarian analysis.[1109]

What light do these various views shed on the judiciary's present-day handling of executive branch national security restrictions that curtail civil liberties?[1110]

2. Deployment of immigration powers beyond immigration matters: The government deployed immigration laws not to remove unlawful or undocumented immigrants present in the United States, but rather to detain anyone from selected countries (even if lawfully present) until they were investigated for terrorism and cleared. This process was sometimes delayed for months and even years.[1111] To what extent, if at all, does this use of federal immigration powers implicate Rostow's warnings? After *Korematsu*, would persons of given ethnic groups be "presumed to possess the kind of dangerous ideas which require their imprisonment?"[1112] And does it authorize the executive branch, "without even the concurrence of the legislature . . . [to] decide what political opinions require imprisonment, and which ethnic groups are infected with them"?[1113]

3. **Material witness orders:** To what extent do the stories of Tuwalah and Mayfield reflect a vast expansion of unaccountable executive power and the presumption of group disloyalty based on ethnicity and/or religion? Or are the government actions appropriate given the post-9/11 circumstances?

4. **Kirsanow's and Coble's public statements:** In light of your responses to the previous questions, how do you interpret Kirsanow's statement that if there were to be another attack in the United States, the public would demand an Arab American internment? How credible is his statement that a government-sponsored internment, however distasteful, would be legally permissible?

Coming from a member of the U.S. Commission on Civil Rights, was Kirsanow sending a tacit message to the public and to government officials handling national security matters? And did his later disavowal of support for an internment appropriately address the kind of criticisms voiced in the following letter by the *Korematsu* legal team to President Bush?

> July 25, 2002
>
> Dear President Bush,
>
> We are members of the [Korematsu *coram nobis*] legal team . . . . We are deeply troubled by the recent comments made by Peter N. Kirsanow, your appointee . . . , raising the possibility of internment camps for Arab Americans and citing the original *Korematsu* case as supporting such drastic civil rights restrictions.
>
> In 1983, we helped overturn Mr. Korematsu's original conviction, which had been upheld by the U.S. Supreme Court in 1944, by proving that his conviction was obtained by the government through the deliberate suppression, alteration and destruction of evidence favorable to Mr. Korematsu and to all Japanese Americans. In 1983 the U.S. District Court for the Northern District of California further found that the Supreme Court was intentionally misled by government authorities and that there was no evidence of any "military necessity" to imprison 120,000 Americans of Japanese ancestry, two-thirds of whom were American citizens . . . .
>
> By only citing the original, now-discredited, *Korematsu* decision, Mr. Kirsanow has ignored the later Court's findings and thus, is suggesting that there is legal justification for the mass imprisonment of an ethnic group in this country. This is precisely why Mr. Korematsu reopened his case in 1984, so that such travesties would never occur again. Mr. Kirsanow's inflammatory rhetoric, from a position of authority is the type of agitation which caused the immense civil rights deprivations Japanese Americans suffered during World War II and now threatens to victimize innocent Arab Americans.
>
> For a member of the U.S. Commission on Civil Rights to make such irresponsible statements and to cite the discredited original *Korematsu* decision is antithetical to the mission of this Commission. The lesson of the *Korematsu* cases taken together is NOT that the government may incarcerate an entire ethnic group without notice, without attorneys and without trial; it teaches us that

> civil rights and liberties are best protected by strongly affirming their essential place in our national character especially in time of crisis, not by tolerating or condoning their abuse in the name of national security . . . .
>
> As a member of the U.S. Civil Rights Commission, Mr. Kirsanow should be an advocate for our civil rights but his hostility to the protection of the civil rights of Arab Americans disqualifies him from membership on the Commission. We call on you to remove him from his position as a Commissioner.
>
> Very truly yours,
>
> The Korematsu Legal Team[1114]

Given the *coram nobis* cases, how can Kirsanow cite *Korematsu* as legal justification for a present-day internment?

Similarly, how do you understand Congressman Coble's statement that the Japanese American internment was justified? Did it matter that Coble was the Chair of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security? Why might Coble, like Kirsanow, appear to be unaware of the *coram nobis* cases and their impact on the original *Korematsu* and *Hirabayashi* decisions? Note that he was one of the members of Congress who voted against the Civil Liberties Act of 1988.

The attempts by Kirsanow and Coble to justify internment can be viewed in several ways. One perspective is that their statements were unplanned, reflected bad judgment by individuals and were not indicative of overall government policy. Another view is that their statements actually revealed government thinking about invoking national security to shield misdirected or even abusive government actions from public and judicial scrutiny. Which view seems more persuasive, and why? Are there other views?

5. Internment today: The internment was what Jude McCulloch and Sharon Pickering have described as a pre-crime measure to detain without probable cause or even reasonable suspicion.[1115] The authorities took it as a given that some persons of Japanese ancestry would be "disloyal" and, therefore, likely to engage in espionage or sabotage. From there, ancestry became a proxy for "criminal" predisposition.

To what extent have similar presumptions guided the United States' current war on terror?[1116] Amid post-9/11 wide-ranging racial and religious profiling and detentions, is the government is replaying in post-modern form the previous injustice of the Japanese American internment?

D. Post-9/11 Balance Between National Security and Civil Liberties

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.
>
> —Judge Marilyn Hall Patel, 1984[1117]

1. Recalibrating the Balance After 9/11

Consider the following note on the role of U.S. courts in the current enemy combatant controversy.

Note: Enemy Combatants

A. THE TIPTON THREE

Almost 29 months of secret incarceration. The United States imprisoned three British Muslim men at Guantánamo Bay, Cuba, as enemy combatants for nearly two and a half years without trial, without counsel, without even charges lodged against them. It turns out they were innocent of wrongdoing. And they certainly were not terrorists. Now known as "the Tipton Three," the United States imprisoned and tortured Asif Iqbal, Ruhel Ahmed and Shafiq Rasul for a seeming eternity before quietly and unconditionally releasing them back to Tipton, West Midlands.

The story began in October 2001 when the Tipton Three set out on a week of celebrations for Iqbal's wedding in Pakistan. While in Pakistan, a local mosque persuaded the three men to travel to Afghanistan to provide humanitarian services. Their presence in Afghanistan coincided with a U.S. military attack on the Taliban in America's hunt for Osama bin Laden. An Afghan warlord picked up Iqbal, Ahmed and Rasul in Kandahar and imprisoned them under heinous conditions. The United States obtained custody of the men and subsequently transported them from Afghanistan to Guantánamo Bay as "enemy combatants."

The U.S. military fed the Tipton Three and provided them basic medical services. But the military endlessly interrogated the men. American security forces caged the Tipton Three in metal outdoor cells that reached 100-degree temperatures during the day and dropped to freezing at night. Interrogators beat the men, covered their heads with hoods and threatened them with dogs. Despite their protestations, the Bush Administration barred them from a civil judicial hearing to show their innocence. They were trapped in a seeming eternal cycle of harsh interrogation.

"I didn't know how to feel when I was first taken [to Guantánamo]," Ahmed recounts. "I felt scared . . . . But there was no point in feeling scared, isolated and

homesick, because if I gave into these feelings I'd have gone mad. I went into survival mode and for [two and a half] years cut myself off from day-to-day feelings and thoughts."[1118]

In early 2002, Rasul and Iqbal sought to challenge the legitimacy of their detention in federal courts with the help of the Center for Constitutional Rights.[1119] While their case was pending in the U.S. Supreme Court,[1120] the United States released Iqbal, Ahmed and Rasul back to Britain in 2004, after almost 29 months of harsh incarceration.

But genuine freedom did not accompany their discharge. The United States refused to admit that it wrongfully detained and tortured the men. The stain of "terror" remained. The three men struggled to rebuild their lives. Ahmed remembers the lasting stigma, even in his English neighborhood:

> When we did come back to our own community they didn't want us. They were frightened. The Muslim community feels we have given them a bad name; they don't care whether we are guilty or innocent as long as they are not associated to us. They are frightened that people will say they support terrorists.[1121]

The U.S. government tarred these men as national security threats, incarcerated and tortured them and then prevented them from demonstrating their innocence. These actions inflicted permanent life scars. This stark injustice was far from the first under the U.S. judiciary's watch.

B. The Guantánamo Detainees

The events of September 11, 2001 sparked a national fervor to protect Americans on American soil. From 2002 to 2010, the executive branch incarcerated over 775 detainees at Guantánamo Bay, Cuba.[1122] Some of these detainees were dangerously intent on generating political upheaval through violence. Others were innocent of wrongdoing but scapegoated and picked up apparently because of ethnicity and religion.

Former President Bush designated these detainees "enemy combatants," denied them access to their families and legal counsel, barred them from court hearings and even declined to specify charges against them. To many observers, the Administration's attempt to prevent meaningful judicial scrutiny was especially alarming:[1123] "Judges are the last line of defense for citizens against abuse of government power."[1124] In 2008, federal district Judge Leon of the District of Columbia defined the legally ambiguous enemy combatant as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities [against] the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[1125]

The United States has explicit constitutional guarantees of due process and equal protection. But the

> actual performance of [the] judiciary during times of national stress suggests that the courts will be influenced by popular politics and will subtly renounce their role as constitutional backstop; they will instead defer almost completely to the executive and legislative branches [and tend to take] a hands-off approach in reviewing

> government national security actions, even where fundamental liberties are sharply restricted in times of national crisis.[1126]

As a consequence, courts most often legitimize, rather than check, the actions of the executive and legislative branches reacting to the "ephemeral emotions of their political constituencies[.]"[1127]

Initially, U.S. courts responded to the Bush Administration's policies erratically. As in the past, the judiciary struggled to define its role in reviewing civil liberties and national security disputes.

2. One Judicial Challenge to Enemy Combatant Detention: *Rasul v. Bush*

> [It is] precisely during times of war or other perceived crisis—times that our civil liberties are most easily lost—that we [the public and the courts] must diligently guard our rights and insist on lawful conduct by the government.
>
> —Natsu Taylor Saito, 1998[1128]

Decided in 2004, *Rasul v. Bush*[1129] marked the turning point in a series of U.S. Supreme Court pronouncements. It involved not only the rights of Guantánamo Bay detainees, but also the role of the judiciary in reviewing executive national security policy. The *Rasul* majority interpreted the statutory source of the writ of *habeas corpus*.[1130] *Habeas* relief is an ancient procedural mechanism used to challenge illegal detentions. As renowned legal philosopher Ronald Dworkin describes it:

> Since before Magna Carta, Anglo-American law has insisted any anyone imprisoned has the right to require his jailor to show a justification in a court of law. (The technical device through which this right is exercised is called a writ of *habeas corpus*. Addressed to the jailor, it announces that he has custody of a certain person's body and demands that he justify that custody.)[1131]

The *Rasul* Court interpreted the federal *habeas corpus* statute as conferring jurisdiction upon U.S. courts to hear *habeas corpus* challenges by non-citizens detained as so-called "enemy combatants" at Guantánamo Bay, Cuba. Reasoning that the territory is exclusively controlled by the United States, the Court found that the detainees were "held in federal custody in violation of the laws of the United States."[1132]

Two of the so-called "Tipton Three" (Rasul and Iqbal)[1133] were original parties in *Rasul v. Bush*. After almost two and a half years of incarceration, and while the U.S. Supreme Court case was pending, the U.S. military released these three men to British authorities. The remaining plaintiff detainees were two Australian and twelve Kuwaiti citizens picked up in Afghanistan during hostilities between the United States and the Taliban. Like the Tipton Three, each of these detainees asserted that he had never "been a combatant against the United States or [had] ever engaged in any terrorist acts."[1134] Collectively, they maintained that "none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal."[1135] Some detainees claimed that they were abducted by "terrorist forces while traveling or providing humanitarian relief" and

subsequently forced to work for the advancement of terrorism until they were turned over to the U.S. military for bounties.[1136]

The *Rasul* detainees argued that the United States could not indefinitely detain them without due process of law, including their "right to be informed of the charges they face[,] and the right to present evidence on their own behalves and to cross-examine their accusers."[1137] At bottom, they argued that the "right to test the lawfulness of one's detention is a foundation of liberty."[1138]

The U.S. Supreme Court agreed. Speaking through Justice Stevens, the Court struck back against "a long American tradition of denying protection to foreign nationals during times of war."[1139] *Rasul* set the stage for the Court's later ruling in *Boumediene v. Bush*,[1140] which construed the U.S. Constitution to mandate judicial review for enemy combatant detainees. In both cases, the Court reiterated the principle of access to the American judicial system by non-citizens being confined without charges, hearing or trial.

a. Fred Korematsu's *Rasul Amicus* Brief

In the wake of President Bush's Guantánamo detention policy, Fred Korematsu filed the last *amicus* (friend of the court) brief of his life. This time, he advocated in support of the principles underlying the legal challenges advanced by Rasul and the other Guantánamo Bay detainees.[1141] Korematsu's brief to the U.S. Supreme Court in *Rasul v. Bush*[1142] highlighted the connection between his legal challenge to his incarceration during World War II and those of the so-called "enemy combatants" during the war on terror. He argued for executive accountability under law and for a strong independent judiciary. And he reminded the Court that the government's current position is part of a "*pattern* whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny."[1143]

> History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily*. The executive and legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored.[1144]

According to Korematsu and his lawyers, careful judicial scrutiny is essential to the preservation of civil liberties during times of national crisis. Reflecting on a history of U.S. Supreme Court mistakes, Korematsu asserted that the Justices in these cases should have scrutinized executive claims of necessity more closely and "done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers."[1145] Korematsu therefore challenged the Court to learn from the lessons of history:

> But we know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties. Typically, we come later to regret our excesses, but for many, that recogni-

> tion comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.[1146]

The brief described politically motivated prosecutions upheld by the courts under the Alien and Sedition Acts of 1798, the Espionage Act of 1917 and Sedition Act of 1918 during World War I, the Red Scare of 1919-1920 and the Cold War era of McCarthyism. The historical pattern of judicial deference to the executive branch during times of national crisis legitimized often-popular government abuses of the fundamental liberties and rights of targeted citizens and non-citizens.

Most poignantly, Fred Korematsu's *Rasul* brief recounted his 40-year challenge to the legality and legitimacy of the World War II Japanese American internment. He asserted that his legal struggle illuminated parallel aspects of the Guantánamo detainees' legal struggle. The internment had played to public sentiment; the Japanese American internees were innocent of wrongdoing and posed no danger. Yet the government refused to let them demonstrate their innocence. As Korematsu explained 60 years later, "no charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything."[1147] With firsthand knowledge of the "civil liberties disaster" flowing from the harmful combination of gross executive branch abuses and lax judicial scrutiny, Korematsu urged the *Rasul* Supreme Court to vigilantly scrutinize blanket government claims of national security as justification for its indefinite incarceration of Guantánamo detainees.

b. The Significance of *Rasul v. Bush*

Through his final *amicus* brief, Korematsu joined with other voices of protest against the government's position.[1148] Rejecting the Bush Administration's position, the *Rasul* majority determined that Guantánamo detainees who "claim to be wholly innocent of wrongdoing" were entitled to bring a *habeas corpus* challenge to their detention in an independent, impartial and competent court.[1149] Several commentators perceived that the U.S. Justice Department's arguments against any court access revealed an apparent larger executive agenda.[1150] Indeed, for some observers, one of President Bush's motives for incarcerating detainees at Guantánamo Bay was to create a "'legal black hole' where the United States could act 'in total secrecy without the permission of any other nation.'"[1151]

Ultimately, the Court ruled in a 6-3 majority judgment[1152] that the non-citizen detainees had access to federal judicial relief. And a 5-4 majority of the Court held that the statutory scheme for "*habeas corpus* review should be interpreted to grant rights to prisoners located not just within the United States itself but also on territory, like Guantánamo Bay, which is subject to the longstanding, exclusive, and permanent control of the United States."[1153] Most significant, *Rasul* affirmed the significance of judicial scrutiny over alleged executive policies that curtail civil liberties. As Justice Breyer cautioned during the *Rasul* oral arguments, "it seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want, whatever they want without a check."[1154]

With this observation, Justice Breyer suggests that judicial scrutiny is of utmost importance, especially in the wake of 9/11.

After the *Rasul* decision, Congress quickly stepped in and attempted to override the Court's ruling by passing the Detainee Treatment Act (DTA) in 2005. The Act provided that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba."[1155] Then in 2006, through the Military Commissions Act (MCA), Congress added that the DTA applied retroactively to detainees who filed *habeas corpus* challenges before the DTA was enacted.[1156] With the DTA, Congress seemingly deferred to the Bush Administration.[1157]

Thus, in a manner similar to the process leading to the Japanese American internment, the legislative branch appeared to reflexively align with the executive branch to sacrifice fundamental liberties in the name of national security. Against this rapidly changing legal landscape, Lakhdar Boumediene and 36 other Guantánamo detainees decided to pursue *habeas corpus* petitions to challenge their detentions. In a 5-4 decision,[1158] the U.S. Supreme Court in *Boumediene v. Bush* determined that non-citizens detained at Guantánamo have a constitutional (not merely a statutory) right to challenge their detention in a U.S. court. Some legal commentators such as Professor Dworkin view the *Boumediene* case as a landmark for reclaiming "some of the national honor [lost by] the cowardly decision to imprison" any possible national security threat without charges.[1159]

Critics argued, on the other hand, that the Court's *Rasul* and *Boumediene* decisions were an immense mistake. Justice Scalia criticized the majority in his *Rasul* dissent. In his view, for the "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."[1160] Others asserted that the judiciary should defer to the executive in times of war because it is the least equipped of the three branches in experience, background or knowledge to make judgments related to war. Echoing President Bush's earlier arguments, critics claimed that *Rasul* opened "the doors of every federal district court in the United States to the Guantánamo detainees, many of them killers captured on the battlefield and elsewhere around the world, their murderous hands at least figuratively, and sometimes literally, soaked with the blood of Americans, our allies, and innocent civilians."[1161] A few went so far as to call the Court's rulings a "travesty of justice and national security, and a potentially fatal one for the United States"[1162] because it deprives "the President of one of his most necessary wartime powers, the ability to effectively prosecute the War on Terror unimpeded by litigation from our enemies, and the consequences of that litigation."[1163]

Genuine security concerns are paramount. But the U.S. Supreme Court's *Rasul* holding did not free any detainees. Rather, the Court simply ordered the executive to afford detainees judicial hearings to determine if they should remain incarcerated. According to Professor Dworkin and others,[1164] courts have competently reviewed classified material and made confidential determinations in a number of settings. Indeed, post-9/11, district courts have demonstrated that they are capable of reviewing executive actions, evaluating the legitimacy of detentions and render-

ing legitimate decisions. Courts have done so through a combination of unclassified public hearings, closed-door sessions, published unclassified opinions and unpublished classified opinions.[1165] Following *Rasul* and these other judicial decisions, the Department of Defense unconditionally released many detainees.

On the same day the U.S. Supreme Court decided *Rasul*, it also attempted to delineate the contours of *habeas corpus* challenges. By a 6-3 judgment in *Hamdi v. Rumsfeld*, the Court held that American citizen detainees deserve rudimentary procedures to determine the legality of their detention, even if these detainees were captured on foreign soil during combat.[1166] Writing for a plurality,[1167] Justice O'Connor's opinion reviewed the Congressional Authorization for Use of Military Force (AUMF)[1168] and cautioned that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[1169] She ultimately stated, however, that "tailored" procedures in military tribunals might satisfy a detainee's *habeas corpus* rights to "meaningful review."[1170] Seemingly contrary to the Court's acknowledgment of the dangers of an unchecked executive, Justice O'Connor's language appeared to nod deferentially to the President's claim of national security needs for military tribunals.

The concurring opinion hesitated to give the government as much deference as the plurality. Justice Souter, joined by Justice Ginsburg, focused on the statutory language of 18 U.S.C. § 4001(a): "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[1171] These two Justices found that section 4001(a) requires Congressional authorization to be more definitive in order to detain; furthermore, the government did not demonstrate that the AUMF authorized detention.[1172] To support this conclusion, they pointed to the legislative record and history of section 4001(a), which was adopted "to preclude reliance on vague Congressional authority."[1173] They also rejected the government's assertion of inherent authority "under a combination of Article II of the Constitution and the usages of war" as a means of justifying its right to detain, to which they "recall[ed] Justice Jackson's observation that the President is not Commander in Chief of the country, only the military" (citing to *Youngstown Sheet & Tube*).[1174] These two Justices did concede that in moments of "genuine emergency" there may be cause to detain a citizen if he or she is an imminent threat; however, they found that Hamdi could not be an imminent threat because he had been locked up for more than two years.[1175]

E. Into the Future: The Lessons of Japanese American Internment

As evidenced by *Hamdi*, the judiciary has yet to fully grapple with the insights from *Korematsu*. Under President Obama's Administration, over 150 individuals remain detained at Guantánamo Bay.[1176] The judiciary continues to struggle with its role in reviewing the President's national security actions.

1. Insights into Post-9/11 National Security and Civil Liberties?

At first glance, certain elements of the Guantánamo cases resemble the Japanese Americans' struggle. The current setting, however, differs markedly from the legal challenges to the Japanese American internment. For example, in the *Korematsu* era, no concerted opposition emerged to the internment, which was both politically popular and ultimately legally sanctioned at the time. Then, few rose to protest the government's decisions. Now, however, many civil liberties groups have organized against the Guantánamo detentions.[1177] They argue against executive excesses and against racial and religious scapegoating, both in political and legal spheres.

Also, the present U.S. Supreme Court can draw upon the original *Korematsu* decision, which is in hindsight an acknowledged national security and civil liberties "disaster."[1178] It can also draw insights from the *Korematsu coram nobis* revelations about the deep injustice created by the combination of executive branch deliberate dissembling and a deferential judicial branch. Legal precedents such as these were minimally available at the time of the original Japanese internment litigation. Despite these various differences, four significant common points emerge between the original *Korematsu* decision and the current Guantánamo cases.[1179]

a. Perceived Religious and Racial Difference

Both sets of legal disputes "are part of a much larger picture of government and public vilification of unpopular groups"[1180] during time of national crisis. This common context is evidenced by "systemic hostile discrimination against Asian Americans then, [and] harsh treatment of Arabs and Muslims in America now."[1181] The vilification and ensuing discrimination entangle both race and religion. Indicia of foreignness (for instance, adherence by some Japanese Americans to Shinto religion) legitimized the differential treatment of these Americans during World War II.[1182] Similarly, according to government critics, the war on terror has treated Islamic religion as extremist and racially coded ideology.[1183]

As previously discussed, deep racial and religious implications in the war on terror persist.[1184] Legal commentators described the new category of "terrorist" as a "complex matrix of 'otherness' based on race, national origin, culture, and political ideology."[1185] Furthermore, they maintain that the American government, media and public tended to conflate "Arab" ancestry with "Muslim" religion and to tie them inextricably to "terrorist."[1186]

Additionally, both eras were marked by the presumption of racial guilt. During the Japanese American internment, "the Court accepted the overall premise that cultural difference justified the government's differential treatment—what today is called profiling—of Japanese Americans because a propensity to espionage and sabotage could be inferred from those differences."[1187] In 1942, the government advanced and mainstream public accepted the "propagation of a racist lie that persons of Japanese descent in America were traitors because of their race."[1188]

The government's racial scapegoating post-9/11 has taken a unique form, described by Professors Chon and Arzt as "terror profiling"—the "selectively negative treatment . . . of individuals or groups thought to be associated with terrorist activity, based on race, ethnicity, national origin, and/or religion."[1189] Would the government have detained the so-called "Tipton Three" at Guantánamo Bay for almost 29 months without access to counsel or a hearing if they had been white, middle-class, Christian males of U.S. citizenship? The counterexample of John Walker Lindh is illustrative. U.S. military captured Lindh in Afghanistan while he fought for the Taliban in November 2001.[1190] The military refused to classify Lindh as an enemy combatant even though the description tightly fit him. Instead, the military provided him with access to family and legal counsel. Significantly, the Bush Administration swiftly lodged criminal charges against him and afforded him an opportunity to respond in court. Unlike the Tipton Three, Lindh admitted fighting for and meeting with Osama bin Laden. And also unlike the Tipton Three, Lindh was afforded multiple due process protections and given an opportunity to respond in court.[1191]

b. Executive Branch Deceptions

The second commonality is that the executive branch at times deceived the public and the "courts about its national security abuses, particularly when those abuses involve the rights of members of unpopular groups."[1192] Just as the War and Justice Departments presented "intentional falsehoods"[1193] to the U.S. Supreme Court to justify the Japanese American internment, it seems that the Bush Administration also dissembled to the public to justify an expansive war on terror. A 2004 Congressional investigative report found that "the five Administration officials most responsible for providing public information and shaping public opinion on Iraq" made "237 misleading statements about the threat posed by Iraq."[1194] The Bush Administration's misrepresentations of national security issues "appear to be so numerous and wide ranging that their quantity and breadth signal a decided political strategy."[1195]

Commentators maintain that the Bush Administration misled America by dissembling and telling "noble lies" pursuant to a philosophy that it is acceptable or even desirable for elites to lie to the masses.[1196] Moreover, it relied on media complicity, arguably creating a culture of fear and of stifling political dissent.[1197] For example, the Bush Administration easily convinced Congress and lower courts that denial of *habeas corpus* rights to alleged Guantánamo enemy combatants was necessary because the detainees were the "worst of the worst."[1198]

Later, the government admitted that far fewer than half of Guantánamo detainees participated in any hostile act against the United States. In 2006, the Defense Department acknowledged that only 8 percent of detainees at that time were alleged to be al Qaeda or Taliban fighters.[1199] Many detainees had no ties to the war on terror and, like the Tipton Three, were not dangerous. For those committed to protecting civil liberties, the Defense Department's "refusal to explain its enemy combatant designation process generally, its apparent public dissembling about the threat posed by detainees, and its differential treatment of white and nonwhite citizens together raised the red flag of potential Executive abuse of power."[1200]

c. Judicial Deference

The third point of intersection is that courts appear inclined "to defer to the executive during times of national stress unless the public culture demands heightened judicial scrutiny."[1201] The U.S. Supreme Court's deferential approach in *Korematsu* afforded almost complete autonomy to the military in its detention of Japanese Americans and "signaled a hands-off role in reviewing alleged government war power excesses, including those detrimental to the most fundamental of democratic liberties."[1202] Similarly, several lower court judges in the Guantánamo line of cases deferred to the executive's assertion of national security.[1203] In these cases, as in the original *Korematsu* case, the judiciary shielded the President's administration from accountability by denying meaningful judicial review.

For instance, in both *Rasul* and *Hamdi*, lower courts adopted the Justice Department's position that no judicial review was appropriate, and thus left many innocent detainees bereft of any chance to establish their innocence. The Tipton Three suffered this exact fate. The *Korematsu* cases also teach that when the judicial branch fails to check the executive branch, the executive can avoid accountability under law. A huge cost to the rule of law and to society follows, even if apology and reparations follow. As Justice O'Connor warned in her plurality *Hamdi* opinion, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others . . . ."[1204]

d. Damage to Democratic Principles and Processes

The final point shared by *Korematsu* and the Guantánamo cases is that executive branch misrepresentations combined with an overly deferential judicial branch pose a threat to American democracy and the Constitution itself. Democracy is trivialized when the executive branch dissembles. "[T]ruth, critical thought and fact finding as conditions of democracy are rendered trivial and reduced to a collection of mere platitudes . . . ."[1205] By deferring to the executive in *Korematsu*, the U.S. Supreme Court appeared to make a profound value judgment about American democracy. The Court implicitly ruled that unsubstantiated national security concerns justify executive scapegoating of vulnerable people and, furthermore, that these executive policies are virtually unreviewable. For many commentators, the Bush Administration's actions inflicted "long-lasting damage to the government's own legitimacy."[1206]

Indeed, Professor Dworkin describes the Bush Administration's enemy combatant policy as a "disgrace," producing a "landmark change in [America's] constitutional practice."[1207] For constitutional observers, *Korematsu* and the Guantánamo cases reveal that "national security crises coupled with racism or nativism and backed by the force of law generate deep and lasting social injustice. . . . Once legitimated by the courts, government excesses and human suffering take on the mantle of normalcy."[1208] Indeed, the executive's expanded and unchecked powers are not limited to discrete minority groups or relatively politically powerless

individuals, but rather can and will be extended to all Americans.[1209] This new normal speaks directly to the United States' democratic foundation.

These four commonalities underscore what Mr. Korematsu argued in his final *amicus* brief. Especially during times of national crisis, judicial scrutiny of national security restrictions of civil liberties is vital to the preservation of American democracy.

2. Role of the Judiciary: A Proposed Heightened Standard of Review

For all these reasons, Justice Jackson's warning still resonates loudly today. How will the judiciary prevent false executive claims of national security necessity from becoming a "loaded weapon" aimed at the essence of American democracy—the balance of national security and civil liberties? *Rasul* confirmed the salience of judicial oversight of executive national security policies. Yet the *Rasul* majority failed to articulate the appropriate level of judicial review of executive national security actions that curtail fundamental liberties.

Deferential judicial review effectively affords the President a blank check. Unyielding scrutiny, however, may unduly constrain the executive. Ordinary judicial review doctrine embraces deferential review for most government actions, giving the President wide leeway to act in the best interest of the country. That doctrine also mandates heightened scrutiny where government action restricts fundamental liberties. It is still an open question whether the national security setting alters this paradigm of judicial review.

Varying approaches persist. Some judges and scholars, including former Chief Justice William Rehnquist, argued that the judiciary should play a muted role in reviewing military necessity restrictions of civil liberties during military conflict:

> An entirely separate and important philosophical question is whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable. . . . [T]here is every reason to believe that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[1210]

By adopting this posture of sharply limited judicial review or almost total judicial deference to executive actions, courts would have a straightforward task. They would simply align with the executive whenever it invokes national security, even when fundamental liberties are significantly restricted.

For others, the highly deferential approach conflicts with constitutional mandates. The judiciary's purpose is to serve as a constitutional check on the two political branches of government, particularly where fundamental liberties are at stake.[1211] Without close judicial scrutiny, no governmental body exists to assure executive and legislative accountability under law. The consequences of this were seen in the wartime internment cases.

A watchful care approach would call for the judiciary to apply a heightened standard of review to executive restrictions of fundamental liberties even during times of war or national security crises, accounting for the government's security concerns in the court's analysis of the government's asserted compelling interest.[1212] During the Civil War, the U.S. Supreme Court barred President Lincoln from suspending the writ of *habeas corpus* if the civilian courts were open and functioning. The Court ruled that the

> safeguards of liberty [should receive the] *watchful care* of those [e]ntrusted with the guardianship of the Constitution and laws [namely, the judiciary].[1213]

This heightened scrutiny, or watchful care, approach calls for careful judicial assessment of the government's proffered security justification for the restrictions. Under this approach,

> [e]xcept as to actions under civilly-declared martial law . . . a heightened standard of review [should] be applied to evaluate government restrictions of constitutionally-protected liberties ostensibly justified by military necessity or national security.

At the same time, the watchful care approach affords the government needed protection for sensitive information or policies. In particular, a heightened standard of review confirms the appropriate competency of federal courts to adjudicate disputes at the intersection of civil liberties and national security. It announces a confidence that courts possess existing tools for ensuring strict confidentiality where warranted. Secrecy has its proper place. But the internment illustrates that the executive branch historically has invoked confidentiality to evade accountability.[1214]

How will American courts respond today and in the future? Some predict that "blind acceptance by the courts of the government's insistence on the need for secrecy . . . [will] impermissibly compromise the independence of the judiciary and open the door to possible abuse."[1215] Yet, in hearing *habeas corpus* challenges after *Rasul* and *Boumediene*, the federal courts have more consistently scrutinized the government's justification for indefinite detention, upholding 16 detentions and invalidating 37 others.[1216]

In his final pronouncement, Fred Korematsu urged that through public and judicial vigilance "the internment can remain a lighthouse that helps . . . navigate the rocky shores triangulated by freedom, equality, and security."[1217]

Notes & Questions

1. The judicial role in national security cases: National security is an ill-defined concept with highly elastic limits. Government definitions tend to be self-justifying. Historically, the very phrase "national security" is used only occasionally, while other closely related terms such as "military necessity," "war powers" and presidential status as "Commander in Chief" also are deployed in arguing for a relaxed standard of judicial review of official actions. These arguments raise foundational issues about separation of powers—the constitutional relationships among the legislative, executive and judicial branches.

During World War I, Charles Evans Hughes (at various times New York governor, U.S. Cabinet member, U.S. Supreme Court Chief Justice and presidential candidate) argued that "the power to wage war is the power to wage war successfully"—later quoted by the *Hirabayashi* wartime Court. Hughes explained that the Constitution grants the federal government powers that

> may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defense and the perpetuity of our liberties. These rest upon the preservation of the nation. . . . It has been said that the Constitution marches, . . . [s]o, also, we have a *fighting* Constitution.[1218]

If we have not only a Constitution but a "*fighting* Constitution," the judiciary then necessarily is beset by arguments over the contours of its authority. In a system of checks and balances, where each government branch ensures that the other branches exercise their constitutional powers appropriately, claims of national security shift government authority toward the political branches and away from an independent judiciary. Such a shift may be appropriate in situations that require quick government responses to real threats to the government's security. In other situations, it may lead to horrendous violations of civil liberties, especially when the political branches respond to popular opinion or naked political pressure rather than to genuine security threats. To what extent do national security rationales for government action thus evoke contradictory judicial responses? National security is a reason for deferring to the political branches and military authorities; it is also the reason for greater skepticism toward the legislative and executive branches.

Considerations of separation of powers undergird most government assertions of national security or military necessity. Those considerations are complicated significantly when the security or necessity restrictions target a discrete minority group. Constitutional support for the government's war power collides with other constitutional concerns over civil liberties and protecting society's minorities from undue discrimination, especially when race is clearly central to the government's decisions, as it was in the decision to intern citizens and non-citizens of Japanese descent.[1219]

2. **Divergent views on judicial review:** Consider the judiciary's role in national security cases in light of divergent views on standards of judicial review. Fred Korematsu's *Rasul* amicus brief advocated for heightened judicial scrutiny over executive national security actions that curtail civil liberties. This approach to judicial scrutiny might be viewed as contextual, or realist. It accounts for political realities by affording the executive branch leeway on national security matters while holding it accountable for falsely grounded actions or gross abuses of power.

However, as discussed, debate persists about the appropriate level of judicial review of executive actions during times of national crisis. Some argue that heightened scrutiny imposes undue constraints on presidential power: The executive branch needs broad power to protect America from actual, threatened violence and terror.[1220] Yet as stated by Justice O'Connor in her plurality opinion in *Hamdi*, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[1221] She also cited to Justice Murphy's powerful dissent in the original *Korematsu* decision, in which he pointed to the paucity of the military's evidentiary showing. And according to Justices Souter and Ginsburg, the executive

branch is entrusted with maintaining security, and the liberty interest is more reasonably balanced in a different branch such that "each may be a check on the other."[1222]

Court opinions tend to reflect a combination of, or even vacillation between, deferential and heightened approaches to judicial review. Competing values loom behind judicial decisions. Ideally, judicial review standards will accommodate these values and establish a principled and consistent guide for future government conduct. Ultimately, the government needs flexibility to counter threats and respond to national emergencies. Equally important, however, is judicial vigilance,

> especially during times of national stress, [to safeguard] cherished democratic rights to speech, association, and religion; racial and gender equality; unfettered voting; and imprisonment only upon indictment and trial, with access to counsel and due process protections . . . .[1223]

Therefore

> [e]xcept as to actions under civilly-declared martial law, the standard of judicial review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that "military necessity" or "national security" justifies the challenged restrictions. In operation, this means that the standard of review of governmental action is to be determined according to the existing constitutional doctrine, which focuses on the right restricted. That standard is not altered by the government's assertion that its powers of self-protection are involved. The nature of the government's self-protective justification and the significance of the government interest asserted are but ingredients in the application of the fixed constitutional calculus. Thus, a heightened standard of review will be applied to evaluate government restrictions of constitutionally-protected liberties ostensibly justified by military necessity or national security.[1224]

Is this proposed principle conceptually sound? Does it accommodate competing interests and values? Might it prove effective in legal practice? To what extent did the *Rasul* Court adopt a version of this standard of judicial review? To what extent is the judiciary's accommodation of these competing values essential to a functioning American democracy?

3. The torture memos: The government asserted an expanded version of the "unitary executive" on many fronts of the war on terror, most visibly in the Bush Administration's defense of detainee torture. Thousands of persons were detained within the United States. By early 2002, the U.S. military brought persons captured or picked up in Afghanistan to the hastily constructed holding facilities at Guantánamo Bay for interrogation and indefinite detention.[1225] The CIA also established secret prisons and a process of extrajudicial rendition, sending persons apprehended both in the United States and Afghanistan to overseas third countries for interrogation—often through torture.[1226] Firsthand accounts of torture accelerated the public push to close the Guantánamo Bay prison.[1227] Those accounts gained credence when, in August 2009, the Obama Administration released a previously classified CIA report that strongly criticized the CIA's widespread use of "enhanced interrogation techniques."[1228]

In the now-infamous "torture memos" of August 2002, John Yoo and Jay Bybee, attorneys in the Bush White House Office of Legal Counsel, maintained

that torture by U.S. interrogators could not be classified as a war crime because the Geneva Conventions did not apply to al Qaeda.[1229] They also asserted that "courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers."[1230] In other words, the memos appeared to maintain that security powers claimed by the executive are not constrained by domestic or international law.

The memos also reportedly revealed that the Administration's legal counsel assured government interrogators concerned about criminal liability for torture that they would be largely immune from judicial scrutiny. As Deborah Pearlstein observes, "Congressional measures that would bar such practices were ruled inapplicable; interagency voices that contested this view were ignored. And the Administration . . . vigorously opposed efforts to engage the courts after the fact in declaring such practices unlawful."[1231] Professor David Cole concurs, adding that the CIA operated in a "law-free zone":

> The OLC lawyers admitted that "we cannot predict with confidence that a court would agree with our conclusion." But they then went on to reassure the CIA that the question "is unlikely to be subject to judicial inquiry." Even if the treaty prohibiting torture and cruel treatment were violated, the memo continued, "the courts have nothing to do and can give no redress." In other words, the CIA for all practical purposes was operating in a "law-free zone," or at least a zone where the law was whatever the executive said it was—in secret. And no court would ever have the opportunity to disagree.[1232]

Does this perceived "law-free zone" also mean that those who sanctioned the torture programs will escape prosecution and civil liability? Jordan Paust observed in 2007 that the Bush Administration "furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or . . . the torture statute[.]"[1233] Shortly after Jay Bybee circulated his memorandum in August 2002, President Bush appointed him to the Ninth Circuit Court of Appeals. John Yoo, who drafted the torture memos, returned to his faculty position at the Berkeley School of Law. The Obama Justice Department rejected investigators' findings of ethical violations by Bybee and Yoo. And the federal courts dismissed civil lawsuits against Yoo.[1234]

According to Professor Cole, the torture memos also revealed that the Bush Administration authorized what is universally regarded as torture and then dissembled to the public to justify it.

> [T]hese memos are the real "smoking gun" in the torture controversy. They reveal that instead of requiring the CIA to conform its conduct to the law, the OLC [Office of Legal Counsel] lawyers contorted the law to authorize precisely what it was designed to forbid. . . .
>
> Most disturbingly, the OLC lawyers secretly maintained their [torture] position even as the relevant facts changed, and even after the law developed to underscore that the CIA's tactics were illegal. There was one law for public consumption, but another quite different law operating in secret. . . . [The memos] reveal that the department continued in secret to approve all the same interrogation tactics.[1235]

How does the OLC's apparent public dissembling and lack of accountability in the courts affect America's reputation as a democracy deeply shaped by a Bill of Rights?

4. The significance of public pressure and critical legal advocacy: By deciding for the government in 1944, the U.S. Supreme Court in *Korematsu* made a profound value judgment that unsubstantiated claims of national security necessity validated mass racial incarceration. If courts tend to defer to the President during times of national distress, how do advocates of democracy compel the courts to stand as an independent check on the executive? Consider the following approach to public pressure and critical legal advocacy:

> The crucial judicial choice between heightened or minimal scrutiny—an ostensibly neutral aspect of the legal process—is influenced in two related ways. First, the choice is partly influenced by established legal methods—case precedents and the language of legislative acts. Second—and the focus here—in endeavoring to choose the appropriate level of judicial scrutiny, courts will often find that the traditional legal method offers considerable "play in the joints"—that it does not clearly dictate the "correct" level of scrutiny in controversial cases. *Rather, critical legal advocacy and public pressure about the necessity for executive accountability in courts of law, in light of the particular controversy, often provide the tipping point.*[1236]

Public advocacy emerges in two forms. First, public advocacy involves

> critical legal arguments by lawyers and civil and human rights organizations aimed at shaping judges' threshold selections of the level of judicial scrutiny, and ultimately the judge's responses to the specific legal challenges to executive actions.[1237]

And by complementing traditional, formalistic legal arguments, critical legal advocacy

> aims to reveal what is really at stake, who benefits and who is harmed . . . , who wields the behind-the-scenes power, which social values are supported and which are subverted, how political concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision.[1238]

Second, public advocacy involves public education in the form of

> journalist essays, pundit commentaries, public letters to the editor, clergy sermons, scholars' op-ed pieces, community workshops and school forums, all critically analyzing and advocating the need for the courts to carefully scrutinize the executive's national security actions.[1239]

Public education in this form seeks to foster dissent and debate, both of which are crucial pillars to the democratic process. Also, the goal of public education is to create a "compelling sense that it must be the courts that exercise 'watchful care' over our constitutional liberties."[1240] This arm of public advocacy is equally important as the first. Indeed, many have referred to individual advocacy and independent media as the "fourth branch of government."[1241]

The timing of both kinds of public advocacy is important—both at the "front end" and the "back end" of alleged national security abuses:

> The real bulwark against government excess and lax judicial scrutiny, then, is political education and mobilization, both at the front end when the laws are passed and enforced and at the back end when they are challenged in the courts. . . .
>
> In today's climate of fear and anger, our first task in protecting both people and key democratic values is to be pro-active at the front end—to prevent post-modern forms of the internment. We need to organize and speak out to assure that the expansive new national security regime does not overwhelm the civil liberties of vul-

> nerable groups and move the country toward a police state. We need to mobilize and raise challenges to prevent . . . secret incarcerations, particularly en masse. Through political analysis, education, and activism, our job is to compel powerful institutions, particularly the courts, to be vigilant, to "protect all."
>
> Our second task is to be assertive at the back end—to call out injustice when it occurs, to spell out the damage it does to real people in our midst and to our constitutional democracy, and to demand accountability to principles of equality and due process.[1242]

The *coram nobis* legal teams and their many supporters employed critical legal advocacy in their pursuit of belated justice for interned Japanese Americans. In addition to the practical demands of lawyering the controversial case (such as conducting complicated research, filing pleadings, drafting motions and memorandums, attending pretrial conferences and strategizing about procedural opportunities), all members of the team participated in public education and fundraising. The legal teams spent considerable energy on outreach programs that included direct media contact, liaisons with Japanese American communities and relations with church, labor, political and civil groups. The teams' communications director mastered the skills of authoring press releases, organizing press conferences and scheduling the media demands for interviews, photographs and exclusive news.

What role might public advocacy have played in *Rasul* and the ensuing Guantánamo cases, particularly *Boumediene* and *Hamdi*? How might political groups, law firms or non-profits throughout the country engage the first form of public advocacy, that is, critical legal advocacy? In what ways might opinion shapers such as op-ed columnists, professors, ministers, community members or television program hosts across America further the second form of public advocacy, that is, public education? And how might persons not ordinarily advocates on public issues but with expertise in other areas such as journalism, political science, psychology or law employ their skills to help compel the courts to closely scrutinize the executive's national security restrictions of fundamental liberties?

5. Indefinite detention 2012: The National Defense Authorization Act and the continuing import of the Japanese American internment cases: In 2012, Congress passed the voluminous National Defense Authorization Act (NDAA).[1243] One provision raised grave concerns about indefinite detentions not subject to judicial scrutiny. In the name of the war on terror, NDAA section 1021 authorized the U.S. military to indefinitely detain "covered persons." This key term was defined broadly not only as individuals involved in the September 11th attacks, but also individuals who, in the judgment of the military, have "substantially supported" al Qaeda, the Taliban or "associated forces."[1244] Many criticized this language as exceedingly vague—it would allow the military to indefinitely detain innocent American citizens without charges or judicial review. What could or would "substantially support" or "associated force" mean? And who decides this significant definitional question—the President, military or a court of law? How long could the detention last—until the cessation of hostilities? If so, when would that be?[1245] Broad coalitions of private citizens, lawyers and legislators opposed section 1021 in a collective illustration of critical legal advocacy referred to in the previous note. In addition, different groups engaged in legislative advocacy and judicial advocacy.

a. Legislative advocacy: Soon after the NDAA became law, several bills were introduced to remove its indefinite detention provisions.[1246] These bills sought to diminish the prospects of religious or racial scapegoating by ensuring that individuals apprehended on U.S. soil receive due process. They proposed measures including notice of charges of legal violations and the opportunity for hearing in a court of law. They also directed that detainees be held and tried by civil, not military, authorities.

Because the NDAA raised the specter that civil liberties would be sacrificed in the name of national security, the Japanese American internment cases emerged at the forefront of the February 2012 Senate Judiciary Committee hearing on Senator Dianne Feinstein's bill, the "Due Process Guarantee Act." Senator Feinstein, Chair of the Senate Intelligence Committee and a member of the Judiciary Committee, explained that she introduced the legislation because, when she was young, her father took her to see the detention center at Tanforan racetrack south of San Francisco. Seeing the American citizens of Japanese ancestry there, held in confinement "for no reason other than that we were at war with Japan," left an indelible impression. She continued,

> I want to be very clear about what this bill is and what it's not about. It's not about whether [those] who would do us harm should be captured, interrogated, incarcerated, and severely punished. They should be.
>
> But what about an innocent American like Fred Korematsu or other Japanese Americans during World War II? What about someone in the wrong place at that wrong time, who gets picked up and held without charge or trial until the end of hostilities—and who knows when these hostilities will end? The Federal government experimented with the indefinite detention of United States citizens during World War II—a mistake that we now recognize as a betrayal of our core values.[1247]

Professor Lorraine Bannai, a member of Fred Korematsu's *coram nobis* legal team, testified at the same hearing about the continuing relevance of the legal challenges to the internment.

> The lessons of the Japanese American incarceration are many. . . . First, of course, is the real, tangible meaning of the guarantee of Due Process. . . . During World War II, persons of Japanese ancestry were incarcerated without any due process. . . . There were no charges brought against them; they had no hearings, [and] the rule of law was suspended. We are now confronted with new fears against new peoples, and, while we do need to ferret out and prosecute criminal conduct, we need to do so in a way that preserves our system of laws.
>
> Second, the Japanese American incarceration teaches us about the danger of unfettered discretion. Seventy years ago this month, on February 19, 1942, President . . . Roosevelt essentially issued the War Department and military authorities a blank check, delegating to them the authority to take whatever actions they deemed necessary against whomever they saw fit.[1248] Pursuant to this authority, General John L. DeWitt . . . issued orders subjecting Japanese Americans to curfew and then removal from the West Coast and into indefinite detention. . . . In 1983, Messrs. Korematsu and Hirabayashi reopened their wartime cases and . . . won vacation of their convictions based on proof that the government during World War II suppressed, altered, and destroyed material evidence bearing on the issue of military necessity.[1249] . . . After the vacation of his conviction, Fred Korematsu went on to argue for the basic due process [and equal protection] rights of others. . . .
>
> Finally, the wartime incarceration of Japanese Americans teaches us about human frailty during times of crises. Those who played roles in the incarceration were

> smart and educated, and saw themselves as devoted public servants who thought that they were doing what was in the best interests of the country. Many came to later regret their decisions. . . . In this regard, we are warned to ensure that executive and military decisions are checked by the civil branches of government and constitutional limits.[1250]

Proponents of the detention provisions of the NDAA section 1021 emphasized that anyone detained could challenge his or her detention through a petition for a writ of *habeas corpus*.[1251] However, recall from Chapter 3 that Mitsuye Endo filed her *habeas corpus* petition seeking release from internment in July 1942, and the Court took almost three years to grant her petition.[1252] Is an individual *habeas corpus* petition an adequate remedy to challenge broad-scale detentions?

b. Further judicial advocacy: In early 2012, a group of journalists and political activists filed suit to challenge the indefinite detention provisions of the NDAA.[1253] Each plaintiff in *Hedges v. Obama* alleged that the NDAA allows the indefinite military detention of civilians suspected of supporting terrorism, including American citizens, without basic due process guarantees. They alleged that the NDAA threatened them with indefinite detention for writing about groups perceived to have ties to terrorist activity, thus violating their first amendment rights to freedom of speech and association. In May 2012, federal district Judge Katherine B. Forrest issued a preliminary injunction, prohibiting the government from enforcing section 1021, relying in large part on the failure of the government to explain the meaning of key words in the statute and even to inform the court whether any of the plaintiffs might be detained under section 1021.[1254] While she stated that a statute should be presumed valid and that facial challenges to a statute are disfavored,[1255] Judge Forrest reviewed section 1021 by subjecting it to heightened scrutiny, an exacting standard of review, because the statute infringed on a fundamental right.[1256] What is the impact of Judge Forrest's use of a heightened (as opposed to deferential) standard of review in ruling on the NDAA civil liberties challenge?

Postscript: As this book is going to press, an *amicus* brief in favor of plaintiff-appellees was filed in the Second Circuit by the Hirabayashi, Korematsu and Yasui families, represented by two of the original Korematsu *coram nobis* team members.[1257] During oral argument before the Second Circuit, the lawyers invoked the *Korematsu* wartime decision and dedicated their argument to the families of these now-historic litigants.[1258]

Thus, as asked at the outset in the Prologue chapter, and again in closing:

> *Will today's judiciary draw upon yesterday's internment case lessons to demand that the government justify its "loaded weapon" assertion of national security when curtailing fundamental liberties?*
>
> *Or will the courts again defer to the executive branch during times of public fear, and decline to exercise "watchful care"*[1259] *over civil liberties of citizens and non-citizens?*
>
> *And what might influence the approach courts embrace?*

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