# DENYING PREJUDICE: INTERNMENT, REDRESS, AND DENIAL

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*In the early 1980s, Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi marched back into the federal courts that convicted them during World War II for defying the internment of persons of Japanese descent. Relying on suppressed exculpatory evidence discovered in the national archives, they filed writs of error* coram nobis *to overturn their convictions. Remarkably, this litigation was successful and fueled the extraordinary redress movement, which culminated in federal reparations for surviving internees. Yet, a dark side to this victory has never been discussed, until now. In granting the petitions, the Judiciary absolved the one branch of government that has never been held accountable for the internment: itself. Specifically, the lower federal courts adopted an official legal history that insulated the wartime Supreme Court from any fault. According to that account, the Supreme Court was simply duped by conniving officials in the Departments of War and Justice, who suppressed "smoking gun" evidence. But this tidy story is nonsense. The wartime Court was no innocent. It was a full participant in the internment machinery, and it deployed its enormous intellectual resources to avoid interfering with the internment, while at the same time, never granting it official approval. The Court also made certain that blame would fall not on President Franklin Delano Roosevelt or on Congress, but instead on the little known War Relocation Authority, which was labeled a rogue agency. This is what the Court did in the 1940s, exploiting procedure-like tools often extolled as "passive virtues." The Judiciary has never accepted responsibility for its machinations. After the* coram nobis *cases, official history has been rewritten to make any apology simply unwarranted. In this way, the personal victories of Korematsu, Yasui, and Hirabayashi were ironically exploited to complete the circle of absolution the Supreme Court began in the 1940s. This Article provides a more nuanced and disturbing interpretation of the internment,*

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Thanks to Rick Abel, Stuart Banner, Devon Carbado, Ron Chen, Michele Landis Dauber, Carole Goldberg, Margaret Chon, Richard Fallon, Laura Gómez, Kenneth Karst, Judith Koffler, Jennifer Martinez, Frank Michelman, Eric Muller, Karen Narasaki, Gary Rowe, David Shapiro, Joseph Singer, Jay Tidmarsh, Laurence Tribe, Leti Volpp, Eric Yamamoto, Stephen Yeazell, and Alfred Yen for their valuable comments.

This Article is dedicated to Fred Korematsu, Gordon Hirabayashi, Minoru Yasui, Mitsuye Endo, and the lawyers who fought and won the *coram nobis* cases.

*the Judiciary, and the* coram nobis *cases. It also sheds critical light on discussions of military exigency, racism, the role of the Judiciary, and the lessons of history in a post–September 11 world.*

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## INTRODUCTION

By all accounts, what happened in the courtroom of Judge Marilyn Patel on November 10, 1983 was astonishing. Convicted in 1942 for refusing internment, Fred Korematsu returned four decades later to the San Francisco federal district court that had branded him a criminal. Invoking the recondite writ of error *coram nobis*, his attorneys argued that his conviction should be overturned because of "smoking gun" evidence recently discovered in the national archives. That evidence showed that the Executive Branch had suppressed critical exculpatory evidence during the original criminal proceedings

in which Fred Korematsu and three other defendants challenged the internment's constitutionality.

On that eventful day, after months of delay by the U.S. government, Fred Korematsu was finally allowed to make his case to a packed courthouse. Addressing the court, he made a simple request: "I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed or color."[1] Judge Patel stunned the audience by granting the petition and vacating Korematsu's conviction. With eloquence, she explained that *Korematsu* "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."[2] Barely able to contain their enthusiasm and some in tears, the audience felt they had achieved an "impossible dream."[3]

This victory and the other *coram nobis* cases of Minoru Yasui and Gordon Hirabayashi were extraordinarily significant. They added crucial momentum to the redress movement that culminated in the path-breaking 1988 Civil Liberties Act, which provided both an official government apology and $20,000 in reparations for each surviving internee.[4] By any metric, the *coram nobis* cases were remarkable successes. Specific wrongs, such as the suppression of evidence, were identified, and unjust convictions vacated. Yet, there was a dark lining to this silver cloud that has never before been exposed.

In granting victory to the petitioners in the *coram nobis* cases, the Judiciary absolved the one branch of government that has never been held accountable for the internment: itself. In overturning these convictions, the lower federal courts adopted an official legal history that insulated the wartime Supreme Court from any fault. According to that account, the Supreme Court was simply duped by bad apples in the Departments of War and Justice, who suppressed exculpatory evidence. If the wartime Supreme Court opinions were trash, it was because of the incomplete information the Court was provided: garbage in, garbage out.

But this tidy story is nonsense. The wartime Court was no innocent tricked by conniving lawyers. It was a full participant in the internment machinery, and

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1. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 283 (2001) [hereinafter RACE, RIGHTS AND REPARATION].

2. *Id.*

3. This phrase comes from the title of MITCHELL T. MAKI ET AL., ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS (1999).

4. The Civil Liberties Act gave compensation only to those who were U.S. citizens or permanent residents. This left out the thousands of ethnic Japanese who were abducted from their homes in Latin America and interned in the United States. For that odd and sad story, see Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998).

it deployed its enormous intellectual resources to avoid interfering with the internment, while at the same time, never granting the internment official approval. Respectful of its sister branches of government, the Court also made certain that blame would not fall at the feet of President Franklin Delano Roosevelt or on the Congress. Instead, it thrust responsibility upon the little known War Relocation Authority, ridiculously characterized as a rogue agency.

This is what the Court did in the 1940s. And as I show in Part I, it did so with tremendous acumen, exploiting what are typically praised as the "passive virtues."[5] For its machinations, the Judiciary has never apologized or accepted responsibility. Although the more political branches have expressed regret and paid reparations, the Judiciary has never faced up to its past, and indeed prominent jurists such as the sitting Chief Justice have provided apologia, not apology.[6] After the *coram nobis* cases of the 1980s, official history has been rewritten to make any apology unwarranted. In this way, the personal victories of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui have been ironically exploited to complete the circle of absolution the Supreme Court began in the 1940s.

I want to be clear: The *coram nobis* cases were remarkable victories won by litigants and lawyers whom I deeply admire. They are my heroes. However, the apparent acceptance of responsibility manifested in the 1980s *coram nobis* cases was and is a mirage. To avoid misunderstanding or misuse of my argument, I emphasize that my critique of the *coram nobis* cases does nothing to rehabilitate the wartime opinions, which are and should remain ignominious precedents. But the reality is that, regarding the Judiciary, we do not have acceptance of responsibility; we have supreme denial. That is the counter-story told in Part II.

What is the payoff of this more nuanced and disturbing interpretation of the internment, the Judiciary, and the *coram nobis* cases? Put another way, what flows from better appreciating intellectually and morally the sins of our Judiciary, the one branch of government that aspires to rise above mere politics and be the firewall against majoritarian tyranny? In Part III, I sketch out some preliminary answers in light of reparations theory and the revival of what I call the *Korematsu* mindset, post–September 11.

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5. *See infra* Part I.D.

6. *See infra* Part III.B. One might object to my use of the term "Judiciary" because no institution is a monolith. To be sure, not all judges behaved the same way back in the 1940s or in the 1980s, and perhaps I paint with too broad a critical brush. Still, I think it appropriate to speak of both agency and responsibility in institutional terms, with the official actions of majorities of the highest court to address the issue representing the institutional line. In the 1940s, the official line is represented by the majority opinions in each of the four internment cases. In the 1980s, it is the Ninth Circuit's review of the *Hirabayashi coram nobis* opinion.

It has become trite to invoke Santayana's famous remark that those who forget history are destined to repeat it.[7] Nevertheless, it bears repeating that the same goes for those who deny responsibility for history's wrongs. This Article is an intervention to make that denial more difficult, and the self-congratulatory and self-mystifying rhetoric of the Judiciary more comical.

## I. DENIAL AND ABSOLUTION

### A. The Internment Machine

Before September 11, the day of infamy was December 7 in the year 1941.[8] The attack on Pearl Harbor left approximately 2300 dead, nearly twenty Navy ships destroyed, and chaos in our minds and fear in our hearts. Immediately, the United States declared war. Beginning that very day, the FBI arrested over two thousand Japanese resident aliens, who had been kept on a special list of people marked as potentially subversive and dangerous. This "ABC" list included nearly all of the first-generation leadership of Japanese Americans.[9]

In January 1942, a report authored by sitting Supreme Court Justice Owen Roberts concluded inter alia that espionage by sleeper cells in Hawaii had aided the enemy attack. In the same month, pressure increased for radical solutions to the internal threat that the Japanese in America posed. For example, West Coast politicians, such as Representative Leland Ford of California, urged mass internment of the Japanese;[10] prominent editorialists, such as Westbrook Pegler,

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7. "Progress, far from consisting in change, depends on retentiveness . . . when experience is not retained, as among savages, infancy is perpetual. Those who cannot remember the past are condemned to repeat it . . . . This is the condition of children and barbarians, in whom instinct has learned nothing from experience." RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 245 (Suzy Platt ed., 1989) (quoting 1 GEORGE SANTAYANA, THE LIFE OF REASON 284 (1905)).

8. What follows is a brief summary of the history. More detailed accounts can be found in RACE, RIGHTS AND REPARATION, *supra* note 1, at 38–40, 96–102; COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982) [hereinafter PERSONAL JUSTICE]; and various books written by Roger Daniels. *See, e.g.*, ROGER DANIELS, CONCENTRATION CAMPS: NORTH AMERICA JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II (1981) [hereinafter DANIELS, CONCENTRATION CAMPS]; ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION (1962); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993) [hereinafter DANIELS, PRISONERS].

9. The ABC list identified "potentially 'subversive' and 'dangerous'" individuals: "'A' for 'known dangerous' aliens; 'B' [for] 'potentially dangerous,' and 'C' [for those with] pro-Japanese inclinations and propagandist activities." This list included community leaders, "Buddhist priests, and martial arts instructors." RACE, RIGHTS AND REPARATION, *supra* note 1, at 96.

10. *See* DANIELS, PRISONERS, *supra* note 8, at 35.

did the same.[11] Seeing a convenient opportunity to eliminate competition, White-owned agricultural interests poured gasoline on the fire.[12]

On February 14, 1942, General John L. DeWitt, in charge of the Western Defense Command,[13] made his final recommendation in favor of mass evacuation of Japanese Americans from the West Coast.[14] Shortly thereafter, on February 19, President Franklin Roosevelt issued Executive Order 9066, which authorized military commanders to designate military areas in the United States and to exclude any person from those areas.[15] Although aware of the racially targeted evacuations to come, Roosevelt made no mention of the Japanese in his Executive Order.[16]

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11. *See id.* at 29 (recommending that, for every American hostage killed by Axis powers, the United States should kill one hundred internees in its concentration camps).

12. As an article in the *Saturday Evening Post* explained:

> We're charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It's a question of whether the white man lives on the Pacific Coast or the brown man. They came into this valley to work, and they stayed to take over. . . . If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.

Frank J. Taylor, *The People Nobody Wants*, 214 SATURDAY EVENING POST 24, May 9, 1942, at 66 (quoted in Justice Murphy's dissent in *Korematsu v. United States*, 323 U.S. 214, 239 n.12 (1944)).

13. At the time, the Western Defense Command included Washington, California, Oregon, Idaho, Utah, Montana, Nevada, Arizona, and the Territory of Alaska. *See, e.g.*, STETSON CONN ET AL., GUARDING THE UNITED STATES AND ITS OUTPOSTS 33 (2000), *available at* http://www.army.mil/cmh-pg/books/wwii/Guard-US/index.htm; Lawrence E. Davies, *San Francisco Put in Darkness Again*, N.Y. TIMES, Dec. 13, 1941, at 13.

14. *See* PERSONAL JUSTICE, *supra* note 8, at 82 (quoting portions of the recommendation memorandum titled *Evacuation of Japanese and Other Subversive Persons From the Pacific Coast*).

15. The relevant language read:

> I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

According to Chief Justice Rehnquist, Secretary of War Henry Stimson received a blank check authorization, over the telephone, from Roosevelt on the issue, "to go ahead on the line that [he himself] thought the best." WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 190 (1998). According to Attorney General Francis Biddle, Roosevelt did not struggle long and hard over this decision. *See* DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II 322 (1994) (Quoting Biddle as recalling, "I do not think [Roosevelt] was much concerned with the gravity or implications of this step . . . . He was never theoretical about things. What must be done to defend the country must be done.").

16. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 108 (2001) (pointing out that although the Executive Order did not mention the Japanese or evacuation by name, everyone understood "that the purpose of the order was to give the army the power to remove the Japanese Americans from the Pacific Coast"). For analysis of Roosevelt's motivations regarding internment and his racist views about the Japanese generally, see *id.* at 110–23, 238.

In late February, Congress also began to hold roving hearings, chaired by Representative John Tolan of California.[17] Most witnesses at these "National Defense Migration" hearings spoke ill of the Japanese; in sharp contrast, well-known witnesses expressed sympathy for those of German or Italian descent. Author Thomas Mann spoke for anti-Nazi refugees.[18] The mayor of San Francisco, Angelo Rossi, was an Italian American.[19] Tolan himself encouraged testimony about Italian American Joe DiMaggio's honest and law-abiding parents, who lived in the San Francisco area.[20]

In the first half of March 1942, DeWitt issued Public Proclamations No. 1[21] and No. 2,[22] which designated military areas along all West Coast states, as well as Arizona, and warned of future evacuation. On March 21, Congress passed Public Law 503,[23] which criminalized disobedience of duly authorized military regulations. This was the federal law under which Hirabayashi, Yasui, and Korematsu would be convicted. On March 24, DeWitt's Public Proclamation No. 3[24] instituted a curfew on all alien enemies and everyone of Japanese descent—alien and citizen alike. Three days later, DeWitt's Proclamation No. 4[25] prohibited Japanese from relocating out of the military areas at their own discretion. This "freeze order" made certain that they would leave only as the military dictated. Beginning March 24 and proceeding throughout the year, the first of 108 civilian exclusion orders were issued. These exclusion orders required all Japanese Americans, aliens and "non-aliens,"[26] living in specified territories to report to specified evacuation centers.

The evacuees were then warehoused for months in assembly centers run by the Army—often hastily converted fairgrounds and racetrack stalls, fit for animals but not families, especially those with infants, small children, and the elderly.[27] As of April 7, 1942, after mountain and midwestern state governors viciously rejected the idea of resettlement—some warning of mass lynchings[28]—it

17. The hearings were held in front of the House of Representatives Select Committee Investigating National Defense Migration. *See* H.R. REP. NO. 77-2124 (1942).

18. DANIELS, CONCENTRATION CAMPS, *supra* note 8, at 79.

19. *See* ALLAN R. BOSWORTH, AMERICA'S CONCENTRATION CAMPS 68 (1967).

20. DANIELS, PRISONERS, *supra* note 8, at 51.

21. Public Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 26, 1942).

22. Public Proclamation No. 2, 7 Fed. Reg. 2405 (Mar. 28, 1942).

23. Act of Mar. 21, 1942, Areas or Zones, Restrictions, Pub. L. No. 77-503, 56 Stat. 173 (1942).

24. Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942). The curfew ran from 8pm to 6am daily.

25. Public Proclamation No. 4, 7 Fed. Reg. 2601 (Apr. 4, 1942).

26. Apparently, "non-alien" was more palatable than "citizen."

27. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 199–202 (providing oral histories about assembly centers, including incidents in which tour buses would stop at the centers to look at the Japanese Americans like "caged animals").

28. *See id.* at 196.

became clear that the assembled Japanese would be funneled indefinitely into "relocation centers."

By June 1942, just six months into the war, 97,000 Japanese Americans had been rounded up, most of them held in assembly centers. In the first week of June, our crushing victory in the Battle of Midway made any West Coast invasion highly improbable.[29] Still, the internment machine continued to churn. By November, over 100,000 persons were forced from assembly centers into relocation camps.[30] Of these, approximately 70 percent were U.S. citizens because of their birth in the United States.[31] The others were indeed aliens, as is often mentioned by internment apologists, but their alien status was not by choice but perforce.[32] At the time, federal law only allowed "free white persons" and persons of African descent to naturalize.[33] And in 1922, the Supreme Court had made clear in *Ozawa v. United States*[34] that regardless of how fair the flesh and how absolute the cultural assimilation,[35] the Japanese were not White.[36]

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29. Chief Justice Rehnquist claims that the relocation program was put into effect before the Battle of Midway. REHNQUIST, *supra* note 15, at 211. But Eric Muller points out with precision how this was not in fact the case:

> The overwhelming majority of evacuees did not board trains for the interior until at least six to twelve weeks *after* the Battle of Midway was won. So while the *evacuation* had been largely (albeit not entirely) completed by Midway, the *internment*—which would last three long years—had really not even begun.

Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1413 (1999).

30. *See* PERSONAL JUSTICE, *supra* note 8, at 149.

31. This right was secured by a Chinese litigant at the end of the nineteenth century. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (holding that Chinese persons born in the United States were citizens under the Fourteenth Amendment's Citizenship Clause).

32. The Chief Justice is satisfied with the internment of the first-generation Japanese because they were not citizens. REHNQUIST, *supra* note 15, at 209–10. He never points out, however, that federal naturalization law was not colorblind. I concede that even given the legal opportunity, some Japanese may have chosen not to naturalize. No one has good data on the percentage of who would have done what. We should remember, however, that "free" choice is always exercised in context, and that this context was a racially hostile one. In other words, we should not minimize the impact of the federal bar on naturalization by supposing that some (many?) *Issei* would have chosen not to naturalize, because that choice was guided (if not determined) by society's marking them as racial outsiders who did not belong to America.

33. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 36, 57–67.

34. 260 U.S. 178, 198 (1922).

35. Ozawa wrote in his brief to the Supreme Court:

> In name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American. I set forth the following facts that will sufficiently prove this. (1) I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. (2) I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. (3) I am sending my children to an American church and American school in place of a Japanese one. (4) Most of the time I use the American (English) language at home, so that my children cannot speak the Japanese language. (5) I educated myself in American schools for nearly eleven years

The ten "relocation" centers, euphemisms for concentration camps,[37] were located in deserts or swamps, circumscribed by barbed wire and armed sentries. By no means were these "concentration camps" Nazi death camps.[38] Still, conditions were deplorable, and contrary to the claims of Chief Justice Rehnquist,[39] there were numerous incidents involving the physical brutality of military guards.[40] In addition, without adequate medical care, many elderly, infirm, and infants suffered and died needlessly.[41]

The milieu was ironic and Kafkaesque. For instance, Japanese Americans were forcibly drafted out of camps to fight in Europe, in segregated battalions: They were disloyal enough to imprison but loyal enough to kill, and to die, for the country.[42] Those who resisted the draft as absurd given their families'

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by supporting myself. (6) I have lived continuously within the United States for over twenty-eight years. (7) I chose as my wife one educated in American schools . . . instead of one educated in Japan. (8) I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.

Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, 4 AMERASIA 1, 11 (1977).

36. *Ozawa*, 260 U.S. at 198.

37. In my analysis, I use the terms "curfew," "evacuation," and "relocation"—terminology employed by the government during internment. I do so recognizing that these words are grotesque euphemisms. "Curfew" is "house arrest." "Evacuation" is "banishment," and it cannot be separated from "relocation," which, in turn, is a euphemism for "imprisonment." I use these obfuscatory terms because they have become terms-of-art in the judicial analysis that I critique. I use them ironically, recognizing that such linguistic evasion facilitated the segmentation strategy central to the Court's mischief. *See infra* Parts I.B. and I.C. (discussing the segmentation technique).

38. This terminology has caused some controversy in the past. When an exhibition titled *America's Concentration Camps: Remembering the Japanese American Experience* traveled to New York, there was some protest from Jewish groups that argued that the use of the term "concentration camps" was inappropriate. After negotiations, the title remained the same; however, an explanatory footnote was added to the title. *See, e.g.*, ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 44 (2000).

39. *See* REHNQUIST, *supra* note 15, at 192 ("There was no physical brutality, but there were certainly severe hardships . . . .").

40. *See, e.g.*, Muller, *supra* note 29, at 1408–09 (describing beatings, tear gas, and shootings).

41. *See, e.g.*, MEI T. NAKANO, JAPANESE AMERICAN WOMEN: THREE GENERATIONS 1890–1990, at 150 (1990) ("I carried my baby full-term but the camp's inadequate medical care, including the doctor's late arrival, intensified a complex birth. A better-staffed hospital environment might have prevented the hemorrhaging aggravated by a hasty, fatal delivery on a hard flat table while I endured indescribable pain." (quoting June Tsutsui, interned in Amache)); RACE, RIGHTS AND REPARATION, *supra* note 1, at 203 (describing open sewers and a lack of vaccines); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 365 & n.170 (1987) (citing stories of suffering caused by poor medical care relayed by John Tateishi in JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS (1984)).

42. On January 20, 1944, the Department of War announced that it would draft Japanese Americans out of the internment camps into segregated combat units. *See* ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II,

imprisonment in concentration camps were stigmatized, prosecuted, and sent to federal penitentiaries.[43] Japanese Americans were also expected to be productive and compliant citizens within the camps. They were to demonstrate patriotism under duress and to work to make each camp self-sufficient.[44] Children behind barbed wire were instructed to pledge allegiance to the American flag.[45]

For an average of nine hundred days, the internees—many of them children—were imprisoned. Family structures dissolved. Family savings evaporated. Real and personal property were lost. Lives were shattered. Spirits were broken.[46] Yet for the internees, no individualized findings of guilt or disloyalty were made. Instead, military necessity under exigent circumstances provided the blanket justification for their internment. Of course, in Hawaii, where Pearl Harbor was bombed, and where far more Japanese Americans resided both in relative and absolute numbers, there was no internment.[47]

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at 64 (2001). They were drafted into the 442d Regimental Combat Team, which had merged with the 100th Battalion (originally from Hawaii). This unit, which included volunteers and draftees, "became the most decorated unit of its size and length of service in U.S. military history." MAKI ET AL., *supra* note 3, at 43. The decorations stemmed from extraordinary heroism producing extraordinary casualties.

43. *See* MULLER, *supra* note 42.

44. Consider, for example, this oath that Poston, Arizona internees were required to sign:

> I swear loyalty to the United States and enlist in the War Relocation Work Corps for the duration of the war and 14 days thereafter in order to contribute to the needs of the nation and in order to earn a livelihood for myself and my dependents. I will accept whatever pay, unspecified at the present time, the War Relocation Authority determines, and I will observe all rules and regulations.
>
> In doing this I understand that I shall not be entitled to any cash or allowances beyond the wages due me at the time of discharge from the work corps; that I may be transferred from one relocation center to another by the War Relocation Authority; that medical care will be provided, but that I cannot make a claim against the United States for any injury or disease acquired by me while in the Work Corps; that I shall be subject to special assessments for educational, medical and other community service as may be provided for in the support of any dependents who reside in a relocation center; that I shall be financially responsible for the full value of any government property that I use while in the work corps; and that the infraction of any regulations of the War Relocation Authority will render me liable to trial and suitable punishment. So help me God.

RICHARD S. NISHIMOTO, INSIDE AN AMERICAN CONCENTRATION CAMP: JAPANESE AMERICAN RESISTANCE AT POSTON, ARIZONA 34–35 (Lane Ryo Hirabayashi ed., 1995).

45. *See* GOODWIN, *supra* note 15, at 429 ("'To be frank with you,' sighed Mrs. Jones, an elementary-school teacher appointed by the WRA [War Relocation Authority], 'it embarrasses me to teach them the flag salute. Is our nation indivisible? Does it stand for justice for all? Those questions come up to my mind constantly.'").

46. *See, e.g.*, RACE, RIGHTS AND REPARATION, *supra* note 1, at 193–230.

47. Martial law, however, was declared. *See infra* note 292 (discussing mention of Hawaii in the brief for the appellant). Robinson points out that Roosevelt was strongly in favor of mass evacuation of Japanese Americans in Hawaii to, for example, the U.S. mainland concentration camps. However, such a move would have been simply impractical, and it was not supported by General Emmons, who was in charge of Hawaii at the time. Moreover, there was no mass hysteria for internment within Hawaii. *See* ROBINSON, *supra* note 16, at 156–57. Practical realities thus trumped any claimed military necessity. *See also* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR,

## B. Denial

The internment was not much challenged in courts of law. Recall that the first-generation Japanese American leadership, who generally kept a low public profile, was arrested immediately after Pearl Harbor. Also, the second-generation Japanese American Citizens League (JACL), the most influential community organization, strongly urged cooperation as evidence of loyalty.[48] Moreover, the Japanese had little access to legal counsel, especially after being placed in the camps.[49] Thus, only four individuals' cases ended up reaching the Supreme Court.[50] In these cases—*Hirabayashi*,[51] *Yasui*,[52] *Korematsu*,[53] and *Endo*[54]—the Judiciary would have its say about the propriety of internment. The President and Congress had already spoken, through Executive Order 9066, Public Law 503, and the millions of dollars authorized to build, supply, and maintain the camps. So, what exactly did the Supreme Court do?

### 1. Curfew: *Hirabayashi* and *Yasui*

The Supreme Court decided the first case, *Hirabayashi*, in 1943. Gordon Hirabayashi, a pacifist, engaged in civil disobedience against the internment in order to create a test case.[55] After refusing to comply with an exclusion order,[56] Hirabayashi turned himself in to the FBI on May 16, 1942. He brought his personal diary, which revealed that he had also violated the curfew order during the weeks past.[57]

His trial began October 20, 1942. Hirabayashi admitted to violating both orders, and the jury quickly found him guilty on two counts: violating the curfew order and violating the evacuation order. He was originally given consecutive

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1929–1945, at 748 (C. Vann Woodward ed., 1999) (suggesting that "the very size of the Japanese community in Hawaii" and their importance to the economy made "wholesale evacuation" impossible).

48. *See, e.g.*, MAKI ET AL., supra note 3, at 33–34 (describing national JACL policy to urge full cooperation with the government to demonstrate loyalty).

49. For a discussion about the lawyers involved in the cases that made it to the Supreme Court, see PETER IRONS, JUSTICE AT WAR (1983).

50. A few more cases had been filed in state or federal courts; however, they did not reach the Supreme Court. *See, e.g.*, *Ex parte* Kanai, 46 F. Supp. 286 (E.D. Wis. 1942); *Ex parte* Ventura, 44 F. Supp. 520 (W.D. Wash. 1942).

51. Hirabayashi v. United States, 320 U.S. 81 (1943).

52. Yasui v. United States, 320 U.S. 115 (1943).

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

54. *Ex parte* Endo, 323 U.S. 203 (1944).

55. *Hirabayashi*, 320 U.S. at 83–85. For a portrait of Hirabayashi, see IRONS, *supra* note 49, at 89–92.

56. *See* Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725 (May 19, 1942).

57. Hirabayashi's diary showed that he obeyed the curfew until May 4, 1492, but subsequently disobeyed it until he turned himself in on May 16. IRONS, *supra* note 49, at 90–92.

sentences that ran for less than ninety days. Since a ninety-day sentence would allow him to serve time outside doing menial labor instead of inside a jail cell, Hirabayashi requested a longer sentence. The judge obliged and granted him a ninety-day sentence for each offense, to run concurrently instead of consecutively.[58] This seemingly trivial difference would become critical later.

The Ninth Circuit Court of Appeals heard the appeal en banc in this case, as well as in *Yasui* and *Korematsu*, on February 19, 1943. Instead of deciding the cases, the court certified[59] the relevant legal questions of each case to the U.S. Supreme Court.[60] However, the High Court took the unusual step of requesting that the entire cases be transmitted to it as if they had been brought on direct appeal.[61]

The Supreme Court heard arguments in *Hirabayashi* and *Yasui* on May 10 and 11, 1943. By this time, internment was a *fait accompli*. Yet, in its published opinion, the Court found a way to ignore the elephant caged in the courtroom. It did so by adopting what I call a *segmentation* technique that allowed the Court to avoid discussing the detention of Japanese Americans.[62] This formalist technique involved dividing the entire internment process into three separate, divisible steps of (i) curfew, (ii) exclusion, and (iii) relocation.

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58. *See id.* at 159.

59. According to Irons, this was done at the suggestion of the Attorney General Francis Biddle, without knowledge of the defendants or of the Supreme Court. *See id.* at 182.

60. The certification was not without dissent. Judge William Denman suggested that the entire case turned on critical psychological facts regarding loyalty and suggested that the Ninth Circuit Court of Appeals would be better suited to finding these facts than the Supreme Court. Of course, no appellate court is well suited to find facts. Denman's motivation to dissent is difficult to understand. On the one hand, he showed sympathy to the plight of Japanese Americans, by referring to "the discriminating cruelty with which these Mongoloid people have been treated." Brief for Appellant at 40, *Hirabayashi* (No. 870). As another example, he made repeated comparisons to Germany's treatment of the Jews. *See id.* at 41, 43. On the other hand, he wrote that "this court would be compelled to find that General DeWitt has a rational ground to expect [a Japanese attack]." *Id.* at 46. For additional comments about Denman and his dissent, see IRONS, *supra* note 49, at 175–76, 183–85.

61. The statute that governed certification during the wartime cases was 28 U.S.C. § 346, currently codified as 28 U.S.C. § 1254(2). Whether the Supreme Court brings up the entire case when legal questions have been properly certified is a matter of discretion. *See, e.g.*, Cincinnati, H. & D.R. Co. v McKeen, 149 U.S. 259, 261 (1893). One supposes that the factors relevant to granting certiorari might be relevant. *See, e.g.*, SUP. CT. R. 10(c) ("[A] United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . .") (codified as Rule 38(5)(c) during the wartime cases).

62. I do not want to claim greater originality than warranted. Peter Irons in his seminal work carefully described the deliberations of these cases and their final reasoning. In his discussion, he pointed out various aspects I highlight. *See, e.g.*, IRONS, *supra* note 49, at 228 (describing concurrent sentencing in *Hirabayashi*); *id.* at 231 (describing the Justices as "straining to evade the evacuation issue" in *Hirabayashi*); *id.* at 320–21 (describing the distinguishing of evacuation from relocation); *id.* at 342–43 (describing *Endo*'s nonconstitutional grounds of decision).

Recall that Hirabayashi had been a conscientious objector who tried to challenge the entire internment process. But his convictions in the district court were for violating curfew and an exclusion order. According to historian Peter Irons, Chief Justice Harlan Stone[63] was keen on avoiding the exclusion issue, thinking that it could open up review of the entire internment, including the continued incarceration of tens of thousands of people.[64] Therefore, through reasoning argued by neither party, the Chief Justice took advantage of Hirabayashi's concurrent sentences. He wrote:

> Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained.[65]

Through this sentencing fortuity, the Court sua sponte found an elegant way to segment off the narrow issue of curfew as the sole question presented.[66]

As is well known, the Court's substantive review of the curfew conviction was paradoxical.[67] On the one hand, as a matter of theory, the Court waxed eloquent against racism, prejudice, and racial discrimination. Indeed in *Hirabayashi*, the Court poured the foundation of what we now call strict scrutiny for governmental racial classifications. The Court wrote, "Distinctions between citizens solely because of their ancestry are by their very nature odious

63. President Coolidge appointed Stone, who was then Attorney General, to the Court. Before government service, he was Dean of the Columbia Law School and a Wall Street lawyer. *See* ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT: TEACHER'S MANUAL 40–41 (2001) [hereinafter TEACHER'S MANUAL]. Three separate concurrences were written in *Hirabayashi*, one each by Justices Douglas, Murphy, and Rutledge.

64. IRONS, *supra* note 49, at 234 ("[I]f Hirabayashi 'had been in [a] concentration camp,' a much 'graver question' would confront the court." (quoting Justice Douglas's notes)). According to Irons, the conference notes reveal that Justice Black desired the outcome to be determined "on narrowest possible points." *Id.* at 231. The Chief Justice heartily agreed. *Id.*

65. Hirabayashi v. United States, 320 U.S. 81, 85 (1943).

66. The government made no mention of this argument in its brief. To avoid the larger discussion of the internment, the government argued that Hirabayashi lacked standing to question the constitutionality of any restraint placed on other persons because Hirabayashi himself, after making bail, was allowed to proceed inland to accept employment found by religious friends. Brief for the United States at 36, 72–73, *Hirabayashi* (No. 870). According to Irons, after serving two months in jail, Hirabayashi was released on bail and awaited the Supreme Court's opinion in Spokane, Washington. He finished serving his sentence in a road camp in Tucson, Arizona. *See* IRONS, *supra* note 49, at 250–51.

67. The following analysis describes how the Court addressed the equal protection issue. In its opinion, the Court also addressed whether the federal government had the affirmative power to issue such orders and, even if it did, whether Congress violated the nondelegation doctrine by granting such powers to the military too vaguely. The Court found no merit in Hirabayshi's delegation arguments.

to a free people whose institutions are founded upon the doctrine of equality."[68] On the other hand, as a matter of practice, the Court was extremely deferential to claims of military necessity. As Chief Justice Stone explained, "reasonably prudent men" had "ample ground" and a "substantial basis" to believe that the Japanese in America "might reasonably be expected to aid a threatened enemy invasion."[69]

Such reasoning conforms to what we now call racial profiling.[70] The Court thought it was rational to assume that the Japanese posed greater security threats than Americans of other ethnicities. In the Court's view, there was plenty good reason to focus on the Japanese: "The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan."[71] Indeed, for the Court, it would have been silly to blind itself to this racialized common sense. It wrote: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."[72] Such arguments should sound familiar post–September 11.

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68. *Hirabayashi*, 320 U.S. at 100. Five years earlier, Justice Stone authored footnote 4 of *United States v. Carolene Products Co.*, commonly noted as a precursor to the "strict scrutiny" doctrine announced in *Korematsu*. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting perhaps stricter review of statutes evincing "prejudice against discrete and insular minorities"). At this time, it was not clear that the Fifth Amendment's Due Process Clause featured an equality component identical to that of the Fourteenth Amendment's Equal Protection Clause. Arguably, that dispute was not settled until *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 n.13 (1998).

69. *Hirabayashi*, 320 U.S. at 94–95.

70. Definitions of racial profiling abound. *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081 (2001) ("A racial profile associates members of particular racial groups with particular crimes, based on a reasonable and genuine belief in actual statistical differences in crime rates or patterns of criminal involvement among groups."); Samuel R. Gross & Debra Livingston, *Essay: Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) ("'[R]acial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating."); Deborah A. Ramierz et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AMER. CRIM. L. REV. 1195, 1205 (2003) ("[R]acial profiling is the inappropriate use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation."). For interesting analyses of racial profiling, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 973–74, 1030–32 (2002) and David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 237–38 (2001).

71. *Hirabayashi*, 320 U.S. at 101.

72. *Id.*

In legitimizing this foundation for the ethnic-specific curfew, the Court noted that Japanese Americans might be disloyal because American society discriminated against them:

> There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.[73]

Indeed, in a footnote, the Court provided an exhaustive inventory of the various laws that treated Japanese Americans as second-class aliens: federal laws that prevented their immigration and naturalization;[74] state laws that restricted property ownership[75] and intermarriage with Whites;[76] and economic discrimination that limited professional and employment opportunities.[77] No doubt, this was prompted by the government's brief, which specifically suggested that "as a result of their [discriminatory] treatment," the Japanese threatened disloyalty.[78]

Without seeing the catch-22 that Japanese Americans were put in, the Court went on to explain that the Japanese therefore posed a greater national security risk.[79] The Court demonstrated no sense of either the ironic or the

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73. *Id.* at 96.

74. *See id.* at 96 n.4. *See generally* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990 (1993); LUCY ELIZABETH SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

75. *See generally* Keith Aoki, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998).

76. *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE (2001); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000).

77. *Hirabayashi*, 320 U.S. at 96 n.4.

78. The government's brief explained:

> The reaction of the Japanese to their lack of assimilation and to their treatment is a question which of course does not admit of any precise answer. It is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment, and may feel a consequent tie to Japan, a heightened sense of racial solidarity, and a compensatory feeling of racial pride or pride in Japan's achievements.

Brief for the United States at 21, *Hirabayashi* (No. 870) (citations omitted); *see also* Brief of the States of California, Oregon and Washington as Amici Curiae at 11, *Hirabayashi* (No. 870) ("The Japanese of the Pacific Coast area on the whole have remained a group apart and inscrutable to their neighbors. As they represent an unassimilated, homogenous element which in varying degrees is closely related through ties of race, language, religion, custom and ideology to the Japanese Empire.") (citations omitted).

79. Specifically, the Court wrote:

> The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.
>
> Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this

absurd. It also took no special responsibility for the fact that, in coordination with state judiciaries, it itself had sanctioned the very curtailment of fundamental rights in the past, which justified further continued oppression.

And it was not as if the Court were clueless. The JACL pointed out in its amicus brief that accepting such reasoning would put this country on "a treadmill of intolerance from which there is no escape."[80] In making its case, the JACL pulled no punches: "By [this line of reasoning], the Nazi treatment of the Jews is vindicated, for the Jews of Germany had suffered civil and social disabilities and therefore, by the sadistic turn of logic, should have been ripe for treason to the Reich precisely as Herr Hitler declared."[81] Yasui's brief similarly observed the dangerous bootstrapping nature of such arguments: "[I]n days to come the Government may argue that the Japanese-Americans have not been assimilated into American life because during World War II they were locked up in concentration camps."[82]

In his arguments, Hirabayashi suggested a different axis of division, not along immutable race or ethnicity but along political citizenship. In other words, curfew should distinguish between (enemy) aliens and U.S. citizens. Accordingly, if citizens of Japanese descent should have to suffer curfew in the name of national security, so should all citizens. The Court declined this invitation:

> In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with responsibility of our national defense have reasonable ground for believing that the threat is real.[83]

In the end, through segmentation, this case was framed as solely about curfew, about staying home between the hours of eight o'clock in the evening and six o'clock in the morning. And curfew in a time of war—even if ethnically targeted—did not seem too gross a burden when it was so commonsensical to target the Japanese. After all, from mainstream society's perspective, *they* targeted *us*.

By hearing *Hirabayashi*, the Supreme Court asserted its continuing powers of judicial review, even in wartime, over the other branches of government. But

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group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack.

*Hirabayashi*, 320 U.S. at 98–99.

80. Brief of Japanese American Citizen's League as Amicus Curiae at 64, *Hirabayashi* (No. 870).

81. *Id.* at 64–65.

82. Appellant's Brief at 34, Yasui v. United States, 320 U.S. 115 (1994) (No. 871).

83. *Hirabayashi*, 320 U.S. at 95.

through segmentation, which we will soon see more of, the Court carved off an easier issue than the case or controversy in toto presented. By professing an idealized antiracist rhetoric, the Court also bolstered its reputation for fairness and equality, and denied any responsibility for a distasteful but realpolitik compromise (for example, injustice toward some in exchange for safety for most). At the same time, by deferring wholesale to the government's claims based on racial (but according to the Court, not racist) common sense, it avoided interfering with the larger internment process.

*Yasui*, the companion case to *Hirabayashi*, presented the same curfew issue.[84] Although the rationale of the district court that convicted Minoru Yasui was bizarre,[85] that reasoning was neither defended by the government[86] nor relied upon by the Supreme Court. In *Yasui*, issued the same day as *Hirabayashi*, the Court simply relied on the *Hirabayashi* opinion to affirm the curfew conviction.[87]

### 2. Exclusion: *Korematsu*

One year later, in 1944, the Court confronted the case of Fred Korematsu. Korematsu was arrested on May 30, 1942, trying to pass as a Spanish-Hawaiian, under the alias "Clyde Sarah."[88] Tried before a judge, he was found guilty of violating an exclusion order. The judge determined that the appropriate punishment would be five years' probation, but oddly, he decided against actually imposing the sentence.[89] The case was appealed, and the Ninth Circuit certified

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84. *See Yasui*, 320 U.S. at 116–17.

85. Citing *Ex Parte Milligan*, 71 U.S. 2 (1866), the district court held that the curfew order was unconstitutional as applied to citizens. *See* United States v. Yasui, 48 F. Supp. 40, 45 (D. Or. 1942). But the court also found that Minoru Yasui had somehow lost his citizenship because he had worked for the Japanese Consulate after graduation from law school. *See id.* at 55. Yasui could not find employment elsewhere despite his Juris Doctor.

86. *See* Brief for the United States at 9, *Yasui*, 320 U.S. 115 (No. 871) ("We do not undertake to support the conviction on that ground.").

87. *See Yasui*, 320 U.S. at 117.

88. Keen on staying in Northern California to be with his Italian American sweetheart, Fred Korematsu had plastic surgery on his nose and eyes to try to alter his physical features. This did not, however, prevent others from mapping his physical features to the ethnic category, Japanese. On this point, Judge Denman of the Ninth Circuit Court of Appeals noted:

> After that time [Korematsu] had made an unsuccessful attempt to have his features altered by plastic surgery, hoping thereby to escape the discrimination against his minority group of citizens. This attempt is as pathetic as that of another of our minority groups—of those of one-sixteenth negro blood hoping to conceal the fact that they have not "passed over" into general Caucasian social intercourse.

Korematsu v. United States, 140 F.2d 289, 293 (9th Cir. 1943) (Denman, J., concurring in the judgment) (concurring only in the judgment but dissenting from the grounds of the majority opinion in *Korematsu* after remand from the Supreme Court).

89. *See* IRONS, *supra* note 49, at 153. The district court's order stated that Korematsu should "be placed on probation for the period of five (5) years . . . . Further ordered that the bond heretofore given for

it to the Supreme Court with *Hirabayashi* and *Yasui*. As explained, the Supreme Court commanded that all three cases be brought up in their entirety to be decided by the Court itself.[90] Because of the odd sentencing posture, one procedural uncertainty was whether Korematsu had an appealable final judgment.[91]

Three weeks before handing down the curfew cases, the Court determined that there was indeed a final order, and thus an appealable judgment, in *Korematsu*. The case was then remanded to the Ninth Circuit to address the substantive issues.[92] The Court could have addressed the merits of the case directly as it did in the curfew cases. It was not as if the curfew cases were procedurally or jurisdictionally any different from Korematsu's case: In none of the cases had the Ninth Circuit issued any opinion. But *Korematsu* raised harder substantive questions, and delay would work in the Court's favor. If heard promptly, the case could have been decided contemporaneously with the curfew cases in June 1943. But the Court's *Korematsu* opinion was not published until December 1944, one-and-a-half years later.[93]

This procedural history identifies an obvious way through which the Court delayed addressing the central issues. More subtle techniques, however, were also employed. In *Korematsu*, the Court, per Justice Hugo Black,[94] began with the now-familiar segmentation technique. The *Hirabayashi* Court avoided addressing the exclusion order conviction because it believed that doing so would present a challenge to the entire internment structure. Accordingly, it blinded itself to the social reality of internment and focused on the curfew conviction alone. In *Korematsu*, there was no fortuity of concurrent identical sentences that would allow the Court to dodge the internment issue. Still, the

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the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended." *See* Korematsu v. United States, 319 U.S. 432, 432–33 (1943) (quoting the district court order).

90. *See supra* text accompanying notes 59–61.

91. When Korematsu filed his notice of appeal, the United States filed a motion arguing that there was no final judgment since the sentence was probationary. Korematsu's attorney specifically asked the trial court judge to impose a few days of jail sentence in order to avoid any uncertainties about appealability, but the trial court refused. *See* IRONS, *supra* note 49, at 162 (describing government attorney Zirpoli as "eager to keep the case from the appellate courts").

92. *See Korematsu*, 319 U.S. at 436.

93. In fact, the procedural history is even more tortured. On remand, the court of appeals affirmed Korematsu's evacuation conviction on the authority of the Supreme Court's opinion in *Hirabayashi*. *See Korematsu*, 140 F.2d at 290. It did so without any additional oral argument. *See* IRONS, *supra* note 49, at 258. Afterward, the *Korematsu* case was ready to be heard at the Supreme Court in the Spring of 1944. However, because a case that raised similar issues, *Endo*, was in the pipeline, the Court delayed oral argument in *Korematsu* until the following term. Both cases were heard on October 11, 1944.

94. Justice Hugo Black, Roosevelt's first Supreme Court appointee, was a Democratic Senator from Alabama. He was also a former member of the Ku Klux Klan. Later, he would develop a reputation for being a staunch defender of many civil liberties, advocating a literalist reading of constitutional text. *See* TEACHER'S MANUAL, *supra* note 63, at 38–39. Justice Frankfurter wrote a concurrence in *Korematsu*. Justices Roberts, Murphy, and Jackson each dissented in separate opinions.

Court found a way to carve out the exclusion issue from the continuing incarceration of Japanese Americans.

It did so through remarkable formalism. As detailed in Justice Roberts'[95] dissent, the exclusion order was part and parcel of Korematsu's relocation into an internment camp.[96] As of March 27, 1942, Proclamation 4 (the "freeze order") made it illegal for Fred Korematsu to move from the West Coast voluntarily.[97] Then the exclusion orders came down, and Civil Exclusion Order No. 34 required Korematsu to report to an evacuation site.[98] Remaining in his home area after the evacuation deadline (unless he was housed in an assembly center) was a federal crime. From these evacuation sites, the Japanese were forcibly escorted by Army soldiers into assembly centers, and if military rifles were somehow ambiguous, Civilian Restrictive Order 1, issued on May 19, made clear that no one could leave the assembly centers without authorization.[99] Public Proclamation No. 8, issued on June 27, clarified that evacuees would be forcibly moved from the assembly centers to relocation centers managed by the War Relocation Authority.[100]

On these facts, Justice Roberts vigorously resisted the characterization that this was "a case of temporary exclusion of a citizen from an area for his own safety or that of the community, [or] a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows."[101] Instead, it was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely based on his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[102]

Still, the majority, per Justice Black, found a way to deny the obvious. First, it noted in passing that the only issue framed at trial was the violation of the exclusion order.[103] Second, the Court pointed out fantastically that it did not really know what would have happened to Korematsu had he obeyed the exclusion order, since some Japanese "were released upon condition that they remain

95. Justice Owen Roberts, appointed by Herbert Hoover, was a prominent Philadelphia lawyer. In 1937, he was the "switch in time that saved nine" that obviated Roosevelt's "court-packing" plan. He was also the Justice who chaired the official investigation into the Pearl Harbor attack in January 1942. *See id.* at 40.

96. *See* Korematsu v. United States, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting).

97. *See* Public Proclamation No. 4, 7 Fed. Reg. 2601 (Apr. 4, 1942).

98. *See* Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 28, 1942).

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

100. *See* Public Proclamation No. 8, 7 Fed. Reg. 8346 (Oct. 16, 1942).

101. *Korematsu*, 323 U.S. at 226.

102. *Id.*

103. *Id.* at 221.

outside the prohibited zone until the military orders were modified or lifted."[104] This is notwithstanding the government's concession that, "had [Korematsu] obeyed all of the provisions of the order and the accompanying Instructions, [he] would have found himself for a period of time, the length of which was not then ascertainable, in a place of detention."[105] Third, the Court emphasized that the three separate requirements of evacuation, reporting to an assembly center, and staying in a relocation center imposed three separate sets of duties. If they had been codified in a federal criminal statute, they would be considered three separate offenses.[106] With the issues framed this way, addressing the entire internment would be nothing short of judicial activism:

> To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or certain to be applied to him . . . ."[107]

Aggressively applying the segmentation technique and appealing to the virtues of judicial self-restraint, the Court treated the case as if it were simply a requirement that Japanese Americans temporarily vacate their homes in narrowly designated military areas, for the sake of their own personal safety and national security.[108] The Court refused to address the legality of the entire West Coast Japanese American population's subsequent incarceration in assembly centers and then relocation centers. One could predict the rationalization to come.

Having narrowed the issue again, the Court approached the substance by replicating the *Hirabayashi* strategy. In prose that any modern civil rights activist would embrace and first-year constitutional law students would recognize, the Court pronounced:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most

104. But as the ACLU explained in its amicus brief, there were no regulations implemented to allow "leaves" until September 26, 1942. Korematsu was convicted for violating military orders in May, many months earlier. Brief of American Civil Liberties Union as Amicus Curiae in Support of Petition at 11, *Korematsu* (No. 22), *reprinted in* 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 89 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

105. Brief for the United States at 28–29, *Korematsu* (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 203, 230–31.

106. *Korematsu*, 323 U.S. at 222.

107. *Id.*

108. *See* Arval A. Morris, *Justice, War, and the Japanese-American Evacuation and Internment*, 59 WASH. L. REV. 843, 855 (1984) (describing the Court as "strain[ing] to separate the inseparable").

> rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[109]

But in practice, rigid scrutiny amounted to limp deference to racial-profiling justifications supported by the backdrop of national security fears.

Quoting generous portions of *Hirabayashi*, the Court did not consider the military's fears to be "unfounded."[110] Indeed, according to the Court, the military's fear of disloyal Japanese Americans was vindicated by the fact that, after internment, "[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan."[111] Anyone familiar with the tortured history of the camp loyalty oaths and the repatriation requests knows how little these facts, understood in context, supported the military necessity rationale.[112] The Court directly rejected any notion that racism prompted the evacuation. Instead, the

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109. *Korematsu*, 323 U.S. at 216. Perhaps not all civil rights activists would embrace this articulation. The idea of "pressing public necessity" is deeply ambiguous, without specification. Moreover, the dichotomy drawn between "public necessity" and "racial antagonism" can be false; our perception of what's pressing and in the public good is filtered through our schemas, including racial ones.

110. *Id.* at 218.

111. *Id.* at 219.

112. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 215–30. After deciding to draft Japanese into military service from the internment camps, male *Nisei* (second generation and thus citizens by birthright) were asked to answer a Selective Service Questionnaire. Those not eligible for the draft were eventually asked a similar Leave Clearance Questionnaire. Questions 27 and 28 of the Selective Service Questionnaire were highly controversial (similar versions were asked on the leave questionnaire). The first question asked "Are you willing to serve in the armed forces of the United States on combat duty, whenever ordered?" *Id.* at 216. Many *Nisei* understandably did not want to leave their elderly parents behind barbed wire to fight for "freedom" elsewhere. To infer from a "no" response to this question the sort of disloyalty that justified internment is absurd. *See generally id.* at 215–16. *See also id.* at 222–27 (discussing the draft resistance).

The second question asked: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese Emperor, to any other foreign government, power or organization?" *Id.* at 216. Some thought this was a trick question, that by answering "no" one was admitting that one had some allegiance to the Japanese Empire in the first place. Also, for the *Issei* (first generation), the question forced them to become stateless. Recall that they could not naturalize, and to forswear their political connections to Japan would have left them without a nation state affiliation. *See id.*

As for the repatriation matter, it is true that a total of 5700 renunciations were filed, nearly all of them from Tule Lake, the camp where the "disloyals" and "troublemakers" were segregated. In July 1944, Congress was happy to enact new legislation to permit the renunciation of U.S. citizenship; no such mechanism existed before. But those renunciations were made under dispiriting, coercive, and sometimes violent circumstances. *See, e.g.*, Acheson v. Murakami, 176 F.2d 953, 959 (9th Cir. 1949) (affirming trial court findings that renunciations from Tule Lake were not made voluntarily). In *Murakami*, Judge Denman—the same judge that dissented from certification of *Korematsu* to the High Court—wrote "[t]he German mob's cry of 'der Jude' and 'the Jap is a Jap' to be 'wiped off the map' have a not remote relationship in the minds of scores of thousands of Nisei, whose constant loyalty has at last been recognized." *Id.* at 958. *See generally* RACE, RIGHTS AND REPARATION, *supra* note 1, at 227–32.

Court reasoned that it was caused by "military imperative."[113] To the Court, drawing general inferences of potential disloyalty based solely on ethnicity was not an act of racial prejudice—it was rational common sense.

The Supreme Court made shrewd use of the previous year's *Hirabayashi* opinion. In that case, the Court held that a curfew order was within the legitimate wartime powers of the federal government[114] and that targeting the Japanese did not evince racial discrimination.[115] In this case, the exact same would go for the next step of evacuation. As the Court explained, in language suggesting it could not have done otherwise: "In the light of the principles we announced in the *Hirabayashi* case, *we are unable to conclude* that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."[116]

Of course, invoking *Hirabayashi* in this way reneged on the promise that the Court made in that very opinion—namely, that it was deciding only the narrow issue of curfew and nothing else.[117] As Justice Robert Jackson[118] pointed out in his celebrated *Korematsu* dissent, the majority took a carefully limited *Hirabayashi* opinion—which repeatedly emphasized that it was deciding only the curfew issue—as precedent for far greater burdens. Jackson lamented that "[t]he Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding."[119] From this experience, Jackson emphasized how a judicial imprimatur of military action was far more dangerous than the military action itself: The official approval would have "a generative power of its own, and all that it creates will be in its own image."[120] Just as *Hirabayashi* acted as a "loaded weapon"[121] ready to be picked up and used by the *Korematsu* Court one year later, Justice Jackson worried out loud about what the *Korematsu* weapon might authorize in the years to come.[122]

Jackson's concerns can be understood in terms of the segmentation technique. Segmentation not only allowed the carving off of easier issues for decision

113. *Korematsu*, 323 U.S. at 219.
114. Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943).
115. *See id.* at 100–01.
116. *Korematsu*, 323 U.S. at 217–18 (emphasis added).
117. Indeed, in his brief, Korematsu repeatedly emphasized that *Hirabayashi* did not decide the specific issues pertinent to his case. Petition for Writ of Certiorari at 10–11, *Korematsu* (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 8, 17–18.
118. Justice Robert Jackson was Attorney General when Franklin Roosevelt appointed him to the Court. He would serve as the United States prosecutor at the Nuremberg trial of war crimes after World War II. *See* TEACHER'S MANUAL, *supra* note 63, at 39–40.
119. *Korematsu*, 323 U.S. at 247.
120. *Id.* at 246.
121. *Id.*
122. *Id.*

but also allowed a temporal staggering in lawmaking (or law interpreting) that fostered the appearance of a reserved, reasoned, and precedent-guided incrementalism. Through segmentation, the Court was able to create precedent on the easier issue (curfew) that would, in the end, draw no dissent.[123] Having constructed this precedent, it then could decide the next[124] and harder issue (only slightly harder because evacuation had been segmented from indefinite detention) guided by extant precedent—an external, preexisting thing that ran on all fours with the case at hand.

Framed this way, evacuation did not raise a novel legal question. Instead, it presented a small extension from a fact pattern that had already been adjudicated as constitutional.[125] The difference was a matter of quantitative degree of burden—evacuation concededly more burdensome than curfew—not a qualitative difference of legal moment. And, as the Court explained, if curfew is constitutional (as the Court said it was just the year before), only a small extension of constitutional interpretation would be required to authorize evacuation as well. Chief Justice Stone specifically concluded internal deliberations of *Korematsu* by urging his brethren: "If you can do it for curfew you can do it for exclusion."[126] This segmentation technique, regardless of whether the full strategy was planned in advance, allowed the Court to obscure its own agency and thereby minimize responsibility for its choice. It ceded responsibility to a Supreme Court of the past (admittedly only one year past), which had established guidance squarely on point (even though the earlier Court had disclaimed that it was doing so). Morally disturbing, but technically exquisite.

### 3. An Aside on Racism

My primary goal regarding the 1940s cases is to spell out the procedure-like tools the Supreme Court exploited to effect its objectives. Still, the substantive justification of racial profiling, coupled with strident denials of racism, invites brief commentary on the meaning and modes of racism. How should we evaluate, for instance, the Court's claim in *Korematsu* that "[t]o cast

123. Justice Murphy's concurrence in *Hirabayashi* was originally drafted as a dissent. However, upon the strong urging of Justice Frankfurter, that opinion was slightly modified and converted into a concurrence. *See* IRONS, *supra* note 49, at 243–47.

124. *Korematsu* was "next" and not simultaneous with *Hirabayashi* because the Court remanded the case to the Ninth Circuit after deciding that there was an appealable final order. *See* Korematsu v. United States, 319 U.S. 432, 436 (1943).

125. This is precisely how the Ninth Circuit Court of Appeals, on remand, viewed the case. On the authority of the Supreme Court's *Hirabayashi* opinion, the Ninth Circuit summarily affirmed Korematsu's conviction for violating the evacuation order. *See* Korematsu v. United States, 140 F.2d 289, 290 (9th Cir. 1943).

126. *See* IRONS, *supra* note 49, at 322.

this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue"?[127]

If racism is defined as crass naked hostility against a racial or ethnic group without any objectively plausible or subjectively entertained rationalization for that antipathy (besides simple group hatred), then the Court's claim is correct. Under this definition, only the most brazen White supremacists count as racist. But why should we suppose that racism functions in this ridiculously cramped way? To pursue this question, we need a working theory of racial mechanics—how race operates in our minds. In previous work, I have laid out a tentative model of racial mechanics, drawing heavily on social cognition literature:

> In any social interaction, we *map* each other into racial *categories* that trigger associated racial *meanings*. These meanings influence the terms, nature, and evolution of the interaction. As shorthand, I use the term "racial schema" to refer to all three elements: (i) *racial categories*, through which the basic concept of race is understood; (ii) rules of *racial mapping*, which are used to classify individuals into categories; (iii) *racial meanings*, which are cognitive beliefs about and affective reactions to the categories.[128]

In other words, in any interaction, we apply rules of racial mapping to place a human being or a group of human beings into a racial category. Immediately, a cache of racial meanings associated with that category is triggered both consciously and unconsciously. These meanings include cognitive beliefs (often called "stereotypes") as well as affective feelings (often called "prejudice"). Some meanings are explicitly held and embraced, whereas others reside implicitly in our minds. Interestingly, social cognition research demonstrates that the explicit is dissociated from the implicit.[129] Put another way, even those who genuinely espouse equality norms on self-reported surveys may have substantial implicit biases against racial minorities. Both explicit and implicit racial meanings[130] alter our thinking and behavior in significant ways.

If we apply this model to the internment, we see that the rules of racial mapping forced the Japanese in America into a racial category: *Oriental*. This in

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127. *Korematsu*, 323 U.S. at 223.

128. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1139–40 (2000).

129. For an excellent review of the astonishing literature, see Nilanjana Dasgupta, Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations (Aug. 18, 2003) (on file with author). Accessible summaries of some of this literature can be found in Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1246–66 (2002).

130. *See, e.g.*, Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 438–41 (2001) (demonstrating the link between implicit bias measured by the Implicit Association Test and interactional behavior).

turn triggered multiple racial meanings associated with that category that had accumulated throughout history, starting from the days of the first Chinese immigrants, the Chinese Exclusion Acts, the alien land laws, and the de jure second-class alien status afforded to Asian peoples.[131] In the war context, the fundamental racial meaning triggered was that of "forever foreign." Orientals were not and could not become part of "us" because they were racially other. As General DeWitt pointed out, no piece of paper could remove this racial taint.[132] As the attorneys general of the western states wrote in their amicus brief in *Hirabayashi*, "[t]he Japanese of the Pacific Coast area on the whole have remained a group apart and inscrutable to their neighbors. As they represent an unassimilated, homogenous element which in varying degrees is closely related through ties of race, language, religion, custom and ideology to the Japanese Empire."[133]

Two consequences flow from the activation of this racial meaning. First, as foreigners who could not become part of "us," the Japanese held allegiances to "them." Accordingly, as parsed by these prevalent racial schemas, they were in fact "enemy aliens" notwithstanding birthright citizenship or claims of cultural assimilation. This is what makes the following stunning statement by the *Korematsu* Court comprehensible: "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . ."[134]

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131. *See* Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 9–44 (1996) (reviewing stereotypes and their historical context). Neil Gotanda has criticized Peter Irons' *Justice at War* for privileging individual attorneys' decisions over such broader historical forces that provided the context for those decisions. *See* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1187–88 (1985) (reviewing IRONS, *supra* note 49).

132. As DeWitt explained:

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted . . . .

PERSONAL JUSTICE, *supra* note 8, at 66 (quoting the transcript of a meeting in DeWitt's office, Jan. 4, 1942). DeWitt repeated his views before a Congressional Committee:

> [I]t makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . .
>
> You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map.

*Id.* at 65–66 (quoting testimony before House Naval Affairs Subcommittee, Apr. 13, 1943).

133. Brief of the States of California, Oregon, and Washington as Amici Curiae at 11, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870).

134. Korematsu v. United States, 323 U.S. 214, 222 (1944).

Second, because they were foreigners, the interests of the Japanese in America could implicitly be discounted. All communities, including nation states, draw boundaries around those insiders who deserve full respect and solicitude. As partially dehumanized outsiders, the Japanese did not fall fully within this nation's circle of concern. As outsiders, their pain and suffering were implicitly and affectively discounted on the national balance sheet.[135] This can be seen in some of *Korematsu*'s justificatory rhetoric. For instance, the Court emphasized that exclusion was a burden that a patriotic citizen should be prepared to bear. Giving a civics lesson and inducing patriotic assent, the Court pointed out:

> [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.[136]

Of course, *all* didn't really mean all. Recall that in *Hirabayashi*, the Court made clear that it would be silly to make *all* citizens (including German and Italian Americans) subject to curfew.[137]

My task here is not to state, much less defend, an entire social cognitive theory of race.[138] Rather, the point is merely to resist the simplistic dichotomy of evil racists versus pure egalitarians, as if each Justice must have been one or the other. With a more complex understanding of racial mechanics, we need not suppose that the Supreme Court Justices were evil racists in order to understand that racial schemas deeply influenced their rationalization of the cases, in ways that substantially harmed Japanese Americans.

### C. Absolution: *Endo*

So far, we have examined how the Supreme Court artfully deployed procedure-like tools to achieve substantive results that were obviously commonsensical according to the prevailing racial schemas. Much of this the Court implemented through the technique of segmentation. For example, in *Korematsu*, the Court promised that, "[i]t will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or

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135. Paul Brest has called this "selective indifference." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 21 (1976).

136. *Korematsu*, 323 U.S. at 219.

137. *See Hirabayashi*, 320 U.S. at 95. Also, Public Proclamation No. 5, issued on March 30, 1942, allowed German and Italian aliens to apply for exemptions from any curfew or evacuation order. *See* Public Proclamation No. 5, 7 Fed. Reg. 2713 (Apr. 9, 1942). Public Proclamation No. 13, issued on October 19, 1942, exempted all Italian aliens from military curfew and travel regulations. *See* Public Proclamation No. 13, 7 Fed. 8656 (Oct. 23, 1942).

138. *See, e.g.*, Jerry Kang, Trojan Horses of Race (work in progress).

relocation order is applied or is certain to be applied to him, and we have its terms before us."[139] That time would come, not through *Korematsu*, but through the habeas corpus petition of Mitsuye Endo—the final internment case heard by the Court. Although the three other cases arose from challenges to federal convictions, *Endo* arose from a petition for the great writ.[140] The district court denied the writ, and the Ninth Circuit Court of Appeals certified relevant legal questions.[141] As in the other cases, the Supreme Court commanded that the entire record be brought up so that it could decide the whole matter in controversy.

The segmentation technique that had worked so successfully in the prior cases seemed unavailable here. Clearly at issue was the indefinite detention of a U.S. citizen who the government conceded was loyal to the United States. Dodging this issue, when it was so cleanly presented through a habeas corpus petition, would have been difficult. Still, given the malleability of doctrine and procedure, one might suppose that there could have been some way out.[142] But there was good reason to think that the time was ripe for decision. After all, the war was going well; Roosevelt had been reelected to his fourth term, and it was time to face the music. And the Court was about to compose a tune that would upset almost no one.

In this final opinion, issued on the same day as *Korematsu*, a Japanese American litigant finally won: *Endo* is the one success story in the 1940s litigation. Yet it was ultimately an unsatisfying victory. Immediately after noting that Endo should be given her liberty, the Court expressly declined to address any of the constitutional issues that had been argued. Couching itself again in the passive virtues,[143] the Court instead decided the case on administrative law and statutory grounds. The "fall guy" was the War Relocation Authority (WRA), which, according to the Court, was never granted the power to detain concededly loyal American citizens such as Endo.[144] In this way, the Supreme Court

139. *Korematsu*, 323 U.S. at 222.

140. The Supreme Court accepted certification of this case in the Spring of 1944 from the Ninth Circuit Court of Appeals, but oral argument was delayed in both *Korematsu* and *Endo* until October.

141. *Ex parte* Endo, 323 U.S. 283, 284 (1944).

142. Indeed, the courts below raised issues of both exhaustion and jurisdiction. Specifically, the district court denied the petition for failure to exhaust administrative remedies since Endo allegedly had not filed all the requisite forms necessary to gain "indefinite leave." *Id.* at 294. Although the government raised this point in the trial court, it did not raise it before the Supreme Court. Relatedly, there was some question about jurisdiction. While her petition was pending, Endo was moved from the Tule Lake concentration camp to Topaz. The Supreme Court clarified that moving Endo did not deprive the district court of jurisdiction as long as the jailer remained within the jurisdiction of the district court. *See id.* at 304–05.

143. *See infra* Part I.D.

144. *Endo*, 323 U.S. at 302–04.

shielded the executive and legislative branches from blame. Neither Endo nor, by proxy, the over 100,000 Japanese Americans interned, received public vindication that their *constitutional* rights had been violated.

To decide whether the WRA had been granted the power to run the camps as it did, the Court examined the relevant foundational documents, Executive Order 9066, Executive Order 9012 (creating the WRA), and Public Law 503. Adopting a literalist stance, the Court noted that none of these documents specifically mentioned detention (indefinite or otherwise).[145] Executive Order 9066 only authorized the military to designate military areas and terms of access to those areas.[146] Public Law 503 merely created federal criminal penalties to back up Executive Order 9066, and although its legislative history mentioned curfew, it did not mention detention.[147] Executive Order 9012, which created the WRA, only stated blandly that its purpose was "to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security."[148]

In reaching the conclusion that neither the President nor Congress had authorized mass detention, the Court invoked the familiar interpretive protocol of reading legislation to avoid constitutionally worrisome meanings.[149] Applying this protocol, the Court created a presumption that the President and Congress were "sensitive to and respectful of the liberties of the citizen."[150] The Court did allow for the possibility that the power to adopt temporary detention, as part of the relocation program, might be legitimately implied. However, any longer period of detention of a concededly loyal U.S. citizen for an objective other than protection against "espionage and sabotage" was not what either political branch sought or empowered the WRA to do. After all, the fact that "lawmakers intended to place no greater restraint on this event was clearly and unmistakably indicated by the language they used."[151] To read the executive orders and the federal statute in any other manner

> would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. *We cannot make such an assumption.* As the Presi-

145. *Id.* at 300–01.
146. *Id.*
147. *Id.*
148. *Id.* at 300.
149. *See generally* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836–43 (2001) (discussing the history and doctrinal evolution of the "avoidance canon").
150. *Endo*, 323 U.S. at 300.
151. *Id.*

> dent has said of these loyal citizens: "Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities."[152]

The general norm of interpreting ambiguous government pronouncements to avoid a conclusion of unconstitutionality reflects judicial respect for the coordinate branches of government. And stated abstractly, this bias in favor of charitable interpretations seems like good judging, which blunts the otherwise sharp point of the countermajoritarian difficulty.[153] But in *Endo*, this otherwise reasonable interpretive practice produced an epic whitewash. Notwithstanding the harsh and public reality of biased, negative racial meanings influencing the decisionmaking process of the political branches, the Court explained that it could not possibly assume that this was so. And by publicizing Roosevelt's self-serving characterization of Japanese Americans as "loyal Americans" in its opinion, the Court further shored up the President's reputation.[154] This is notwithstanding Roosevelt's purposeful delay in ending the internment until after his November reelection.[155] Perhaps it is worth mentioning here that seven of the nine Justices were appointed by Roosevelt himself.[156]

It is preposterous to think that the two political branches of our government did not authorize the internment camps, as constructed, maintained, and operated by the WRA. In his dissent, Justice Roberts thought the majority to be "ignor[ing] patent facts"[157] and "hid[ing] [its] head in the sand"[158] by suggesting

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152. *Id.* at 303–04 (emphasis added).

153. This is the standard justification for the doctrine, but it has come under substantial attack. *See, e.g.*, Kelley, *supra* note 149; Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1054–55 (1994) (suggesting protection of minority rights as one reason to reach constitutional issues even if nonconstitutional grounds for decision exist); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71.

154. For further discussion of Roosevelt's periodic "laudatory" statements about Japanese Americans, notwithstanding their incarceration in relocation centers, see ROBINSON, *supra* note 16, at 170–73 (analyzing Roosevelt's February 1, 1943 statement proclaiming that "Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry").

155. Historian Doris Kearns Goodwin writes, "[B]y deciding to wait until after the election to rescind the exclusion order, [Roosevelt] bears responsibility for extending what was already one of America's darkest hours." GOODWIN, *supra* note 15, at 515; *see also* ROBINSON, *supra* note 16, at 221–27 (making the case that Roosevelt delayed any major decision on releasing the Japanese Americans until after the election).

156. Justices Black, Douglas, Frankfurter, Jackson, Murphy, Reed, and Rutledge were appointed by Roosevelt.

157. *Endo*, 323 U.S. at 309.

158. *Id.*

that inferior public servants had acted beyond the authority granted by executive order.[159] He pointed out that Congress made annual appropriations to the WRA to maintain the camps after full congressional reports, testimony, and hearings. Such appropriations surely amounted to ratification even if the original Public Law 503 did not. In fact, although nowhere mentioned in the opinion, the government had invited just such an inference from the act of appropriations back in the prior *Hirabayashi* case.[160]

The majority conceded the existence of such appropriations, reports, testimony, and hearings. Still, it was not persuaded:

> But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.[161]

"[S]ingle phase of the total program" refers to the procedures by which loyal Americans were released (or more accurately not released). One would think that the "exit" procedures amounted to more than a trivial factor of the internment machinery and that appropriations to keep Japanese Americans under locked guard and to release them only through specific, publicly articulated procedures should count as constructive knowledge and ratification of those procedures. As Justice Roberts pointed out in his dissent, requiring this degree of hyper-specificity before inferring ratification added a new element "never before thought essential to congressional ratification."[162] But countenancing ratification would be to hold Congress accountable for massive constitutional violations, and this the Court would not do.[163]

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159. *Id.* at 309–10.

160. As the government argued:

> It is submitted that the Act of March 21, 1942 [PL 503], constituted not only clear authorization of the action taken, but also a plain legislative ratification of Executive Order 9066, and of the orders issued thereunder. . . . Moreover, the Congressional authorization is further confirmed by the $70,000,000 appropriation made by the Act of July 25, 1942, for the War Relocation Authority, in connection with the evacuation program. . . . Such appropriation acts are a familiar form of expression of Congressional understanding and approval.

Brief for the United States at 42, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870) (citations omitted).

161. *Endo*, 323 U.S. at 304 n.24.

162. *Id.* at 309.

163. As Justice Douglas stated later in an interview, he simply could not get a majority for a decision on constitutional grounds: "I had the desire to put it on the constitutional grounds but I couldn't get a Court to do that. Black, Frankfurter, Stone, were very clear that that was not unconstitutional but that this would have to turn, *Endo* would have to turn upon the construction of the regulations." Transcriptions of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy, Cassette Number

Contrast how the Court addressed similar interpretive issues raised in the earlier *Hirabayashi* decision. At issue there, in addition to the racial discrimination concern, was whether the curfew and evacuation orders were authorized by some combination of executive and legislative branch actions.[164] Relatedly, Hirabayashi had raised the nondelegation doctrine, which prevents Congress from delegating lawmaking powers to administrative agencies without adequately specific and substantive standards. In addressing these issues, the Court concluded that notwithstanding the vagueness in Executive Order 9066 and Public Law 503, neither of which mentioned "curfew," both curfew and evacuation were authorized even as applied to citizens.[165] In addition, the Court discerned a sufficiently specific standard, with the phrase "espionage and sabotage" being the touchstone, so as to avoid any nondelegation difficulties.[166] In other words, when it needed to do so in *Hirabayashi*, the Court had little difficulty seeing something (specific authorization, including standards) that was gossamer, if not invisible. By sharp contrast, in *Endo*, the Court denied seeing what was patently visible (authorization of the camps).

In these ways, *Endo* was a partial victory. On the one hand, Endo was discharged, and the Supreme Court did hold that indefinite detention of concededly loyal U.S. citizens by the War Relocation Authority was illegal. Could it really have done otherwise? On the other hand, the two political branches of the federal government were absolved of any sins, and an obscure, long-since dissolved agency ended up holding the bag.

It is interesting to note that Justice Douglas, who authored *Endo*, also saw this case as a partial victory—at least in retrospect. In a 1962 interview, he claimed that he wanted to address the constitutional issues but could not get the Court to go along.[167] And this he considered to be arguably his "biggest disappointment" about the wartime cases:

> But it was, I think perhaps the biggest disappointment to me was the fact that they couldn't. The Court wouldn't, in *Endo*, go to the constitutional ground but just stick to the conventional way of deciding the case a strain

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Eight: May 23, 1962 [hereinafter Douglas Transcript], *available at* http://libweb.princeton.edu/libraries/firestone/rbsc/finding_aids/douglas/douglas8.html.

164. *Hirabayashi*, 320 U.S. at 89–90.

165. It is true that curfew was mentioned in the legislative history of Public Law 503. Representative Costello for the House Military Affairs Committee stated a legislative understanding that curfew and removal from military areas were contemplated. Brief for the United States at 40 n.60, *Hirabayashi* (No. 870) (citing H.R. REP. NO. 77-1906, at 2 (1942)). Also, the War Department sent an identical letter to the chairs of the Senate and House Committees on Military Affairs, which said that the legislation "should be broad enough to . . . enforce curfews." *Id.* at 39 n.59.

166. *Id.* at 102.

167. *See* Douglas Transcript, *supra* note 163.

> to construe a regulation to avoid a constitutional question. I'm the author of that but I did it under the necessities of the situation. But it seemed to me to be a much more wholesome thing from the point of view of the Court as an educating influence just to say what you can and can't do.[168]

Not only was *Endo* a partial victory; in practical terms, it was also a hollow victory. The opinions in *Korematsu* and *Endo*, although complete, were not immediately released.[169] The War Department was tipped off about the decisions and their timing—most likely by Justice Frankfurter.[170] *Endo* was issued on Monday, December 18, 1944. One day before, on a Sunday of all days, the War Department rescinded its orders—something that the executive branch was not inclined to do during the summer months preceding the presidential election.[171]

* * *

When given the chance to judge internment—at that time, arguably the civil rights issue of the century—this is what our Supreme Court did, warts and all. When asked by the litigants for basic justice, the Court provided no brutal but honest confession of some utilitarian calculus that justified internment, perhaps by multiplying the benefits to insiders ("Whites") and discounting the burdens to outsiders ("Japs"). Instead, there was only casuistry.

To repeat, my point is not centrally about the substantive validity, usefulness, and ultimate moral acceptability of racial profiling as employed during World War II. Instead, my focus is on the more procedural aspects of the wartime cases that have received less attention. At its core, in *Hirabayashi*, the Court employed the technique of segmentation, separating the curfew from the evacuation conviction. In *Korematsu*, the Court segmented evacuation from detention, and also exploited *Hirabayashi* as precedent (which was made possible only through segmentation in the case before). Finally, in *Endo*, the Court's

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168. *Id.*

169. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 174–75 (regarding timing and delay); *see also* Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933, 1935 (2003) (compiling sources). As Gudridge notes, Justice Douglas complained in a memorandum to the Chief Justice, on November 28, 1944: "An opinion in this case was distributed on November 8, 1944. . . . I feel strongly that we should act promptly and not lend our aid in compounding the wrong through our inaction any longer than necessary to reach a decision." *Id.* at 1935 n.11.

170. *See* IRONS, *supra* note 49, at 345; ROBINSON, *supra* note 16, at 230.

171. As Justice Douglas recalled:

> *Korematsu* and *Endo* were delayed for some time in the Court after the votes had jelled because there was a lot of dissatisfaction in the Executive Branch. People in the Department of the Interior who were handling the assembly centers were very much up in arms and I think that the idea of Frankfurter and perhaps some others was that if the Court just didn't do anything, that perhaps this thing would solve itself, everybody would be discharged, I mean in the category of *Endo*, and we wouldn't have to reach the question.

Douglas Transcript, *supra* note 163.

procedural approach involved the avoidance of the constitutional law issues, by invoking an interpretive presumption in favor of constitutionality and the judicial practice of avoiding constitutional questions.

These tactics, conjoined with the general manipulation of timing, allowed a majority of the Court to achieve the following goals: (i) to not interfere with the internment which, although distasteful, made common sense and entailed what might be called "acceptable losses"; yet, (ii) to withhold explicit approval of the indefinite detention of concededly loyal U.S. citizens, a practice too difficult to reconcile with official commitments to "equal justice under law"; and (iii) simultaneously, to avoid tarnishing its own reputation or that of the other federal branches, either by what it said or did. Put bluntly: Let the military do what it will, keep its own hands clean, and forge plausible deniability for others.[172]

## D. Objection: The "Minimalist Virtues"

The phrase "minimalist virtues" is a play on Alexander Bickel's "passive virtues" and Cass Sunstein's "judicial minimalism."[173] In the early 1960s, Bickel celebrated the passive virtues of the judiciary.[174] He emphasized that besides striking down a law or validating it, the courts could exercise their power in a third way—by *not* deciding a case.[175] For instance, not only could the Supreme

172. Recently Patrick Gudridge published an essay about *Endo*. *See* Gudridge, *supra* note 169. I take issue with only two of his points. First, he suggests that what I called the segmentation tactic in *Korematsu* was not significant since that tactic "also limited any resulting injustice to only the relatively few individuals prosecuted for curfew or evacuation order violations." *Id.* at 1946 (footnote omitted). More important, he argues, was *Endo*, which would decide the continuing detention, and which was released on the very same day. *Id.*

This account underestimates the significance of the segmentation technique, which permitted the Court to invoke the administrative law dodge in *Endo*. If the evacuation and detention issues were fused together and considered in unison, the Court would have had a much more difficult time explaining how one facet of the indivisible program had been authorized by the executive branch and Congress while another facet was not. In contrast, by decoupling the two components, it became possible for the Court to see military authorization to evacuate, and not see War Relocation Authority authorization to detain indefinitely. The ACLU attorneys that coordinated the wartime cases before the Supreme Court clearly held this view. *See* IRONS, *supra* note 49, at 267–68.

Second, Gudridge suggests that *Endo* should be read as a foil to *Korematsu*, which together represent "mutually repelling perspectives" that never converge in any "meeting point." Gudridge, *supra* note 169, at 1967. My argument has demonstrated the contrary—that they were hand and glove, a part of a broader strategy of denial.

173. This term is introduced in CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999).

174. *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

175. *See* Bickel, *supra* note 174, at 50.

Court refuse to hear a case based on various jurisdictional doctrines, it could also leave many matters undecided even when a case was heard by using a variety of devices.[176] The modern champion of such a view is Sunstein, who praises decisional minimalism, an approach that "say[s] no more than necessary to justify an outcome, and leav[es] as much as possible undecided."[177] Bickel's passive virtues and Sunstein's minimalism are not identical; exercising the passive virtues can be seen as just one facet of Sunstein's larger theory of judging. Still, they share sufficient similarities to be grouped together in this analysis, under the rubric of minimalist virtues.[178]

In making their cases, neither Bickel nor Sunstein spends much time discussing the Japanese American internment. Still, a defense of the wartime Court's actions can easily be drawn along minimalist virtues grounds.[179] As a descriptive matter, the Supreme Court's decisional method in the wartime cases appears to be both "minimalist" and "passive." True, the Court did take the cases,[180] but in resolving them, the Court segmented off as much as possible whenever it could, always deciding the easiest issues, in the narrowest way possible. Its rhetoric often limited it to a specific set of unique, time-bound facts. Further, it avoided constitutional issues whenever it could. Although various advantages of such minimalist and passive judging have been articulated, the two that warrant discussion here are democratic accountability and political expediency.[181]

### 1. Democratic Accountability

One principal advantage of exercising the minimalist virtues is that it can promote democracy by forcing deliberative judgments by democratically account-

176. Examples include the doctrines of ripeness, mootness, and other techniques famously listed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

177. SUNSTEIN, *supra* note 173, at 3; *see also id.* at 40 ("The notion of the 'passive virtues' can be analyzed in a more productive way if we see that notion as part of judicial minimalism and as an effort to increase space for democratic choice and to reduce the costs of decision and the costs of error.").

178. To be clear, Sunstein does not equate judicial minimalism with judicial restraint.

179. To avoid misunderstanding, I repeat that neither Bickel nor Sunstein makes the following argument.

180. Bickel focused more on avoiding the case entirely through the exercise of jurisdictional discretion or, if the case had to be taken, avoiding the merits entirely through doctrines such as ripeness. He paid less attention to the practice of deciding cases on what Sunstein would call minimalist grounds.

181. Sunstein identifies additional benefits, which include decreasing the judicial burden (by deciding fewer matters) and relatedly, decreasing the number of judicial errors and the magnitude of their damage. SUNSTEIN, *supra* note 173, at 4.

able bodies.[182] A far-reaching judicial decision, especially on constitutional grounds, can take a political matter off the table. By contrast, a less ambitious decision, both in terms of breadth as well as theoretical depth,[183] can keep the matter in the realm of deliberative politics. As Bickel explained, by not deciding a case or some issues within a case, the Court can "engage[] in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise."[184] And as Sunstein has described, by deciding cases as narrowly as possible, focusing on the unique and specific facts of the case presented, and refusing any deep theoretical account or explanation, important matters can be left to more deliberative democratic channels for resolution: "[I]t allows democratic processes room to maneuver."[185] This is especially important because judges may simply be wrong; to avoid issues is not a sign of judicial cowardice but a sign of humility.[186]

A democratic accountability defense of the judicial strategy in the internment cases, if one were to be made, fails because the Court was interested in anything but accountability. Consider, for example, the issue of military authorization. At various points in the wartime cases, the Court was invited to strike down aspects of the internment on grounds that the military's actions had not been authorized by the President or Congress. For instance, Hirabayashi had argued that curfew, at least as applied to citizens, was not authorized by either Executive Order 9066 or Public Law 503. Korematsu argued the same about evacuation and imprisonment.[187] Amici repeated these points.[188]

A Court faithful to the minimalist virtues, keen on forcing democratic accountability, could have found authorization to be lacking, or relatedly, that insufficiently specific standards for the exercise of that delegated power had been

182. *Id.* at 5.

183. *See id.* at 10–13 (discussing narrowness and width, shallowness and depth).

184. Bickel, *supra* note 174, at 50. The quote continues: "Is not this the meaning of the deliberate-speed formula itself, which resembles poetry and resembles equity techniques of discretionary accommodation between principle and expediency, but which fits precisely one thing only, namely the unique function of constitutional adjudication in the American system?" *Id.*

185. SUNSTEIN, *supra* note 173, at 54.

186. *Id.* at 49.

187. *See* Brief for Appellant at 16, 20, 35, 41–43, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22) (arguing that neither the President nor Congress had authorized DeWitt's plan of discriminatory evacuation and detention), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 99, 114, 118, 133, 139–41.

188. *See, e.g.*, Brief of American Civil Liberties Union as Amicus Curiae, at 4, *Korematsu* (No. 22) (arguing that Congress did not grant to military authorities the power to detain citizens), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 79, 82.

established.[189] In other words, instead of affirming curfew and evacuation as constitutional, the Court could have struck down these infringements on narrower delegation grounds. This would have, in turn, pressed the President and Congress as early as 1943 to authorize explicitly and clearly what they sought to do implicitly.

But the Court did not take this route. Instead, it found adequate authorization, even as against citizens, notwithstanding the fact that neither the President nor Congress was willing to give explicit authorization. Now, it is true that the minimalist technique of finding no authorization and avoiding the constitutional question was utilized later in *Endo*, to strike down the indefinite internment of loyal citizens. But timing is everything: This strategy, executed in 1944, with the *Endo* opinion published only after the military rescinded its own orders, did nothing to promote democratic conversation or accountability. Instead, it only shielded our elected actors from responsibility by placing the blame on the WRA.

One could respond by saying that my beef is not with minimalism per se but with *selective* minimalism. In other words, one could argue that only *Endo* was genuinely "minimalist," because it was resolved on delegation grounds. If the Court had employed the same minimalist strategy in *Hirabayashi* back in 1943, then democratic accountability would indeed have been promoted. Perhaps this is correct. But I am not persuaded that only *Endo* can be fairly called a minimalist case. Consider the techniques, such as segmentation, exploited in the 1943 case of *Hirabayashi*: The techniques were minimalist. If we instead focus on the purpose to which the techniques were used, then again the 1943 cases, as well as *Endo*, seem to share the same mission. In all three cases discussed—*Hirabayashi*, *Korematsu*, and *Endo*—procedure-like devices were used to avoid facing social reality.

In any event, I have little interest in the definitional games that this line of argument invites. To be clear, my goal is not to repudiate judicial minimalism generally, however defined. Nor is it my goal to demonstrate definitively that the wartime cases were examples of minimalist judging, again however defined. Instead, my task is merely to reply to one potential defense of the 1940s decisions, based on the democratic accountability prong of the minimalist virtues theory. It is simply unpersuasive to praise the 1940s Court for promoting democratic accountability by exercising minimalist virtues. Whatever defenses might exist for the Court's maneuvers, they cannot include accountability.

189. *See, e.g.*, SUNSTEIN, *supra* note 173, at 27 (listing various devices, including striking down a statute for vagueness and on the basis of the nondelegation doctrine). I recognize that arguably this seems to be a form of activism itself.

Stepping back for a moment, there is a more general reason to be skeptical about minimalist virtues promoting democratic accountability when "discrete and insular" minorities are attacked. During internment, the sort of democracy that was realistically in play was tyranny of the majority. To be fair, Sunstein emphasizes repeatedly the significance of context[190] and suggests an "injustice" exception to his general rule in favor of minimalism.[191] He lists *Brown v. Board of Education* as a prominent example.[192] Also, in discussing affirmative action, Sunstein concedes that "if . . . public deliberation is unlikely in any event, or likely to operate very badly, a more rule bound [maximalist] approach to the Constitution would be better."[193]

Outside of listing a few examples, Sunstein does not specify the contours of this injustice exception, which recognizes that "passive virtues [should not be used] to perpetuate injustice."[194] Interestingly, he nowhere lists *Korematsu* (or any of the internment cases) as an example in which the minimalist virtues functioned as passive-aggressive vices. In fact, the one time he mentions *Korematsu* is to characterize it somewhat favorably as a minimalist case that "upheld the uprooting of Japanese Americans during World War II, but left open the possibility that other forms of discrimination would be invalidated."[195] In other words, according to Sunstein, compared to a maximalist affirmance of racial profiling, *Korematsu* was somewhat better.

Still, I surmise that Sunstein, if pressed, would invoke his injustice exception to concede that minimalism was not justified in the internment cases even if at first glance the conditions for minimalism appeared satisfied.[196] And doing so would be prudent since minimalism in no way promoted democratic

190. *See, e.g., id.* at 262 (noting that minimalism is sometimes "a blunder").

191. More generally, he notes that democracy itself might require nonminimalist affirmations of the preconditions of democracy. *Id.* at 56. Examples would include robust protections of freedom of speech. *Id.*

192. *Id.* at 37–38. He writes: "[I]f the argument for the constitutional right were compelling, as in for example Brown v. Board of Education, a majority or minority that rejects the right should not be allowed to exercise any kind of heckler's veto. The legal system should aspire to justice even if justice is controversial." *Id.* at 103.

Sunstein does point out, however, that *Brown v. Board of Education*, 349 U.S. 294 (1955), was not as "maximalist" as one might think. This decision came down after a long series of desegregation cases and was not self-implementing. *See* SUNSTEIN, *supra* note 173, at 103. Other examples include acceptance of homosexuality as well as racial intermarriage. *Id.* at 40.

193. SUNSTEIN, *supra* note 173, at 132.

194. *Id.* at 40; *see also id.* at 39 (explaining that the technique of denying certiorari may also perpetuate unconstitutional injustice).

195. *Id.* at 29.

196. Sunstein identifies the conditions in which minimalism may be most appropriate: If they "involve issues of high factual or ethical complexity that are producing democratic disagreement and debate; here minimalism is likely to be the best route." *Id.* at 46.

decisionmaking and accountability, especially if we understand democracy as more than a simplistic maximization of majority preferences.

2. Political Expediency

A judicial strategy that avoids certain cases and questions may be appropriate for another set of reasons—because sometimes the Court cannot do the (entire) right thing for reasons realpolitik. As Bickel reminded us, "No good society can be unprincipled; and no viable society can be principle-ridden. . . . The Court exists in the Lincolnian tension between principle and expediency."[197] So suppose that the Court thought the internment was indeed unconstitutional (assumption 1); under ideal circumstances, the first-best option would have been to tell the nation just that. But further suppose that the Court believed it was folly to challenge a popular President and his military during wartime. Forcing an immediate release of the Japanese Americans would have invited executive branch resistance and sparked a constitutional crisis (assumption 2).[198]

Under one view, the only option remaining would be to affirm the internment notwithstanding the Court's actual view of the merits. This would, of course, legitimate an unconstitutional practice. The Bickelian insight is that there is another option—a second-best solution, so to speak—that avoids legitimation by dodging the gnarly issue of internment.[199] If this was the Court's motivation in the 1940s cases, then the Court can at most be criticized for making a distasteful but justified compromise in the face of wartime realities.

This defense, however, fails. On the one hand, it does not accurately describe what the Court did. Although the Court was dodgy, it did not dodge

197. Bickel, *supra* note 174, at 49–50.

198. Apparently, Roosevelt made it obvious to the Supreme Court that he would execute the German spies in *Ex parte Quirin* regardless of what the Court said. During oral argument, Attorney General Francis Biddle stated that "the claims of the saboteurs were so frivolous, the Army [would] execute the men whatever the Court did; that the Executive would simply not tolerate any delay." *See* WILLIAM O. DOUGLAS, THE COURT YEARS 1939–1975, at 139 (1980). In his autobiography, Biddle also quoted Roosevelt as saying he would not "give [the saboteurs] up . . . to any United States marshal armed with a writ of habeas corpus." FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962).

According to a 1962 interview with Justice Douglas, the Court was mindful of the possibility of executive branch refusal to abide by judicial decisions. *See* Douglas Transcript, *supra* note 163 ("There was somewhat considerable discussion as to what, what power a court would have to give relief if it were attempted, whether the, in time of war, whether the situation would develop as it did one time under Lincoln's administration where the writ of *habeas corpus* was suspended.").

199. A Bickelian analysis could go just the other way. In other words, the internment was constitutional; however, for the Court to say that it was constitutional would legitimate or encourage distasteful military policy. Accordingly, the Court should have avoided affirming the internment by, for example, refusing certiorari or finding ripeness or mootness problems.

these cases in the above sense. Recall that the Court took the cases, instead of finding some creative way not to assert jurisdiction. Indeed, upon certification, the Court insisted that the entire cases be sent up to be decided as if on direct appeal.[200] Further, the Court did not avoid the merits entirely by employing some device such as standing, ripeness, mootness, or political question. Instead, it segmented off easier aspects of the case and incrementally affirmed their constitutionality—curfew in *Hirabayashi*, evacuation in *Korematsu*.

This strategy ought to make us ponder seriously whether the Court actually thought that the internment was unconstitutional (assumption 1). It should also raise doubts regarding whether the Court was much worried about legitimation; after all, the segmentation strategy legitimated not only critical facets of the internment but the Court's own decisionmaking process. Perhaps this is why the one reference Bickel makes to the wartime cases is Justice Jackson's "loaded weapon" dissent in *Korematsu*. Bickel explained that Jackson's loaded (or legitimated) weapon warning gave eloquent testimony of what can happen when the Court takes a case, legitimates the challenged practice, and thereby confers official approval.[201]

On the other hand, even if the Court had done what Bickel and Jackson might have recommended, what would that have purchased? Would there have been cause for celebration if, for example, the Court had simply refused certiorari on all these cases? This would mean that because of a fear of backlash (assumption 2), the Court would sacrifice the constitutional rights of a racial minority (assumption 1) in order to avoid legitimating a distasteful governmental practice (internment based on group profiling in response to a national security threat).

Such an approach seems both dishonest and cowardly—whimpering away from speaking truth to power. Just consider how many racially oppressive governmental practices were and still could be dodged by the Court for fear of majoritarian backlash. Further, consider who the winners and losers are in this

200. Recall specifically how the cases appeared before the Court. In each, the Ninth Circuit Court of Appeals certified legal questions to the Court, and the Supreme Court then instructed that the entire record be sent up so that the case could be decided as if on direct appeal. Obviously, the Court did not have to call up the entire case. Indeed, the Court could have refused to answer the questions certified and left the Ninth Circuit to do its work without higher guidance. Moreover, the Court could have refused certiorari after the Ninth Circuit issued its opinions.

I have already mentioned the *Korematsu* complication, in which the Supreme Court remanded the case after deciding that an appealable final judgment existed, so that the Ninth Circuit could address the merits first. To clarify, *Korematsu* first appeared to the Supreme Court through the certification statute. After deciding that an appealable final judgment existed, the Court remanded the case down to the Ninth Circuit, which issued an opinion. The Supreme Court then granted Korematsu's petition for writ of certiorari.

201. *See* BICKEL, *supra* note 174, at 156.

Bickelian compromise that self-censors the truth in order to avoid legitimation. Outsiders win almost nothing. In this specific context, the Japanese American outsiders are interned without vindication. In the next case, the next set of outsiders (perhaps, some subset of Arab Americans) remains vulnerable regardless of whether the Judiciary avoided legitimation or not. After all, no prior act of legitimation was necessary for the military to initiate internment of the Japanese Americans. A commonsense assessment of a national security threat, processed through our racial schemas, sufficed.

Instead, it is insiders who win most when the Court avoids legitimation. Perhaps it is true that insiders never have to fear racial or group profiling; accordingly, they may have little to gain.[202] If so, their benefit is principally psychological, because in their official doctrine of "equality" is kept free of any untidy and embarrassing exceptions. But there are some groups that sit less squarely in the center.[203] For such groups, avoiding judicial legitimation may generate nontrivial benefits. But this tax-and-transfer policy is regressive: It forsakes the constitutional rights of those on the outside[204] to promote the constitutional rights of those situated more toward the inside. Faithful discharge of the equal protection of the laws should do just the opposite. This trade-off smacks almost entirely of political expediency and almost nothing of principle. As Gerald Gunther has well articulated, we must be cautious about such "subtle vices" to the "passive virtues."[205]

There may be, however, a final neo-Bickelian defense of the wartime cases that threads between my two responses that (i) the Court did not engage in a full dodge, and (ii) even if it had, that would be nothing to applaud. This final defense would go something like this: The Supreme Court navigated between the extremes of a disastrous, quixotic commitment to principle and raw political expediency as best it could under extraordinarily difficult circumstances. This defense would give the Court credit for not entirely dodging the cases. Put

202. For instance, after the terrorist Timothy McVeigh bombed the federal building, no one seriously called for the racial profiling of Whites.

203. Consider certain White ethnic subgroups. In the past, the Irish as well as the Jews were arguably not considered White. Also, even though the U.S. census considers various Middle Easterners to be White, the sociocultural rules of racial mapping vis-à-vis people from places such as Iraq and Turkey, especially in a post–September 11 climate, are up for grabs.

204. To be fair, one might emphasize that the constitutional rights of Japanese Americans would have been violated in any case because of military disobedience (assumption 2). If so, then it would be more accurate to say that we sacrifice speaking truth about the violation of their constitutional rights.

205. Gerald Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1, 25 (1964) (describing the "passive virtues" as "a virulent variety of free-wheeling interventionism").

another way, if the Court was hell-bent on not interfering with internment whatsoever, why did it even bother hearing the cases in the first place?[206]

Under the reasoning of this defense, the simple fact that the Court heard these cases is evidence of the Court's reasonable attempt to discharge its Article III responsibilities under demanding conditions. Similarly, the Court could have invoked the political question doctrine but chose not to do so. Because it did not, the Court should again be credited for exercising judicial review, even if in a restrained, piecemeal form. Finally, even if the Court permitted some infringement of liberties such as curfew and evacuation, it should be credited for granting Endo's habeas corpus petition. We cannot forget that the indefinite detention of loyal U.S. citizens was deemed illegal even if its constitutionality was not squarely addressed.

This final defense reads too much into the Court's decision to take the cases. On a matter as momentous as internment, the Court could not have easily sat silent. These cases certainly satisfied the extant standards for granting certiorari.[207] And even if the decision not to hear a case need not be as principled as decisions by which cases are actually decided, completely arbitrary or unchartered discretion in the face of tens of thousands of incarcerated Americans would not do.[208]

In addition, there were instrumental reasons for the Court to take over the entire cases as if on appeal. First, the framing and resolution in the Ninth Circuit could have been problematic from the Court's perspective. In the certification process, for instance, Judge Denman sharply dissented and revealed, in an odd and conflicted opinion,[209] some sympathies for the Japanese. For example, he complained that the legal questions certified to the Court misidentified the central issues and omitted critical facts, such as the government's concession that not a single Japanese American had been indicted for espionage or sabotage.[210] The

206. According to Justice Douglas, Justice Black—who authored the *Korematsu* opinion—voted against certiorari. Chief Justice Stone did not vote either way. Every other Justice voted to grant certiorari. *See* Douglas Transcript, *supra* note 163.

207. *See supra* note 61.

208. *Cf.* Bickel, *supra* note 174, at 50–51 (describing circumstances in which it may be prudent for the Court to deny certiorari in politically charged cases).

209. *See* Korematsu v. United States, 140 F.2d 289, 300 (9th Cir. 1943) (Denman, J., dissenting). Denman's dissent to the certification of the *Hirabayashi* case was printed in the federal reporters as an appendix to the *Korematsu* case, decided on remand, after the Supreme Court clarified that there was an appealable final judgment. For the whole story, see PERSONAL JUSTICE, *supra* note 8, at 183–85. Judge Denman contended that at issue were critical "psychological facts" about the loyalty of the population, which would be better determined by the Ninth Circuit, given its experience and proximity to the Japanese American population. *See Korematsu*, 140 F.2d at 300. He added that allowing the Ninth Circuit to decide this case first would not waste much time, and the entire business could be completed in approximately a month. *See id.* at 304.

210. *See Korematsu*, 140 F.2d at 300–01.

significance of Judge Denman's remarks should not be overstated because he was a lone dissenter. However, it is reasonable to suppose that the Supreme Court was concerned about the possibility of problematic lower court factual findings on issues of loyalty and military necessity, which could be reversed only on a clearly erroneous showing. Second, the Court may also have been worried about the timing of when each issue would be decided. Indeed, if the lower courts did not employ the Court's segmentation techniques, facets of the internment could have come to issue faster than the Court desired.

Similarly, this defense makes too much of the Court's decision not to employ the political question doctrine, which would have made the internment a nonjusticiable question. At the time, the political question doctrine was considered most appropriate for those specific situations in which the Constitution itself, by text and structure, delegated interpretive authority to a coordinate branch of government.[211] No such case could be made here, when the violation of individual rights was front and center.[212] Not surprisingly, the government never specifically asked the Court to invoke a political question. Even if that doctrine were available, it would have been better for the Court simply not to have taken the cases in the first place. Invoking the political question doctrine, on these facts, would have ceded too much power to the other branches of government. Martial law had not been declared. And the lives of American citizens were being directly affected by government power. For the Court to suggest broadly that such circumstances were not judicially reviewable and that the political branches were free to work out matters as they saw fit would have undermined the scope of judicial review too much. And once surrendered, such judicial power could not be readily retrieved.

In the end, this final defense relies on a belief that the Court could not have realistically done otherwise, for fear that the executive branch and the military would ignore its edicts or worse. But there is reason to be distrustful of the Court's estimate of backlash. We can never know what would have happened if, in *Hirabayashi*, the Supreme Court had reached the merits and declared the

211. Rachel Barkow calls this the classical political question doctrine. *See* Rachel E. Barkow, *More Supreme Than Court?*, 102 COLUM. L. REV. 237, 247 (2002). To be sure, other considerations would also influence whether the political question doctrine would be triggered. However, this more prudential version was not in full ascendancy at the time. According to Barkow, cases such as *Coleman v. Miller*, 307 U.S. 433 (1939), and *Colegrove v. Green*, 328 U.S. 549 (1946), mark the beginning of a prudential political question doctrine. *See* Barkow, *supra*, at 258–60.

212. In *Marbury v. Madison* itself, which is shorthand for judicial supremacy in constitutional interpretation, Justice Marshall noted the existence of certain political questions, outside the bounds of judicial consideration. However, as Justice Marshall described: "The subjects are political. They respect the nation, not individual rights . . . ." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803); *see also id.* at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.").

entire internment unconstitutional or otherwise illegal. There is reason to think, however, that the Union would have survived, with its judiciary intact. After all, it survived desegregation a decade later. And the relief provided could have recognized military and political realities, allowing release from the internment camps at "[a]ll [d]eliberate [s]peed."[213]

Finally, consider that by 1944, military urgency had clearly dissipated. Even if the earlier *Hirabayashi* curfew decision could be explained on political expediency grounds, what sort of distasteful but realistic compromise demanded severing the issue of evacuation from detention in *Korematsu*, delayed until 1944? Further, what sort of Lincolnian dilemma demanded that the Supreme Court absolve the other branches of any responsibility by putting the entire blame on the WRA in *Endo*? The Court surely paid attention to political expediency, but does not deserve praise for doing so.

* * *

The internment was a civil rights disaster. The wartime Court was a full and facile participant in that disaster. Beside its substantive decisions to accept crude forms of racial profiling, it exploited its procedure-like powers in a consummate display of the minimalist vices. This minimalist tactic cannot be defended on democratic accountability or political expediency grounds. If the Court was navigating a path between expediency and the equality principle in the dangerous underbrush of war, it hewed a path far closer to expediency than to equality. And accountability was the one thing the Court doggedly avoided.

## II. VINDICATION AND LOSS

If the story of the 1940s is tragic, the story of the 1980s is euphoric. The extraordinary tale of the Japanese American redress movement has already been well told,[214] and only the highlights are mentioned here. Arguably, each branch of the federal government has participated in redress. In 1976, President Gerald Ford issued a proclamation making clear that Executive Order 9066 terminated at the end of World War II. Emphasizing the valor and sacrifice of Japanese American soldiers, President Ford promised that "this kind of action shall never again be repeated."[215]

In 1980, Congress created a study commission called the Commission on Wartime Relocation and Internment of Civilians (CWRIC). Three years later,

213. *See generally* BICKEL, *supra* note 174, at 247–54.

214. JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989) [hereinafter JUSTICE DELAYED]; MAKI ET AL., *supra* note 3.

215. Proclamation 4417, An American Promise, 41 Fed. Reg. 7741 (Feb. 20, 1976).

the CWRIC issued its monumental report, Personal Justice Denied.[216] On the strength of its findings, Congress passed and President Ronald Reagan signed into law the Civil Liberties Act of 1988,[217] which provided $20,000 in reparations for each surviving internee and established a substantial public educational fund. It also committed the President to a formal apology, which was given by President George H. Bush.

As for the Judiciary, it was given two opportunities to participate in the redress movement, through two sets of civil actions. One was a multibillion dollar class action damages suit, which after various procedural and jurisdictional difficulties provided no relief.[218] The other—the focus of this Article—was the *coram nobis* litigation pursued in three federal district courts. On the basis of "smoking gun" evidence unearthed at the national archives, the federal courts vacated the convictions of all three men who had unsuccessfully litigated their cases up to the Supreme Court during World War II.[219] Defeated four decades earlier, they finally emerged victorious.

In so many ways, the Japanese American redress movement was a stunning success. To have all three branches of government take responsibility for the internment and also to apologize is a remarkable victory. Or so goes the conventional wisdom. It turns out that the Judiciary did not quite do what is commonly supposed. Instead of accepting responsibility, it cloaked itself in denial. This is the dark lining of that otherwise silver cloud. It is a sad story that has never been told.

## A. Vindication: Seeing Prejudice

### 1. The Suppressed Evidence

In 1981, CWRIC researcher Aiko Yoshinaga-Herzig and historian Peter Irons uncovered remarkable evidence of government wrongdoing during the wartime litigation. First, they located the original copy of General DeWitt's Final Report, which was not the copy generally distributed or made available to the

216. PERSONAL JUSTICE, *supra* note 8.

217. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. App. §§ 1989–1989d (2000)).

218. Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988).

219. *See* Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987); *see also* Yasui v. United States, 772 F.2d 1496, 1499–1500 (9th Cir. 1985); Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

Court in the wartime litigation. This original copy included the following language:

> It was impossible to establish the identity of the loyal and the disloyal with any degree of safety. *It was not that there was insufficient time* in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.[220]

When the War Department received this original report in April 1943, it forced DeWitt to change the language. After some protest, DeWitt complied and altered the report to read as follows: "To complicate the situation *no ready means* existed for determining the loyal and the disloyal with any degree of safety. It was necessary to face the realities—a positive determination could not be made."[221]

All copies of the original report, except the one found in the national archives, were destroyed.[222] The revised version was dated June 1943, but was not made public until January 1944. Attorneys at the Department of Justice, who eagerly awaited the Final Report in preparation for the 1943 *Hirabayashi* and *Yasui* curfew cases, did not receive a copy until after these cases were decided.[223]

Second, the researchers located various memoranda from intelligence agencies refuting any threat of espionage or sabotage. The Office of Naval Intelligence (ONI) produced a report that concluded that the potentially disloyal were fewer than 3500 and that most of these individuals were already in custody after the ABC list arrests, made immediately after the bombing of Pearl Harbor.[224] The Federal Bureau of Investigation (FBI) expressly rejected DeWitt's assertion in the Final Report that there was any shore-to-ship signaling on the west coast.[225] J. Edgar Hoover's FBI had concluded that the call for evacuation was

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220. Petition for Writ of Error *Coram Nobis*, *Korematsu*, 584 F. Supp. 1406 (No. CR-27635W) (quoting DeWitt's initial Final Report) (emphasis added), *reprinted in* JUSTICE DELAYED, *supra* note 214, at 125, 140.

221. *Id.* at 141 (emphasis added).

222. *See* IRONS, *supra* note 49, at 211.

223. There were various other shenanigans. Although the Department of War did not release the Final Report to the Department of Justice (DOJ) in time, it did leak copies to attorneys general of the West Coast to assist the drafting of their *Hirabayashi* amicus brief. The War Department did not fully trust the DOJ to provide unconditional support to their claims and arguments.

224. *See* IRONS, *supra* note 49, at 203. *See generally* Memorandum from Lieutenant Commander K.D. Ringle, Office of Naval Intelligence (Jan. 26, 1942) (concluding that "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people"), *reprinted in* RACE, RIGHTS AND REPARATION, *supra* note 1, at 300.

225. J. Edgar Hoover noted:

> [T]here is no information in the possession of this Bureau . . . which would indicate that the attacks made on ships or shores in the area immediately after Pearl Harbor have been associated

based primarily upon public and political pressure, not good data.[226] Finally, the Federal Communications Commission (FCC) confirmed the FBI's signaling claim and chided the Army for incompetently attributing broadcasts picked up all the away in Japan to sources in California.[227] The federal government provided none of these memoranda to the Court in any of the litigation.

Finally, the researchers discovered how the original *Korematsu* brief had been altered to keep the Court clueless. As originally drafted, in a critical footnote, the government's brief took the following position on DeWitt's controversial Final Report:

> The Final Report of General DeWitt . . . is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. *The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice.* In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.[228]

This language signaled to the Court that there was reason to question the Final Report's accuracy. Any reliance whatsoever on the Final Report was dicey because it was not part of the record below, either at the district court trial or in the Ninth Circuit appeal. Instead, it was transmitted to the Supreme Court directly in the *Korematsu* litigation and the facts cited therein could only be accepted under the doctrine of judicial notice. Even under the widest interpretation of judicial notice, the above footnote would have made it difficult for a fair-minded Court to accept the entire document without reservations.

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> with any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights.

Memorandum from J. Edgar Hoover to the Attorney General (Feb. 7, 1944), *reprinted in* RACE, RIGHTS AND REPARATION, *supra* note 1, at 301.

226. *See* PERSONAL JUSTICE, *supra* note 8, at 73. Hoover concluded:

> The necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data. Public hysteria and in some instances, the comments of the press and radio announcers, have resulted in a tremendous amount of pressure being brought to bear on Governor Olson and Earl Warren, Attorney General of the State, and on the military authorities . . . .

*Id.* (quoting memorandum from J. Edgar Hoover, to the Attorney General (Feb. 3, 1942)).

227. Letter from James Lawrence Fly, Chairman of the FCC, to Attorney General Francis Biddle (Apr. 4, 1944) ("In the early months of the war, the Commission's field offices and stations on the West Coast were deluged with calls, particularly from the Army and Navy, reporting suspicious radio signaling . . . . In no case was the transmission other than legitimate."), *reprinted in* RACE, RIGHTS AND REPARATION, *supra* note 1, at 304.

228. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 310.

But after the Department of War's intervention, the presses printing the *Korematsu* brief were literally stopped[229] and the footnote was revised to read:

> The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and *we rely upon the Fnal [sic] Report only to the extent that it relates to such facts.*[230]

On the basis of this newly discovered evidence—the suppressed original Final Report, exculpatory intelligence memoranda, and the revised *Korematsu* brief footnote—Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi marched back into the federal district courts that had convicted them. With the help of young, smart, passionate *nisei* lawyers, they petitioned for the obscure writ of error *coram nobis*, which permits courts to correct factual errors in criminal convictions to avoid manifest injustice.[231] The closest analogy is the writ of habeas corpus, which did not apply because the petitioners were no longer in custody.

### 2. The *Coram Nobis* Litigation

The writ of error *coram nobis* required a showing of extraordinary circumstances amounting to a complete miscarriage of justice.[232] In past cases, government misconduct was often at issue. What was not clear, however, was whether prejudice also had to be shown and to what degree of certainty. In other words, did the petitioners have to demonstrate that "but for" the bad act the end result would have been different, and how convincing did this demonstration have to be?[233]

*Korematsu.* The first *coram nobis* case heard was that of Korematsu, by Judge Marilyn Patel, in San Francisco in 1983.[234] After numerous delays, the

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229. *See* IRONS, *supra* note 49, at 287–88.

230. Brief for the United States at 11 n.2, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22) (emphasis added), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 203, 213 n.2.

231. District courts are granted the authority to issue such writs through the All Writs Act, 28 U.S.C. § 1651 (2000). This writ was not destroyed by Federal Rule of Civil Procedure 60(b), which ends all common-law writs, because although the *coram nobis* writ is litigated pursuant to the civil rules, it by nature regards a criminal proceeding. Further, it is not preempted by the federal "motion to vacate" (habeas corpus) statute, 28 U.S.C. § 2255, which requires the petitioner to be in custody.

232. *See* United States v. Morgan, 346 U.S. 502, 511–12 (1954).

233. The issue is still more complicated. At issue was also the degree of confidence required of the court that the result would have been different. Must the court be certain or was a reasonable probability enough?

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

Department of Justice filed a two-page letter in response to the petition, under the court's Local Rule 220-6, which generically governs the hearing of related motions. The letter was nonresponsive. Victor Stone, who argued all three cases for the Department of Justice, wrote that "it is time to put behind us the controversy," and that "without any intention to disparage those persons who made the decisions in question—that it would not be appropriate to defend this 40-year old misdemeanor conviction."[235] In other words, the conviction should be vacated as a matter of "executive grace," but the *coram nobis* petition should at the same time be dismissed. Inviting judicial minimalism, he wrote that there was "no continuing reason in this setting for this court to convene hearings or make findings about petitioner's allegations of governmental wrongdoing in the 1940s."[236]

The district court interpreted this cryptic response as an opposition motion under Federal Rule of Criminal Procedure 48(a). Related to the common law motion of *nolle prosequi*, this motion allows prosecutors to dismiss voluntarily the case at certain times, under certain circumstances. As Judge Patel made clear, however, the common law doctrine never applied in cases in which final judgment had already been entered. Further, there was no reason to see Rule 48(a) as expanding the doctrine.[237]

Accordingly, Judge Patel granted the petition for a writ of error *coram nobis*.[238] As she made clear, this in no way affected the law the Supreme Court created during the wartime cases. It only corrected errors in fact, in the specific criminal conviction of Korematsu.[239] The government initially filed a notice of appeal, but then withdrew it. This was the first and most significant victory of the *coram nobis* cases.

In issuing the writ, the court had to confront the difficult issue of "prejudice." In the *coram nobis* petition, submitted in identical form in all three cases, the petitioners asserted as a historical claim that "[h]ad courts been provided with accurate and credible facts, the military orders would not have been upheld."[240] In terms of law, they argued that "any reasonable likelihood" that the result would have been different satisfied the prejudice requirement.[241] Given the

235. Government's Response and Motion, *Korematsu* (No. CR-27635W), *in* JUSTICE DELAYED, *supra* note 214, at 210, 211.

236. *Korematsu*, 584 F. Supp. at 1406.

237. *Id.* at 1411.

238. *Id.* at 1420.

239. *Id.*

240. Memorandum of Points and Authorities in Support of Petition for Writ of Error *Coram Nobis*, *Korematsu* (No. CR-27635W), *in* JUSTICE DELAYED, *supra* note 214, at 189, 193.

241. *Id.* at 196 (in cases of suppressed or falsified evidence, as in this case) (citing United States v. Augurs, 427 U.S. 97, 103 (1976)).

uncertainty surrounding the legal issue, the petitioners also cited to cases regarding the destruction of evidence that suggested that either prejudice or bad faith would be sufficient for reversal.[242] The government did not address this issue at all in its response.

Judge Patel concluded that prejudice was not necessary as a matter of law. Her authority was *United States v. Taylor*,[243] a 1981 Ninth Circuit opinion that situated the *coram nobis* writ in a family of due process principles "not strictly limited to those situations in which the defendant has suffered arguable prejudice; [it is] designed to maintain also public confidence in the administration of justice."[244] She did note how important the suppressed evidence was, describing it as "critical,"[245] and commenting that the Supreme Court had been given only a "selective record."[246] Still, she concluded that as a matter of counterfactual speculation, "[w]hether a fuller, more accurate record would have prompted a different decision cannot be determined. Nor need it be determined. Where relevant evidence has been withheld, it is ample justification . . . that the conviction should be set aside."[247] In other words, the fraud upon the courts was sufficiently egregious so as to justify vacation of the conviction independent of a showing of prejudice.[248]

*Yasui.* The next *coram nobis* case that was decided was Minoru Yasui's in Portland, Oregon. In that case, the district court, per Judge Belloni, did precisely what the government requested. In a two-page order, the judge granted the prosecution's motion to vacate Yasui's conviction without addressing the past.[249] He refused to make any findings of fact, four decades old, that were in his view legally immaterial. In an exercise of minimalist judging, the court avoided any ruling on prosecutorial misconduct. Yasui decided to appeal his case even though he received the core relief that he requested—vacation of his conviction. He died in November 1986 before his appeal could be heard.[250]

*Hirabayashi.* Now the record was 1 to 1 in a best-out-of-three series. Emboldened by the *Yasui* victory, the government chose to litigate Hirabayashi's *coram nobis* petition full-bore in the Western District of Washington. The dis-

242. *Id.* at 203.
243. 648 F.2d 565 (9th Cir. 1981).
244. *Id.* at 571 (footnote omitted).
245. Korematsu v. United States, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984).
246. *Id.* at 1419.
247. *Id.*
248. *Id.*
249. *See* RACE, RIGHTS AND REPARATION, *supra* note 1, at 318.
250. The Ninth Circuit had previously ruled that Yasui's appeal was untimely and remanded the case for a showing of excusable neglect. *See* Yasui v. United States, 772 F.2d 1496, 1499–1500 (9th Cir. 1985). His family tried to maintain the appeal; however, the case was ultimately dismissed for mootness.

trict court, per Judge Voorhees, held a full evidentiary hearing, which brought back to the courtroom key figures during World War II.[251] They included Edward Ennis, Director of the Alien Enemy Control Unit at the Department of Justice and a principal author of the *Hirabayashi* and *Korematsu* briefs; Assistant Secretary of War John McCloy and Colonel Karl R. Bendetsen[252] from the Department of War; and William Hammond, who had been the Assistant Chief of Staff for the entire Western Defense Command. During the hearing, Victor Stone argued for the government that any allegations of racism were "not only spurious but also almost incredible."[253]

On the prejudice requirement, the parties disputed vigorously. Not surprisingly, based on Patel's opinion in Korematsu's *coram nobis* petition, Hirabayashi's attorneys argued that prejudice was not absolutely necessary to grant the petition.[254] The government, by contrast, argued that actual prejudice was necessary.[255] Judge Voorhees sided with the government and concluded as a matter of law that prejudice had to be shown. But no reason was given, Patel's opinion was not mentioned, and the *Taylor* precedent was not distinguished. Instead, he simply cited *United States v. Dellinger*,[256] a Seventh Circuit case, as authority—a case mentioned by the government in its brief.

This conclusion of law prompted, according to the court, two factual investigations on (i) how significant the claim of exigent circumstances was in the Supreme Court's analysis in 1943, and (ii) how much the suppressed evidence would have undermined that claim. On the first issue, the district court found that "exigency" was very significant. Reading the Supreme Court at its word, Judge Voorhees noted that the Court repeatedly emphasized exigency.[257] So did the 1940s Justice Department, which, according to the court, did not know the

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251. Peter Irons, *Introduction: Righting a Great Wrong*, *in* JUSTICE DELAYED, *supra* note 214, at 3, 36–40.

252. Bendetsen was in charge of the Wartime Civil Control Administration of the Western Defense Command. He is considered by many as a central villain in the internment. He was the person who made certain that the Final Report's language was changed.

253. RACE, RIGHTS AND REPARATION, *supra* note 1, at 285.

254. Petitioner's Post-Hearing Brief, Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986) (No. C83-122V) ("Coram Nobis relief is warranted where Government abuses 'offend elementary standards of justice,' cause 'serious prejudice to the accused,' *or*, even absent such prejudice, 'undermine public confidence in the administration of justice.'" (citing United States v. Taylor, 648 F.2d 565, 571 (9th Cir. 1981)) (emphasis added)), *in* JUSTICE DELAYED, *supra* note 214, at 268, 268–69; *see also id.* at 271; Petitioner's Reply Brief, *Hirabayashi* (No. C83-172V), *in* JUSTICE DELAYED, *supra* note 214, at 346, 353.

255. Government's Post-Hearing Brief, *Hirabayashi* (No. C83-122V), *in* JUSTICE DELAYED, *supra* note 214, at 306, 313, 317.

256. *Hirabayashi*, 627 F. Supp. at 1454 (citing United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981)), *rev'd in part*, 828 F.2d. 591 (9th Cir. 1987).

257. *Id.* at 1453–54.

genuine basis of DeWitt's recommendation because of the suppression of the original version of the Final Report.[258]

On the second issue—whether the Supreme Court would have done otherwise—the district court exercised its view of solomonic wisdom by splitting the baby. On the one hand, Judge Voorhees found prejudice on the evacuation conviction. He explained that it would have been "most difficult" for the government to argue that lack of time was the rationale for exclusion had the suppressed evidence been made available:

> Counsel for petitioner could have pointed out that with very little effort the determination could have been made that tens of thousands of native-born Japanese Americans—infants in arms, children of high school age or younger, housewives, the infirm and elderly—were loyal and posed no possible threat to this country.[259]

Judge Voorhees also thought that the Supreme Court would have shown less deference to the military because it would have known from the original Final Report that the military thought it was "impossible" to separate the loyal from the disloyal. In such circumstances, "the Supreme Court would have found itself in an area of inquiry where its collective wisdom and its collective experience were far greater than that of General DeWitt."[260] Further, he suggested that the Supreme Court would not have applied what I call the segmentation technique in *Hirabayashi* had it been given the entire story. Instead, "the Supreme Court would have felt impelled to consider and to rule upon" the exclusion conviction rather than simply affirming the curfew conviction.[261] For these reasons, Hirabayashi was "seriously prejudiced" by the suppression of the evidence as to his evacuation conviction.[262]

On the other hand, Judge Voorhees thought that Hirabayashi suffered no prejudice as to his curfew conviction. Curfew was a smaller burden and viewed as much less of an injustice. Even if the Supreme Court had been aware of DeWitt's reasoning, Judge Voorhees found that the Supreme Court would have "without question" affirmed that conviction.[263]

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258. *Id.* at 1454.
259. *Id.* at 1456.
260. *Id.* at 1457.
261. *Id.*
262. *Id.*
263. *Id.* Judge Voorhees' splitting-the-baby approach risks internal inconsistency. Voorhees held that there was no prejudice on the curfew conviction, and that the 1940s Supreme Court would have affirmed that conviction even if it had been provided the suppressed evidence. If so, then the 1940s Court surely would have stuck to its segmentation strategy and said nothing more about the evacuation conviction given the fortuity of concurrent sentencing for the two offenses. This suggests that Voorhees misapplied his own view of the law of *coram nobis*. Since both convictions would have been affirmed—the curfew for lack of prejudice, the evacuation through segmentation—Hirabayashi should have had his

Hirabayashi's appeal was heard by Judges Mary Schroeder, Alfred Goodwin, and Jerome Farris. A central issue was prejudice. On the one hand, Hirabayashi pressed the contention that the Supreme Court was "duped" by bad actors who suppressed critical evidence.[264] On the other hand, Ronald Reagan's Department of Justice argued that there was no prejudice and that the Supreme Court would have done the exact same thing. As the court of appeals put it:

> What the government contends in this appeal is that on the basis of the record before it, the Supreme Court should have known both that General DeWitt was a racist, and that he made no military judgment of emergency. The government asks us to hold, therefore, that the Supreme Court probably would have reached the same erroneous result even if the government had not suppressed the evidence and had accurately represented to the Court the basis of General DeWitt's decision.[265]

How absurd it is to have Reagan's Department of Justice contending that the 1940s Supreme Court was in no way deceived and to have Hirabayashi suggest that the Court was an innocent.

On the central legal question of whether prejudice had to be shown, the Ninth Circuit exercised the minimalist virtues and tenaciously refused to answer. It disagreed with Judge Voorhees' suggestion that prejudice was necessary by pointing out that neither the Supreme Court nor the Ninth Circuit had imposed such a requirement. At the same time, it declined to affirm Judge Patel's conclusion in Korematsu's *coram nobis* case that prejudice was not required. In the critical evasive passage, it wrote: "We need not decide whether there is as high a test as the *Dellinger* footnote suggests because petitioner has satisfied the higher standard."[266] In other words, whether actual prejudice was necessary as a matter of law did not have to be decided because, in this case, actual prejudice had been shown as a matter of ("historical") fact.[267]

The Ninth Circuit affirmed the district court's finding that the suppressed material would have "profoundly and materially affected" the Supreme Court's analysis of the evacuation issue.[268] This meant affirmance of the district court on

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writ denied on both counts. The inconsistency is avoided since Voorhees insisted, quite preposterously, that the "smoking gun" evidence would have prompted the 1940s Court to reach the evacuation issue anyway. *See supra* text accompanying note 261.

The government made this argument on appeal. But the Ninth Circuit did not have to address this point since it reversed on the curfew conviction as well.

264. Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987).

265. *Id.* at 601.

266. *Id.* at 604 n.14. *Dellinger* was the Seventh Circuit case that Voorhees had cited for the prejudice requirement.

267. *Id.*

268. *Id.* at 603–04.

evacuation. By contrast, the court summarily reversed as clearly erroneous the finding that the suppressed material would *not* have had the same impact vis-à-vis curfew.[269] By also finding prejudice on curfew, the end result was total vindication for Hirabayashi.

These cases were extraordinary successes. True, Yasui's death precluded him from total victory, but even he had his criminal conviction vacated.[270] Both Korematsu and Hirabayashi succeeded in persuading the federal courts to ultimately grant their petitions and, in the process, to acknowledge publicly how much the petitioners had been wronged. These victories also helped answer objections by members of Congress to the reparations bill that eventually became law.[271] The conventional wisdom is that these cases were unqualified successes and that all the relevant players, including the litigants, their enterprising and driven lawyers, and the judges[272] who granted the writs, deserve applause. And for good reason. But embedded in this vindication was a subtle but significant loss.

## B. Loss: Denying Prejudice

The word "prejudice" suffers an equivocation in my analysis. Above, we used "prejudice" in the sense of harmless error—something that appellate judges, lawyers, and proceduralists well understand. But "prejudice" can also mean prejudice in the social cognitive attitudinal sense. What no one has fully appreciated is that by seeing "prejudice" in the *coram nobis* procedural sense, we denied the "prejudice" of the Supreme Court in the racist sense.[273]

By finding prejudice, the Ninth Circuit in *Hirabayashi* officially denied the Supreme Court's responsibility for any wrongdoing. If the Court misfired in the 1940s, the reason was because the Court was denied relevant evidence. If

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269. *Id.* at 608.

270. His conviction was vacated even though the *coram nobis* writ was denied.

271. *See, e.g.*, John Tateishi & William Yoshino, *The Japanese American Incarceration: The Journey to Redress*, HUM. RTS., Spring 2000, at 10, 10–11.

272. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 98 (1998) ("[Judge Patel] self-consciously sought to do more than correct the judicial record. She used the occasion to afford a public acknowledgment of the harm done . . . ."); IRONS, *supra* note 49, at 366–67 (describing the *coram nobis* petitions briefly and closing the book in victorious terms).

273. There is some danger here in using the word "prejudice" because it connotes a particular view of racism. Under this view, racism can be understood in terms of an individual's irrational or pathological antipathy toward a racial group. This view does not consider racism in its subtler cognitive forms or its more diffuse institutional manifestations. This is not how race works. And by "prejudice" I mean to include racial mechanics in their entirety, as described briefly *supra* Part I.B.3. Also, I want to make clear that I mean to encompass both *attitudes* and *beliefs* in this term even though in the psychological literature "prejudice" is often reserved for the former and "stereotype" for the latter.

the Court had been given all the correct data, it would have come out the right way. Recall that back in the 1940s, the Supreme Court denied responsibility for the (more) political branches, by absolving Roosevelt and Congress and instead holding the WRA responsible, while granting Endo's writ of habeas corpus. In the 1980s, the Ninth Circuit completed the circle of absolution and absolved the wartime Supreme Court of any wrongdoing, while granting Hirabayashi's writ of *coram nobis*.

In the end, according to the official line, was anyone responsible for this grotesque, racist violation of civil rights? To be sure, both the President and Congress have apologized. But according to the official legal story, it was not their fault. Remember *Endo*. The WRA and a handful of government officials in the Army, the Department of War, and the Department of Justice are the only ones to blame. No institutional responsibility has been taken, especially on the part of the Judiciary.

But the official line is not the truth. The suppressed smoking gun evidence, as damning as it is, would not have altered the 1940s results. This is not because the suppression was in any way trivial or excusable. This is so because the Court, thinking through its racial schemas, had no intention of interfering with the internment, whatever the evidence.

### 1. Evacuation

Recall that the district court in the *Hirabayashi coram nobis* case found prejudice on the evacuation issue.[274] On appeal, the United States argued that the finding was clearly erroneous. The court of appeals thought otherwise and affirmed that finding based on reasoning that is, frankly, difficult to comprehend. I attempt to provide a fair and accurate restatement of those reasons, followed by my refutation.

*DeWitt's Racism: Who Knew?* First, the court of appeals suggested that the Supreme Court had no reason to believe that General DeWitt was racist. Evidence regarding DeWitt's attitude "was limited primarily to a newspaper clipping."[275] Moreover, this evidence was presented by the Japanese Americans and their amici, who were partisans in the litigation. Although we now know that this was "objective and irrefutable proof" of racial bias, according to the Ninth Circuit, the Supreme Court in the 1940s did not.

This is preposterous. Here is the text of the newspaper clipping addressed above, reporting DeWitt's comments before a House of Representatives

274. *See supra* Part II.A.2.

275. Hirabayashi v. United States, 828 F.2d 591, 601 (9th Cir. 1987).

Subcommittee on Naval Affairs and published in Hearst's *San Francisco News*,[276] April 13, 1943:

> I don't want any Jap back on the Coast . . . . There is no way to determine their loyalty . . . . It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him. . . . I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.[277]

During the wartime litigation, this article appeared in full in the Appendix of Hirabayashi's reply brief, was quoted prominently in Yasui's opening brief,[278] and was also quoted in Korematsu's brief.[279] It was specifically mentioned by attorney Al Wirin during Yasui's oral argument.[280] In dissent, Justice Murphy quoted long portions.[281] This passage was not a partisan "spin" of Army policy. Instead, it was a verbatim quotation by a prominent newspaper, just one month prior to Supreme Court oral argument, never disclaimed by DeWitt.[282]

In addition, Korematsu referred explicitly to another document equally damning, a letter from DeWitt to the Secretary of War one and a half months prior to evacuation. In it, DeWitt wrote that "the Japanese race is an enemy race" and that regardless of being born in the United States, their "racial strains are undiluted." Further, "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."[283]

To avoid confusion, we must remember that the question is not whether the newspaper transcript and the personal letter provide conclusive evidence of DeWitt's racism by the standards of the 1940s or the 1980s or even today. The proper question instead is whether these materials reveal as much about the

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276. The Hearst newspapers were vicious in their treatment of the Japanese Americans. *See, e.g.*, JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS xvi (1984) (Quoting Henry McLemore: "I am for immediate removal of every Japanese . . . . Herd 'em up, pack 'em off and give 'em the inside room in the badlands. Let 'em be pinched, hurt, hungry and dead up against it. . . . I hate the Japanese. And that goes for all of them.").

277. H.R. REP. NO. 1911, at 13–14 (1942) (Tolan Committee Report).

278. *See* Appellant's Reply Brief at 25–26, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870); Appellants' Brief at 55, Yasui v. United States, 320 U.S. 115 (1943) (No. 871).

279. *See* Petition for Writ of Certiorari at 33, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 40.

280. IRONS, *supra* note 49, at 222–23.

281. *See* Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting); *see also id.* at 241 n.15 (Quoting Dewitt, who commented that "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.").

282. And it would not do to say that the Final Report should be considered more official and in the record; neither newspaper transcript nor Final Report was in the record in any strict sense. Both would have to be taken account of through some loosey-goosey judicial notice.

283. Brief for Appellant at 63, *Korematsu* (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 161.

attitude and reasons for DeWitt's actions as the original version of the Final Report. Put another way, given that the Supreme Court was made aware of the above, would the language in the original Final Report have altered the Court's fundamental assessment of DeWitt's fairness or bias? No, it would not have.[284]

*The Solicitor General's Protestations.* Second, the Ninth Circuit pointed out that the Supreme Court relied heavily on the claims of Solicitor General Charles Fahy, who argued exigency as the justification for internment.[285] Moreover, such reliance was to be expected because the government "was clearly in a better position to know"[286] and because of the traditional deference paid by the Court to the Solicitor General, sometimes called the Tenth Justice. Accordingly, the court of appeals thought it unlikely that the Supreme Court "would have reached the same result even if the Solicitor General had advised . . . the Court of the true basis for General DeWitt's orders."[287]

On the one hand, this must be right. If the Solicitor General in oral argument confessed that the entire internment was a racist cabal, with absolutely no military justification, the Supreme Court would have had great difficulty allowing internment to proceed. This much is revealed by the following exchange between Justice Frankfurter and Solicitor General Fahy during the *Korematsu* oral argument:

> MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?
>
> MR. FAHY: It would not have been.

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284. The Government made just this argument to the Ninth Circuit. "General DeWitt's beliefs were not concealed from anyone, including the Supreme Court, in 1943 or thereafter." Opening Brief for Appellee/Cross-Appellant United States at 31, Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (No. 86-3853).

285. In his follow-up memorandum, the Solicitor General again stressed exigent circumstances, calling them both "unique and pressing" and inappropriate for individual loyalty hearings:

> The Government does not contend that, assuming adequate opportunity for investigation, hearings may not ever be appropriately utilized on the question of the loyalty of persons here involved. It is submitted, however, that in the circumstances set forth in our brief, this method was not available to solve the problem which confronted the country. The situation did not lend itself, in the unique and pressing circumstances, to solution by individual loyalty hearings. In any event, the method of individual hearings was reasonably thought to be unavailable by those who were obliged to decide upon the measures to be taken.

*See Hirabayashi*, 627 F. Supp. at 1453–54.

286. *Hirabayashi*, 828 F.2d at 602.

287. *Id.*

> MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.
>
> MR. FAHY: That is correct, Your Honor; and the report simply does nothing of the kind.[288]

On the other hand, this is a red herring—the wrong counterfactual. The proper question is what would the Supreme Court have done if the suppressed evidence were made available and if the Solicitor General answered questions during oral argument in ways that nevertheless furthered his client's position. Even if the original Final Report were entered into evidence, and even if the memoranda from the FBI, the FCC, and the ONI were also admitted, Fahy would have been clever enough to discredit that evidence as irrelevant, not probative, taken out of context, not sufficiently expert, or simply a minority report.

For example, the offending language in the original version of the Final Report could have been interpreted away as impolitic exaggeration. In other words, the Report was intended in its entirety to convey how difficult it would be—although not theoretically impossible—to distinguish the loyal from the disloyal under unique pressing circumstances. Or, the Court could have been persuaded to discount DeWitt's prejudices as irrelevant because curfew was authorized ultimately by the Department of War (untainted by racism) and not DeWitt. Indeed, this was the very argument pressed by the 1980s Department of Justice—that DeWitt was not the one who made the final decision and that those who did were not infected by his sort of racism.[289]

*The* Korematsu *footnote.* Third, the Ninth Circuit emphasized the bowdlerized footnote in the *Korematsu* brief. It pointed out that the Court asked specific questions about that footnote during oral argument,[290] which supposedly demonstrated the Court's sensitivity to the facts of military exigency. But again, the question is not whether exigency was an important variable to the wartime Court: Of course it was. The question is whether the suppressed evidence would have reversed the Court's judgment about the existence of that exigency.

Another point as to timing deserves mention here. Hirabayashi's case came before *Korematsu.* This means that the *Korematsu* brief was not even in existence when Hirabayashi's case was litigated. So, how could a future misleading edit to a footnote that had not yet been written have prejudiced him?[291] The same goes

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288. *Id.* at 600.

289. *See* Brief for Government at 26–29, *Hirabayashi* (No. 86-3853).

290. According to Irons, one of Korematsu's attorneys made specific reference to the "extraordinary footnote" in his argument. *See* IRONS, *supra* note 49, at 315.

291. I thank Margaret Chon for this point.

for Fahy's deceptive comments in an oral argument that had not yet taken place. Probed this way, the Ninth Circuit's analysis loses coherence.

A charitable reading could partly save the analysis. True, specific executive branch shenanigans in the *Korematsu* litigation could not have directly prejudiced Hirabayashi, but those misdeeds point indirectly to the exculpatory evidence that had been in existence at the time of Hirabayashi's litigation but was suppressed from the Court.

But regrettably, again, there is little reason to think that the suppressed FBI, FCC, and ONI documents would have altered the Court's decision, because comparable evidence was already available. Consider, for example, the FBI memorandum, which rejected the idea of any national security threat posed by Japanese Americans. Even without that memorandum, the FBI's position was not a secret. Various briefs in the Supreme Court litigation made specific reference to J. Edgar Hoover's testimony to the House of Representatives that there was in fact no sabotage committed in Hawaii.[292]

As for the ONI memorandum, it turned out that the author, Kenneth Ringle, published its essential contents in an anonymous *Harper's* magazine article.[293] This article was specifically cited in the *Hirabayashi* litigation.[294] Obviously, an anonymous article in a periodical does not carry the same weight as an official intelligence document. That said, the author was identified as a West Coast "Intelligence Officer" who had studied the Japanese population. Moreover, the details and the logic of the argument provided in the *Harper's* piece internally authenticated itself as the work of an intelligence professional and not a dilettante's idle speculation. And one cannot press too hard the point that the article was not "in the record"; almost nothing was officially in the record.

There was also the FCC memorandum, by Chairman James Fly, to Attorney General Francis Biddle, which disputed the claim that Japanese Americans had engaged in shore-to-ship signaling. But Korematsu in his brief had noted to the Court that DeWitt had never charged a single person of

292. *See* Brief for Appellant at 6–7, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870) (quoting H.R. REP. NO. 70-2124, at 49 (1942)) (referring to communication by James Rowe, Jr. Assistant to Attorney General, describing Hoover's conclusions); *see also* Brief of Japanese American Citizens League as Amicus Curiae at 72, *Hirabayashi* (No. 870) (citing Hoover who explained that "in the first 24 hours after the attack more than 1000 of the most dangerous enemy aliens were rounded up").

293. Anonymous, *The Japanese in America*, HARPER'S MAG., Oct. 1942, at 489, 496–97.

294. Brief for Appellant at 20–21, *Hirabayashi*, 320 U.S. at 81 (No. 870) (referring to the article as being drafted by "one fully familiar with the situation"); Brief of Japanese American Citizens League as Amicus Curiae at 92, *Hirabayashi* (No. 870) (identifying the author as a "naval intelligence officer"); Brief of American Civil Liberties Union as Amicus Curiae at 15, *Hirabayashi* (No. 870) (describing the author as "an intelligence officer whose very task was the investigation of persons of Japanese ancestry on the West Coast"); *see also* Anonymous, *supra* note 293.

Japanese ancestry of signaling the enemy and that no arrests had ever been made.[295]

*Dissent Inference.* Fourth, the Ninth Circuit stated that the "divided opinions . . . demonstrate beyond question the importance which the Justices . . . placed upon the position of the government that there was a perceived military necessity . . . ."[296] Again, this is irrelevant: The military exigency argument was obviously important, but this says nothing about whether the suppressed evidence would have altered the finding of military exigency.

Perhaps the Ninth Circuit was suggesting that because three Justices in *Korematsu* dissented even without seeing the suppressed evidence, even more Justices would have dissented and constituted a new majority (in *Hirabayashi*) if the evidence had been revealed. If this is the argument, I draw the opposite inference from the existence of these dissents. Notwithstanding the suppressed evidence, Justice Murphy knew enough to call the majority's opinion in *Korematsu* a "legalization of racism."[297] In his well-crafted, fully documented opinion, he demolished any arguments based on military necessity under exigent circumstances. He also made explicit mention of evidence and sources that should have carried similar, if not the same, weight as the suppressed materials. The suppressed evidence would not have substantially added to the persuasive punch that Murphy threw.

*Right decision in* Endo. Last, the Ninth Circuit asserted that the right outcome in *Endo* "clearly evidence[s]"[298] that military exigency was critical to the Court's *Hirabayashi* and *Korematsu* decisions. Yet again, this is the wrong question. The proper question is whether the *Endo* decision demonstrates that the suppressed evidence would have altered the end results. My discussion of *Endo* suggests just the opposite. All the machinations that the Court deployed to make certain that responsibility would be thrust upon the WRA reveals not the genuine honesty of the Court but its political connivance. Endo's victory in no way reveals a sincere but simple-minded Court duped by executive branch attorneys.

Finally, if one still wonders whether the Court was misled into finding military exigency because of the suppressed evidence, consider all the other arguments expressly raised both by Hirabayashi as well as the government as early as 1943. To make crystal clear that time was not of the essence,

295. *See* Brief for Appellant at 67, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 165.

296. Hirabayashi v. United States, 828 F.2d 591, 603 (9th Cir. 1987).

297. *Korematsu*, 323 U.S. at 242 (1944) (Muphy, J., dissenting).

298. *Hirabayashi*, 828 F.2d at 603.

Hirabayashi emphasized how differently two other groups of people were treated, as compared to the Japanese Americans on the West Coast.

First, Hirabayashi focused attention on Japanese Americans in Hawaii, which was 1500 miles closer to the Pacific theater of operations, and which had actually been bombed. He provided persuasive details about the Hawaiian population, which, if the government theory was to be believed, posed a far greater threat because persons of Japanese ancestry comprised 34.2 percent of the total population.[299] Hirabayashi also cited laudatory comments about the Japanese made by General Delos Emmons, in charge of Hawaii, as early as January 28, 1943.[300] Based on these comparisons, Hirabayashi argued that "the experience in Hawaii demonstrates [that the fear of West Coast invasion was] pure fantasy beyond a shadow of a doubt."[301] Similar arguments, not surprisingly, were raised by Korematsu.[302]

Second, Hirabayashi compared the treatment of the Japanese Americans to the Italian and German resident aliens. Specifically, he claimed that the Attorney General successfully provided individualized loyalty hearings to Italian aliens. Within ten months, the Attorney General deemed 600,000 aliens of Italian origin to be a nonthreat;[303] there was no reason why the same could not have been done with the far smaller Japanese American population, which comprised mostly citizens. In addition, he provided examples of individualized suits to revoke the citizenship of naturalized Germans[304] as well as examples of

299. Brief for Appellant at 6 n.4, *Hirabayashi* (No. 870) (providing population statistics as of 1941).

300. *Id.* at 7.

301. *Id.* at 19.

302. *See, e.g.*, Petition for Writ of Certiorari at 34, *Korematsu* (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 41; Brief for Appellant at 72, *Korematsu* (No. 22) (noting that in Hawaii, as of March 1944, 6678 citizens and 743 aliens of Japanese ancestry continued to work on military installations), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 171.

303. Brief for Appellant at 20, *Hirabayashi* (No. 870). This should not be read to suggest that there were in fact 600,000 individual hearings. Instead, there were approximately 600,000 Italian aliens in the United States at the time of war. And of that total, only a few hundred were placed on special enemy alien lists, prompting their arrest by the DOJ soon after Pearl Harbor. Subsequently, these individuals were given individual hearings in front of enemy alien review boards.

According to historian Roger Daniels, the DOJ interned approximately 1500 aliens of European descent, mostly German and Italian. DANIELS, PRISONERS, *supra* note 8, at 26. The CWRIC reported slightly different numbers, and concluded that by mid-February, the DOJ "had interned 2,192 Japanese; 1,393 Germans and 264 Italians." PERSONAL JUSTICE, *supra* note 8, at 284. Adversarial loyalty hearings were, however, granted to all those interned in the special DOJ camps. *Id.* at 285.

By October 1942 (ten months after Pearl Harbor), the Attorney General had removed all restrictions on Italian aliens. *See* Harrop A. Freeman, *Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law*, 28 CORNELL L.Q. 414, 455 (1943). In December, the same was done for German aliens. *See* BOSWORTH, *supra* note 19, at 211–12.

304. Appellant's Reply Brief at 13, *Hirabayashi* (No. 870).

how our European allies treated enemy aliens without mass internment.[305] Given this empirical evidence making clear the possibility of individualized loyalty hearings at a brisk pace, it seems ever more difficult to believe that the Supreme Court was genuinely misled about exigent circumstances.[306]

Compare this argument about the possibility of individual hearings with what the government explicitly said in its *Hirabayashi* brief. To be sure, as the Ninth Circuit explained,[307] certain portions of that brief emphasized exigent circumstances. But in other telling portions, the government argued that individualized hearings would have been "virtually worthless" unless they were preceded by a thorough investigation, and even then, they would be of "doubtful utility" because they would have required the hearing board to "look deep into the mind of a particular Japanese" in making nearly impossible judgments about loyalty.[308] Hard work indeed examining those "inscrutable" Orientals.[309]

In addition, in a remarkable embrace of group liabilities (if not rights), the government argued that what was at issue was not individual loyalty. "It is entirely irrelevant, therefore, to assert that the majority of individuals evacuated

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305. The ACLU, in its amicus brief, made specific comparisons with the English experience, which was claimed to have set up 112 alien tribunals and, in six months, provided individual hearings to 74,220 cases. Only two thousand were interned. Brief of American Civil Liberties Union as Amicus Curiae at 16, *Hirabayashi* (No. 870).

306. The Japanese American Citizens League's amicus brief also made very strong arguments why the various factors that apparently raised suspicion of Japanese Americans similarly applied to Italian and German Americans. These arguments were cross referenced by Hirabayashi in his reply brief. *See* Brief of Japanese American Citizens League as Amicus Curiae at 12–20, *Hirabayashi* (No. 870); Appellant's Reply Brief at 2–3, *Hirabayashi* (No. 870).

307. The Ninth Circuit noted:

> The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons *who could not readily be singled out* and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once.
>
> . . . .
>
> . . . [W]hat was needed was a method of removing at once the unknown number of Japanese persons who might assist a Japanese invasion, and not a program for sifting out such persons *in the indefinite future*.

Hirabayashi v. United States, 828 F.2d 591, 596 (9th Cir. 1987) (emphasis added) (quoting the government's brief).

308. Brief for the United States at 62–63, *Hirabayashi* (No. 870). Brief for the States of California, Oregon and Washington as Amici Curiae at 43, *Hirabayashi* (No. 870) (citing H.R. REP. NO. 1911, at 13–14 (1942) (Tolan Committee Report) ("Most commonly it was said that homogeneity of racial and cultural traits made it impossible to distinguish between the loyal and the disloyal.")).

309. California, Oregon, and Washington filed an amicus brief in *Hirabayashi* and *Yasui*. They explained that the Japanese "have remained a group apart and *inscrutable* to their neighbors . . . an unassimilated, homogeneous element." Brief for the States of California, Oregon and Washington as Amici Curiae at 11, *Hirabayashi* (No. 870) (emphasis added); *see also id.* at 44 ("[I]nscrutability is a definite racial characteristic.").

were perfectly loyal citizens of the United States."[310] Instead, it was action against the entire group, which, as a group, posed a danger. Having read these arguments explicitly in the government's briefs, would the Supreme Court have really learned something new from the original language of the Final Report?

If the Supreme Court wanted to find that time was not of the essence for the government, there was sufficient material in the government's own brief from which that finding could have been made. This is not to mention numerous additional arguments provided by the Japanese American litigants as well as amici.[311] The Supreme Court was not *actually* ignorant of what was going on; it was *willfully* so.[312] Even if the original version of the Final Report and the suppressed intelligence memoranda had been made available in *Hirabayashi*, and even if the original *Korematsu* brief footnote had appeared in the *Hirabayashi* litigation, there is compelling circumstantial evidence that the Supreme Court would have applied the same techniques of segmentation and selective interpretation in order to affirm the convictions and not interfere with the internment machine.

2. Curfew

I have argued that the suppressed evidence would not have altered the results in the 1940s litigation, including the Court's approval of exclusion. *A fortiori* the Court would not have been moved on curfew. This is why even Judge Voorhees refused to vacate that conviction. However, the Ninth Circuit summarily disagreed, and in a breezy five paragraphs found clear error. Essentially, it suggested that the wartime Court did not distinguish between curfew and exclusion and viewed both as serious deprivations of liberty requiring military exigency.[313]

Reagan's Department of Justice disagreed, and Victor Stone contended that the dissenting Justices in *Korematsu*, who had concurred in *Hirabayashi*, clearly distinguished between the burden of curfew as opposed to evacuation. But the Ninth Circuit retorted that the beliefs of a dissenting minority of Justices were

310. Brief for the United States at 64, *Hirabayashi* (No. 870).

311. For instance, Korematsu explicitly argued that exigency was not credible given the delay between December 7, 1941 and March 30, 1942, when the first groups of people were forced into assembly centers. Brief for Appellant at 21, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 99, 119. Also, Korematsu noticed the "strange" delay of two years before the Final Report was publicly released. *Id.* at 55, *reprinted in* LANDMARK BRIEFS, *supra* note 104, at 99, 153.

312. This inability to see the obvious might recall other spectacular acts of judicial blindness, as when the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), could not see the social meaning of segregated trains and instead saw a rule that burdened Whites and Blacks equally.

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

irrelevant and that the majority in *Korematsu* followed "exactly the same rationale that was followed in *Hirabayashi* and made no such distinction."[314] The court of appeals concluded that both curfew and evacuation were "tried together, briefed together, and decided together."[315] Accordingly, if there was prejudice for one, there must be prejudice for the other.

This analysis is willfully blind to how the wartime Court employed segmentation to divide carefully the various steps in the internment process.[316] Recall that just on this issue, the Court, sua sponte, jumped on the fortuity of Hirabayashi's concurrent sentencing to segment off curfew from evacuation. If the Court had actually thought the issues to be identical, as the Ninth Circuit would contend four decades later, then there would have been little reason to engage in this procedural maneuver or to repeat throughout the *Hirabayashi* opinion how narrow its decision was. Moreover, in *Korematsu*, the Court bent over backwards to distinguish evacuation from detention. After our examination of the Supreme Court's tactics, it seems ludicrous to contend that the suppressed evidence would have led the Court to call off something as "trivial" as curfew, as early as 1943.

### C. The Path Not Taken

The government did not file for certiorari, so the Ninth Circuit's opinion would be the last and highest official pronouncement by the Judiciary on the internment, at least framed in terms of a live Article III case or controversy. The official line is that the Supreme Court would have done otherwise if the evidence had not been suppressed. The Court was not a racist institution. The Court did not think through racial schemas that inscribed onto Japanese Americans the meanings of foreigner, traitor, and outsider whose interests could be forsaken for the good of country. The Court was in fact the victim, tricked by unethical officials who buried the truth.

The Ninth Circuit was not compelled to write this exculpatory opinion. As demonstrated systematically in the Appendix, it could have done otherwise on the issue of prejudice. Whether prejudice was necessary was an open question

314. *Id.*
315. *Id.*
316. I say "willfully" since the DOJ pointed out this segmentation strategy clearly in its brief. *See* Opening Brief for United States at 19, *Hirabayashi* (No. 86-3853). To be clear, the United States was not renouncing segmentation as a bad or inappropriate strategy in the 1940s or in the 1980s. *See, e.g., id.* at 22–23 (arguing that Judge Voorhees had erred by not carefully distinguishing evacuation from detention in granting the writ as to the evacuation conviction count).

given the precedent that was available at the time. The most recent Ninth Circuit case law on point,[317] cited by Judge Patel in the *Korematsu coram nobis* case, suggested that prejudice was not necessary. The court of appeals could have easily adopted Judge Patel's reasoning in the *Korematsu coram nobis* case. Certainly this holding would have been consistent with Hirabayashi's legal arguments on appeal as well as extant legal precedent.[318]

Even better, it could have held that although actual prejudice is normally required, in cases of extraordinary manifest injustice, the writ will nonetheless issue. Applying this rule of law, the Ninth Circuit could have detailed why the suppressed evidence would have had (regrettably) no impact on the 1940s Supreme Court. This would have placed full responsibility on the Court for what it did. However, this would not have meant that the individual petitioner would receive no succor. The court could have explained that nevertheless, in circumstances as extraordinary as this, the writ of *coram nobis* can and should still issue.

But what of Justice Holmes' famous caution that hard cases make bad law? Those who think that writing such an opinion would have created bad law by making prejudice optional in certain cases should consider this. The Ninth Circuit's opinion in *Hirabayashi* is now the standard citation for the substantive standard of *coram nobis* in the circuit.[319] It is regularly cited in a formulation that does *not* demand prejudice.[320] In other words, the best reading of current Ninth Circuit precedent is that prejudice is not always necessary to a *coram nobis* writ. The opinion that should have been written would have produced nothing different.

Finally, for those who think that it would have been uncouth or inappropriate for a lower court to point a finger at the Supreme Court, it is important to distinguish descriptive from normative claims. Descriptively, to be sure, lower courts are chary of doing any such thing. But normatively, I have argued, that is

317. United States v. Taylor, 648 F.2d 565 (9th Cir. 1981).

318. The very first paragraph of the argument section of Hirabayashi's brief on appeal states that "*coram nobis* relief is warranted when government misconduct: (1) seriously prejudices the accused, *or* (2) even without prejudice, undermines public confidence in the administration of justice." Appellant's Opening Brief at 23, *Hirabayashi* (No. 86-3853) (emphasis added). Although at times Hirabyashi's attorneys argued in the alternative, they made clear that the district court erred by requiring a showing "that it is probable that a different result would have occurred . . . ." *Id.* at 24 ("The District Court erred by adding [this] requirement."); *see also id.* at 33 ("Whether the 1943 Supreme Court would still have made the same tragic mistake if the misconduct had not occurred is an issue which need not be resolved.").

319. *See, e.g.*, United States v. Monreal, 301 F.3d 1127, 1132 (9th Cir. 2002); Martinez v. United States, 17 Fed. Appx. 517, 519 (9th Cir. 2001) (mem.); United States v. McClelland, 941 F.2d 999, 1002 (9th Cir. 1991).

320. *See Hirabayashi*, 828 F.2d at 604. That formulation has four elements: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Id.*

precisely what the Ninth Circuit should have done in this specific context. To be clear, I am not saying that this is what the Ninth Circuit had to do, as some matter of doctrinal necessity. Instead, my point is that it could have done so. And it should have done so. Truth should have prevailed over cultural or institutional decor. Truth should have been spoken to power.

## III. TRUTH AND CONSEQUENCE

### A. Truth

The gravamen of my complaint is not principally about individual justice. After all, individual relief to the surviving *coram nobis* petitioners was granted. And by many accounts, the larger successful redress movement has provided tremendous individual healing and vindication to internees.[321] My critique is also not a call for doctrinal reform within the writ of *coram nobis*, although I think I have made a case against requiring prejudice in cases of gross miscarriage of justice, especially when that miscarriage of justice reflects racism's taint of the initial judgment.

Finally, my critique is not a call for apology, although I would not mind hearing one. Frankly, courts do not apologize, especially courts of last resort. Doing so would undercut their mystique of infallibility. Inconvenient precedents are instead interpreted away. When precedents are explicitly overturned, the decision is justified by external changed circumstances, not by any confession of error coupled with a plea for forgiveness. Consider, for example, the tone and substance of *Brown v. Board of Education*.[322]

Perhaps collective institutions, such as governments, can never provide meaningful apology. As Nicholas Tavuchis has argued, in contrast to individual and personal apologies, institutional and collective "apologies" do not really express sorrow and effect a reconciliation between the institution and those it has wronged.[323] This seems correct especially given how quickly apologies can be undercut by new personnel representing those institutions. Consider,

321. Government apology and symbolic reparations have helped heal individual wounds. *See, e.g.*, Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 478 (1998) [hereinafter Yamamoto, *Racial Reparations*]. *See generally* Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 227 (1992). By many accounts, the successful Japanese American redress movement has also catalyzed other redress movements in the United States and around the world. *See, e.g.*, BARKAN, *supra* note 38, at 30 (describing 1988 Civil Liberties Act as a "watershed in the history of restitution" and as a "significant marker in legitimizing restitution demands around the globe").

322. 332 U.S. 631 (1954).

323. NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 108–09, 117 (1991).

for instance, the comments of Representative Howard Coble, who recently disagreed with interning Arab Americans post–September 11 but agreed with Roosevelt's decision to intern the Japanese.[324]

It appears, thus, that the function of institutional and collective apologies has more to do with putting things on the public record, to set matters straight.[325] At the center of my critique, then, is a call for truth, a truthful accounting of what a branch of the federal government did during one of the largest civil rights crises of the century.[326] There is value to truth. After all, that is what a truth commission seeks in the context of redress. As Martha Minow has well stated:

> A truth commission is charged to produce a public report that recounts the facts gathered, and render moral assessment. It casts its findings and conclusions not in terms of individual blame but instead in terms of what was wrong and never justifiable. In so doing, it helps to frame the events in a new national narrative of acknowledgment, accountability, and civic values.[327]

In this sense, the CWRIC was acting in the capacity of a truth commission. But its report shied away from exacting scrutiny of the Judiciary; perhaps there was so much more patent blame to place elsewhere. The *coram nobis* litigation was also part truth commission, creatively leveraging Article III courts.[328] Although the litigation was successful in providing individual relief, it only half-succeeded in affirming truth. As regards the truth of judicial culpability, the *coram nobis* cases tragically failed.

Here, it is important not to misframe the issue as one between a narrow party-focused dispute resolution view of litigation versus a broad public-regarding norm articulation view.[329] Framed this way, one might view my critique as based on a commitment to the latter view of litigation. But I take no general stand on the point. It turns out that in these *coram nobis* cases,

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324. Unlike Senator Trent Lott's praise of Strom Thurmond's 1948 politics, Coble's comment has not drawn any rebuke by the Republican party. Representative Michael Honda, who was interned as a child, has called for Coble to step down from his position as Chair of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. *See* Wendy Thermos, *Honda Seeks GOP Action Over Remarks on Internment*, L.A. TIMES, Feb. 16, 2003, at B3.

325. TAVUCHIS, *supra* note 323, at 117.

326. Even if my goal were principally an apology, telling historical untruths is hardly a way to start things off. There must first be some admission of wrongdoing.

327. MINOW, *supra* note 272, at 78.

328. I am not suggesting here that courts should generally act like truth commissions. It was only because of the unique procedural and substantive posture of the *coram nobis* cases that the courts rightly functioned partly in this manner.

329. *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–71 (5th ed. 2003) (comparing and contrasting the "dispute resolution/private rights" and the "public rights" models of litigation).

individual dispute resolution (vacation of wrongful convictions) was intricately tied to a public articulation of norms (convictions are wrongful because of governmental racism); accordingly, the courts could not choose "merely" to resolve a dispute without saying anything grander.[330] Certainly, that is not what the Ninth Circuit did. It publicly trumpeted an official history about the wartime Supreme Court and its functionings. Too bad that the story was a lie.

## B. Consequence

What are the consequences of a Ninth Circuit "truth commission" adopting an official story that leads to individual relief but denies the truth? Numerous problems surface. For example, the Japanese American redress movement generally has been highlighted as a critical precedent for similar redress movements, ranging from African slavery to Hawaiian self-determination.[331] But, before other movements embrace at least the judicial aspects of the Japanese American redress, they ought to know what in fact they are lauding.

In addition, the social meaning of the Japanese American redress movement is still in the making. As Eric Yamamoto and Chris Iijima each point out, there are potential dark sides to winning reparations.[332] We must be careful of what we wish for. My commentary exposes another dark side, this time to the *coram nobis* victories.

More worrisome is that because the truth has been officially denied, the wartime precedents may have more potency than they would have had otherwise. In granting the *Korematsu coram nobis* petition, Judge Patel proclaimed:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees.[333]

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330. District court Judge Belloni in the *Yasui coram nobis* case came closest to this approach. He vacated the conviction without granting any writ.

331. Indeed, apologies and reparations have been the legacy of the Japanese American redress movement.

332. Yamamoto has pointed out the "hidden dangers of entrenched victim status, image distortion, mainstream backlash, interminority friction and status quo enhancement." Yamamoto, *Racial Reparations*, *supra* note 321, at 482, 496; *see also* Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003). Iijima has pointed out how reparations were won, in part, by invoking a super minority justification, highlighting a caricature of Japanese American volunteers during World War II. Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1998).

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

But we have good reason not to be complacent about Judge Patel's claims. We cannot be so confident when Seventh Circuit Court of Appeals Judge Richard Posner has publicly stated "I actually think *Korematsu* was correctly decided."[334] If Posner is willing to take that lead, surely judges keen on defying "political correctness" will follow. Worse, the sitting Chief Justice has essentially praised *Korematsu* with what Alfred Yen calls faint damnation.[335] Incredibly, in his book he omits any discussion of the *coram nobis* cases or the suppressed evidence underlying them. He also seems complacent about forcing racial minorities into impossible situations. Recall that the wartime Court accepted the claim that previous legal racial discrimination against the Japanese made them more likely to be disloyal. Rehnquist is not oblivious to the "irony" here, but explains that "in time of war a nation may be required to respond to a condition without making a careful inquiry as to how that condition came about."[336] Further, as Eric Muller points out, the Chief Justice rejects the notion that racism, fueled by economic competition, was the true basis for the internment. For Rehnquist, "The Court's answer . . . seems satisfactory—those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war."[337]

Therefore, suppose that in the near future, the evidence of military exigency—this time with nothing suppressed—approximates what the wartime Court thought to be the case during World War II. I need not point out that there have already been numerous arrests and convictions of aliens and citizens in the United States suspected of espionage and terrorism (what was labeled fifth-column activity during the internment),[338] whereas in World War II, not a single Japanese American had been arrested and convicted on these grounds. If and when the next shoe drops, how will the political branches react? By the Chief Justice's lights, they will react the same way they have in the past; in his historical study of law during war, he sees "no reason to think that future wartime presi-

334. *The Triumph of Expedience*, HARPER'S MAG., May 2001, at 39; *see also* Richard Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46, 46 ("In hindsight we know that interning Japanese-Americans did not shorten World War II. But was this known at the time? If not, shouldn't the Army have erred on the side of caution, as it did?"); *id.* (describing President Lincoln's unconstitutional actions during the Civil War and suggesting that they "show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation.").

335. *See* Alfred C. Yen, *Introduction: Praising With Faint Damnation—The Troubling Rehabilitation of* Korematsu, 40 B.C. L. REV. 1 (1998).

336. REHNQUIST, *supra* note 15, at 207.

337. *Id.* at 205–06; Muller, *supra* note 29, at 1405.

338. *See, e.g.*, Phil Hirschkoid, *Third Defendant in Alleged Terror Sleeper Cell Pleads Guilty*, Mar. 25, 2003, *at* http://www.cnn.com/2003/LAW/03/25/buffalo.terror.cell; *see also New York Man Admits to Attending Al Qaeda Training Camp*, N.Y. TIMES, Mar. 26, 2003, at B15.

dents will act differently from Lincoln, Wilson, or Roosevelt."[339] How will the Judiciary respond? The above quotation continues to explain that there is also no reason to think "that future Justices of the Supreme Court will decide questions differently from their predecessors."[340]

Rehnquist further encourages courts to adopt the minimalist judging strategies we have dissected. He notes that, whether we like it or not, courts do hesitate to decide cases against the government during wartime. Echoing Justice Jackson's dissent in *Korematsu*, he writes: "If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?"[341] This strategy invites the massive sacrifice of civil liberties of a racial or ethnic minority, by delay and segmentation, until the bad business is done, at which point everything "bad" will be declared "bad" and a few military officials will be blamed. This is the return of the *Korematsu* mindset. And according to the official line, this would be normatively justified. After all, the Supreme Court itself made no error in its reasoning during World War II.

If truth, not denial, had been written in the Ninth Circuit *Hirabayashi coram nobis* opinion, then things might be different. Not only would the factual bases of the wartime decisions be invalid, the legal precedents themselves would be further stripped of legitimacy. Instead of an epic whitewash, we would have had an Article III court finding, in the context of a live case or controversy, that the 1940s Supreme Court was sufficiently racist that even this suppressed evidence would not have altered its decisions. No law review article, no rhetorical flourish, no worn passage about history's lessons would have had this impact. For every citation of the wartime cases, there would follow a "but see" signal with an excoriating parenthetical explaining that the military necessity calculation made by the Supreme Court was racially biased. This would have been the closest any lower court could have come to overruling *Korematsu*.

The *coram nobis* cases cannot be relitigated. What remains, then, is a fight over how the wartime cases are understood as historical precedent and as lessons

339. REHNQUIST, *supra* note 15, at 224.

340. *Id.*

341. *Id.* at 222. Related strategies have recently been suggested in law review articles. *See, e.g.*, Mark Tushnet, *Defending* Korematsu? *Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306 ("[I]t is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with a Constitution and thereby normalized."); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1097 (2003) (suggesting that sometimes "the appropriate method of tackling extremely grave national dangers and threats entails going outside the legal order, at times even violating otherwise accepted constitutional principles."). I hope to undertake in future work a detailed analysis of these arguments.

learned from the complicated consequences of the *coram nobis* litigation. Specifically, we must appreciate the passive vices a court can employ. This is not a global argument against judicial minimalism. It is instead a specific, detailed articulation of the hidden harm that judicial minimalism can sometimes wreak, especially with regard to racial minorities. This analysis also suggests that minimalist virtues may become vices in contexts in which the Judiciary is engaged in self-criticism.

We must also publicly recognize that the Judiciary has engaged in revisionism to deny its own responsibility for internment. Through public critique, we can help deter what denial otherwise permits—a self-mystifying blindness on the part of the Judiciary to its own fallibility, its own prejudice. Such critique must not only be backward-looking, but must also apply to the cases and controversies that headline today's war.

Consider, for example, the recent opinion by the Fourth Circuit Court of Appeals in *Hamdi v. Rumsfeld*.[342] At issue in that case was the nature of judicial review regarding an executive branch classification of a U.S. citizen seized in a theater of conflict outside the United States as an "enemy combatant." I do not mean to engage the substantive merits of this decision. However, applying the lessons of this Article, two points warrant mention.

First, notice again the use of segmentation. Repeatedly, the *Hamdi* court emphasizes how it is deciding only a narrow question regarding a U.S. citizen designated as an enemy combatant captured within a theater of conflict outside the United States. The court reminds us that it has "no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil . . . . We shall, in fact, go no further in this case than the specific context before us."[343]

Perhaps this is just good judging, whether it is called minimalist or not. But sensitized to the tactic of segmentation, we must be extremely cautious about how this opinion is used as authority for the case in which a U.S. citizen designated as an enemy combatant is captured *within* the United States. This is the harder case of *Padilla v. Bush*.[344] There is also the easier case of *Al Odah v. United*

342. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004) (No. 03-6696). In *Hamdi*, the Fourth Circuit Court of Appeals denied Hamdi's habeas corpus petition:

> Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention.

*Id.* at 476.

343. *Id.* at 465 (citation omitted).

344. 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 2004 U.S. LEXIS 1011 (Feb. 20, 2004) (No. 03-1024). On a habeas corpus petition, the district court concluded that the President had the authority,

*States*,[345] which involved aliens captured and detained outside the sovereign territory of the United States. These three cases might reach the Supreme Court in an *Al Odah-Hamdi-Padilla* trilogy that replicates the segmentation strategy seen in the 1940s.

Second, notice the question of political branch authorization. Hamdi challenged whether Congress had authorized the detention of individuals in his circumstances given the Non-Detention Act, which states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[346] The Fourth Circuit rejected that argument and found authorization from two sources. After September 11, Congress "authorized the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons.'"[347] Also, "Congress has specifically authorized the expenditure of funds for 'the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war.'"[348] As the court continued, "[i]t is difficult if not impossible to understand how Congress could make appropriations . . . without also authorizing their detention in the first instance."[349]

But as students of the internment generally and *Endo* specifically, we know that it is not difficult for a court to find that Congress could appropriate millions of dollars without being held responsible for authorizing anything distasteful done with those monies. So we must be cautious about the trajectory of this line of argument. On the one hand, this aspect of the *Hamdi* opinion might reflect an

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through both affirmative power granted to him by the Constitution and congressional authorization as required by 18 U.S.C. § 4001(a), to classify Padilla as an "enemy combatant." Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002). Secretary of Defense Rumsfeld was ordered to allow Padilla appropriate contact with his counsel so as to be able to make his case that he is being unlawfully detained. On appeal, the Second Circuit reversed, finding no such presidential authority.

345. 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (Nov. 10, 2003) (No. 00-343). The D.C. Circuit explained that the aliens in these circumstances could not avail themselves of any rights created by the Constitution or the laws of the United States, even though they were not "enemy aliens" as defined by the most relevant Supreme Court precedent, *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See Al Odah*, 321 F.3d at 1140–41. *But see* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (concluding that there is jurisdiction over the habeas petition of Gherebi, an alien detained in Guantánamo).

346. 18 U.S.C. § 4001(a) (2000). The Fourth Circuit read this provision as likely repealing the Emergency Detention Act, which authorized detention of individuals inside the United States "deemed likely to engage in espionage or sabotage" during "internal security emergencies." *Hamdi*, 316 F.3d at 468 (citing H.R. REP. NO. 92-116, at 2 (Apr. 6, 1971)).

347. *Hamdi*, 316 F.3d at 459 (quoting Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001)). In *Padilla*, the district court similarly found authorization for Padilla's detention from this joint resolution. *See Padilla*, 233 F. Supp. 2d at 590.

348. *Hamdi*, 316 F.3d at 467 (quoting 10 U.S.C. § 956(5) (2002)).

349. *Id.*

honest and accurate reading of actual congressional authorization that was given. A recognition of authorization amounts to a recognition of responsibility. If Congress authorized this detention, then Congress is responsible for those constitutional violations that result from such detention. Further, Congress can choose to remove its authorization and is put on notice by *Hamdi* to do so if this is not what it intended. On the other hand, *Hamdi* may only be the first step in a two-step dance. It could be the analogue of *Hirabayashi* and *Korematsu*, in which cases the Supreme Court found authorization by reading between the lines of unclear prose only to switch interpretive lenses in *Endo* to become blind to congressional authorization of the WRA internment camps. In the harder cases to come, the challenge is to see whether the Judiciary tries the second step of this dance.

## CONCLUSION

The Judiciary aided and abetted the internment of Japanese Americans in disturbingly clever ways. It did so not only in terms of substance, by agreeing with a racial profiling justification based on faint evidence, but also in terms of procedure—by delaying, framing, segmenting, and not deciding what was centrally at issue. The Judiciary made certain that the internment would not be interfered with, that its own hands would not get dirty, that the coordinate federal branches would be absolved of any wrongdoing, and that a convenient fall guy would be found.

By the 1980s, we were ready to "fess up" to the sins of our past and to apologize, or at least account for what we did. But not the Judiciary. In fact, it effected an exquisite denial. In the same act that vacated the stigmatic convictions of the individual petitioners, the Judiciary absolved itself of any wrongdoing four decades earlier.

I am not suggesting some vast conspiracy here, stretching through the generations. Racism does not work in such simplistic ways. No doubt the Ninth Circuit thought it was crafting a win-win scenario: granting full relief while not making the wrong kind of waves. But their denial of prejudice was a win-lose proposition, with the loss of truth risking substantial consequences in our current war, where sneak attacks, sleeper cells, and racial profiling will resurface with a bloody vengeance.

There was a moment to write truth into law. There was a moment to acknowledge honestly a tragic mistake. There was a moment to show that such opinions can and should be written. That moment was lost.

Those who see the Judiciary as a fundamentally political, results-driven institution will have found this entire argument labored, stating only the obvious.

But I see the Judiciary with less jaundiced eyes and implicitly with the hope that it can act in accordance with its self-proclaimed aspirations. To do so, however, requires all of us to hold up a mirror that confronts the Judiciary, to force it to see what it has heretofore denied: its prejudice.

# APPENDIX
# COULD THE NINTH CIRCUIT IN THE *HIRABAYASHI* CORAM *NOBIS* CASE HAVE DONE OTHERWISE?

## A. Options Matrix

For some, my critique of the Ninth Circuit in the *Hirabayashi coram nobis* case will be unreasonable unless I can explain how it could have constructively done otherwise. This requires a systematic listing of legal options, their consequences, and their feasibility. A simple matrix captures these dimensions:

TABLE 1
SIMPLE PREJUDICE MATRIX

| | LEGAL HOLDING | | CONSEQUENCE | |
|---|---|---|---|---|
| Option | Prejudice required? | Prejudice found? | Conviction vacated? | Supreme Court responsibility? |
| 1 | Yes | Yes | Yes | No |
| 2 | Yes | No | No | Yes |
| 3 | No | Yes (dicta) | Yes | No (dicta) |
| 4 | No | No (dicta) | Yes | Yes (dicta) |

The first column of Table 1 asks whether prejudice is required as a doctrinal matter.[350] The second column asks whether "but for" prejudice is found as a matter of fact. If prejudice is not doctrinally required, as in options 3 and 4, any commentary about whether prejudice in fact existed is dicta. The third column identifies the consequence for the individual petitioner, no small variable to consider.[351] The final column indicates whether the Supreme Court is forced to take institutional responsibility for its wartime actions. Any finding of legal

350. To produce a comprehensive list, I am ignoring for the moment what precedent might have required when the cases were decided.

351. I am supposing that a gross miscarriage of justice has easily been demonstrated. One could argue that the very fact that the Supreme Court in the 1940s would have done exactly the same thing, even had it been provided the suppressed evidence, suggests that there was no gross miscarriage of justice. But this view mistakenly collapses the "prejudice" requirement into the "miscarriage of justice" requirement. This line of argument does, however, raise an interesting question whether any "miscarriage of justice" should be identified according to 1940s sensibilities or 1980s sensibilities. For my argument, nothing turns on the answer to this question because suppression of clearly exculpatory evidence would count as miscarriage in either decade.

prejudice—that the suppressed evidence caused the results in the wartime cases—is, as I have argued, a denial of institutional responsibility.

Do any of the *coram nobis* opinions map cleanly to any of these four options? Only Judge Voorhees' opinion in *Hirabayashi* does. His view on evacuation represents option 1; his view on curfew represents option 2. The other opinions—Judge Patel's in *Korematsu* and the Ninth Circuit's in *Hirabayashi*—do not map cleanly to the other options because, as we have studied, courts often leave matters undecided or ambiguous. This requires us to complicate the matrix by adding the possibility of "maybe" to the first two columns:

TABLE 2
AMBIGUOUS PREJUDICE MATRIX

| | LEGAL HOLDING | | CONSEQUENCE | |
|---|---|---|---|---|
| Option | Prejudice required? | Prejudice found? | Conviction vacated? | Supreme Court responsibility? |
| 1 | Yes | Yes | Yes | No |
| 2 | Yes | No | No | Yes |
| A | *Yes* | *Maybe* | *Not an option* | |
| 3 | No | Yes (dicta) | Yes | No (dicta) |
| 4 | No | No (dicta) | Yes | Yes (dicta) |
| B | *No* | *Maybe (dicta)* | *Yes* | *Partial (dicta)* |
| C | *Maybe* | *Yes* | *Yes* | *No* |
| D | *Maybe* | *No* | *Not an option* | |
| E | *Maybe* | *Maybe* | *Not an option* | |

Not every option created by adding "maybe" to the permutations generates a sensible option. The new option A, for instance, would represent bizarre judging to hold that prejudice is in fact required only to refuse to answer whether prejudice existed.[352] Also, option *D* is not sensible: What is the point of deciding that prejudice does not exist if we do not know whether it matters?[353] Finally, option E does not decide anything. But we do see two new possible options *B* and C. Judge Patel in the *Korematsu coram nobis* case elected the former; the Ninth Circuit in the *Hirabayashi coram nobis* case chose the latter. With the appropriate opinions mapped to each of the options, we have finally:

352. To be careful, this could be an option leading to a remand for new or additional factual findings by the district court.

353. It is quite another thing to decide that we do not know whether prejudice is necessary, but since we have oodles of prejudice, we need not fret. This is option C.

TABLE 3
ACTUAL OPINIONS

| | LEGAL HOLDING | | CONSEQUENCE | |
|---|---|---|---|---|
| Option | Prejudice required? | Prejudice found? | Conviction vacated? | Supreme Court responsibility? |
| 1. *Hirabayashi* district court, evacuation | Yes | Yes | Yes | No |
| 2. *Hirabayashi* district court, curfew | Yes | No | No | Yes |
| B. *Korematsu* district court | No | Maybe (dicta) | Yes | Partial (dicta) |
| C. *Hirabayashi* Ninth Circuit | Maybe | Yes | Yes | No |

Each of the options taken by the various courts had different consequences, in terms of individual relief and institutional responsibility. My core criticism is that the Ninth Circuit *Hirabayashi* opinion (option C) absolved the wartime Court of responsibility. By contrast, option 2 and partially option B place responsibility on the Court. Of course, these alternatives suffer from their own problems. For instance, option 2 would deny relief to Hirabayashi, something that well-meaning judges might have found quite difficult to do. Option B drifts somewhat away from minimalist judging by making (or at least suggesting) factual findings on prejudice notwithstanding its irrelevance as a matter of law.

Before evaluating further the relative merits of these options, we should answer a question of law: Was it feasible to hold that prejudice was not necessary? It would be silly, for instance, to praise option B if Judge Patel simply got the law wrong and prejudice was indeed a necessary element in the *coram nobis* writ.

## B. The Prejudice Precedent

The most important Supreme Court case in the modern history of *coram nobis* in the federal courts is *United States v. Morgan*.[354] There, the Court held that while *coram nobis* was no longer available in civil cases,[355] it remained

354. 346 U.S. 502 (1954).
355. *See id.* at 505 n.4 (citing FED. R. CIV. P. 60(b)).

available in criminal ones.[356] But *Morgan* said little about the specific standard that must be satisfied before the petition would be granted. The Court simply identified "errors . . . of the most fundamental character . . . such as [those that] render[ ] the proceeding itself irregular and invalid,"[357] citing a 1914 Supreme Court opinion, *United States v. Mayer*.[358] This formulation remains the standing rule today and has not been further clarified by the Court.

The majority in *Morgan* nowhere mentioned the issue of prejudice. However, the dissent, which rejected the idea that the *coram nobis* writ even survived in federal court, did argue that prejudice was necessary:

> The writ issued at common law to correct errors of fact unknown to the court at the time of the judgment, without fault of the defendant, which, if known, *would probably have prevented the judgment*. The probability of a different result if the facts had been known is a prime requisite to the success of the writ.[359]

As authority, the dissent cited *Mayer* and a Ninth Circuit opinion, *Robinson v. Johnston*.[360] But *Mayer* provides no support for the claim regarding prejudice; the closest language simply describes how the writ was available when errors in fact "were material to the validity and regularity of the legal proceeding itself."[361] In contrast, *Robinson* specifically states that prejudice is a requirement: "The general rule in regard to the writ of error coram nobis is that its purpose is to bring to the attention of the court some fact which was unknown to the court which, if known, would have resulted in a different judgment."[362] As support, the court of appeals string cited various state cases holding to this effect.[363] However, *Robinson*'s comments on prejudice are dicta since the court decided the case on res judicata grounds[364]—grounds that the Supreme Court

356. *See id.* at 506 n.6 (citing All Writs Act, 28 U.S.C. § 1651(a)) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.").

357. *Id.* at 509 n.15.

358. 235 U.S. 55 (1914). In *Mayer*, the Court held that "[t]his jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid." *Id.* at 69.

359. *Morgan*, 346 U.S. at 516 (Minton, J., dissenting) (emphasis added).

360. 118 F.2d 998 (9th Cir. 1941), *vacated by* 316 U.S. 649 (1942).

361. *Mayer*, 235 U.S. at 68.

362. *Robinson*, 118 F.2d at 1001 (citing Smith v. State, 140 S.W.2d 675 (Ark. 1940); People v. McVicker, 99 P.2d 1110 (Cal. Ct. App. 1940); McNulty v. White, 248 Ill. App. 572 (Ill. App. 1928); Hawks v. State, 157 A. 900 (Md. 1932); State v. Swindall, 241 P. 456 (Okla. Crim. App. 1925)).

363. *See supra* note 362.

364. At issue was whether an order denying a motion to withdraw a guilty plea was res judicata on a subsequent habeas corpus petition. The jurisdiction of the initial order was challenged by petitioner because the motion had been filed after the time allotted by rule. The *Robinson* court,

later reversed.[365] In sum, at the time of the internment cases, there was no clear Supreme Court authority requiring prejudice. Only a dissent suggested that prejudice was necessary, and that dissent's best authority was dicta from a Ninth Circuit opinion reversed on other grounds.

What about other Ninth Circuit precedent? Just a few years before the *coram nobis* cases came *United States v. Taylor*.[366] At issue in *Taylor* were the circumstances in which a district court should grant a petitioner a *coram nobis* hearing. Taylor, the criminal defendant, claimed that the prosecutor had committed a fraud on the court by asserting that certain critical pieces of evidence had been subpoenaed when in fact they had not.[367] It was this prosecutorial claim that allowed mere copies of critical documents to be admitted under the best evidence rule. In explicating *coram nobis*, the *Taylor* court restated the general standard of *Morgan*.[368] It then situated the writ as an example of the more general principle that prosecutorial misconduct can warrant a new trial "especially when the taint in the proceedings seriously prejudices the accused."[369] After citing various examples of misconduct, such as knowingly using perjured testimony, the court clarified that prejudice was not always necessary:

> When a conviction is secured by methods that offend elementary standards of justice, the defendant may invoke the Fourteenth Amendment guarantee of a fundamentally fair trial. See Irvine v. California. *Moreover, this principle is not strictly limited to those situations in which the defendant has suffered arguable prejudice*; the principle designed to maintain also public confidence in the administration of justice.[370]

This is the critical passage cited by Judge Patel in *Korematsu* to conclude that prejudice was not required and that therefore Korematsu's conviction could be vacated without a finding that the Supreme Court would have done otherwise.[371] To summarize Ninth Circuit precedent at the time, the recently

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however, likened that motion to a writ of *coram nobis*, which is not constrained by such timing rules. Accordingly, the original order was jurisdictionally appropriate and could have a preclusive effect, which it was found to have.

365. The Supreme Court vacated this opinion on the authority of its recently decided *Waley v. Johnston*, 316 U.S. 101 (1942), which made clear that res judicata would not apply to such habeas corpus contexts. *See* United States *ex rel* Robinson v. Johnson, 316 U.S. 649 (1942) (per curiam).

366. 648 F.2d 565 (9th Cir. 1981).

367. *Id.* at 571 ("Taylor's claim gives rise to the somber prospect that the Government committed a fraud on the court which ultimately worked a great prejudice to Taylor's case.").

368. *Id.* at 571 n.14.

369. *Id.*

370. *Id.* at 571 (emphasis added).

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

decided *Taylor* stated that prejudice was not always required,[372] whereas *Robinson*, decided four decades earlier, stated in dicta that prejudice was required.

Finally, what about persuasive authority from the other circuits or state supreme courts? The precedents at the time of the *coram nobis* decisions weighed in favor of requiring prejudice. Four circuits had ruled that prejudice is a requirement;[373] no circuit had held explicitly that prejudice is not required. Similarly, at least twenty-two states had specifically held that prejudice is a requirement;[374] again, no state court had held explicitly that prejudice is not required.

What emerges from this doctrinal survey is that the question of prejudice was—in the end—open. A competent judge could write the opinion either way—requiring prejudice as a matter of law or not requiring it, at least under extraordinary circumstances such as this. Given this backdrop, Judge Patel in the *Korematsu coram nobis* case read *Taylor* for the proposition that prejudice is not necessary. By contrast, Judge Voorhees in the *Hirabayashi coram nobis* case saw things differently. He simply cited *Taylor* along with *Morgan* for the substantive proposition that fundamental error is necessary. Then, in the very next sentence, without any discussion of Judge Patel's contrary views, he cited a

372. The Ninth Circuit held that Taylor's claim of government fraud, if proven, would warrant issuing the writ. Moreover, Taylor had alleged enough in his motion to warrant a hearing on the matter. To be clear, the Ninth Circuit did not decide substantively whether the writ should issue; it merely held procedurally that a hearing was due. The court later in the opinion goes out of its way to mention that: "[W]e withhold judgment as to the extent of prosecutorial malfeasance or prejudice to the appellant necessary to warrant relief. The District Court will be able to pass on these issues, if they in fact exist, with the assistance of the complete factual record not presently before this Court." *Taylor*, 648 F.2d at 574 n.28.

373. *See* United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981); Bateman v. United States, 277 F.2d 65, 68 (8th Cir. 1960); Farnsworth v. United States, 198 F.2d 600, 601 (D.C. Cir. 1952); Allen v. United States, 162 F.2d 193, 194 (6th Cir. 1947). In recent years, the Tenth Circuit has also held this way, though this was after the 1980s cases. *See, e.g.*, United States v. Lowe, 6 Fed. Appx. 832, 833 n.1 (10th Cir. 2001); *cf.* FED. R. CIV. P. 60(b)(2) (reopening judgments on the basis of newly discovered evidence usually requires a showing that the court would have reached a different result).

374. The twenty-two states were: Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Minnesota, Missouri, Nebraska, New York, Oklahoma, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, and Wyoming. Smith v. State, 16 So. 2d 315 (Ala. 1944); Penn v. State, 670 S.W.2d 426 (Ark. 1984); People v. Tuthill, 198 P.2d 505 (Cal. 1948); State v. Woods, 400 So. 2d 456 (Fla. 1981); Petree v. State, 194 S.E.2d 267 (Ga. App. 1972); People v. Ogbin, 13 N.E.2d 162 (Ill. 1938); Davis v. State, 161 N.E. 375 (Ind. 1928); Anderson v. Buchanan, 168 S.W. 2d 48 (Ky. App. 1943); Keane v. State, 166 A. 410 (Md. 1933); State v. Beckerm 115 N.W.2d 920 (Minn. 1962); Missouri, State v. Harrison, 276 S.W.2d 222 (Mo. 1955); Simants v. State, 277 N.W.2d 217 (Neb. 1979); People v. Whitman, 56 N.Y.S.2d 890 (N.Y. Gen. Sess. 1945); Hendricks v. State, 297 P.2d 576 (Okla. Crim. App. 1956); Commonwealth v. Mangini, 386 A.2d 482 (Pa. 1978); Andrews v. Langlois, 194 A.2d 674 (R.I. 1963); Dobie v. Commonwealth, 96 S.E.2d 747 (Va. 1957); State v. Domanski, 196 P.2d 344 (Wash. 1948); Jessen v. State, 290 N.W.2d 685 (Wis. 1980); Alexander v. State, 123 P. 68 (Wyo. 1912).

Seventh Circuit case, *United States v. Dellinger*,[375] for the opposite proposition that prejudice is necessary.[376] As already discussed,[377] the Ninth Circuit in Hirabayashi's appeal avoided settling the prejudice issue, and simply concluded that regardless of its necessity, prejudice in fact existed. Of course, it is this path that led to the supreme denial of accountability on the part of the wartime Court.

The Ninth Circuit could have done otherwise. Judge Voorhees' opinion (option 2) regarding curfew may have been too bitter to affirm: After all, who wants to go down in history as having denied Hirabayashi his relief, especially after Korematsu had been granted his?[378] But the law did not inexorably bind Hirabayashi's relief to wartime Court absolution. Two other options were available that would have granted individual relief but would not have so clearly denied institutional responsibility. Judge Patel's opinion (option *B*) is one such example. By finding that prejudice was not legally required, she did not have to produce any historical whitewash about how the "smoking gun" evidence would have changed the Court's decisions. Yes, Judge Patel did suggest that the evidence might have made a difference, but there is no authoritative, Article III, nondicta pronouncement absolving the wartime Court.

Even better, a variation of option 4—which no court took—was available. The Ninth Circuit could have pronounced the following rule of law: Actual prejudice is normally required to issue the writ of *coram nobis*; however, in cases of extraordinary manifest injustice, the writ will nonetheless issue. Certainly this holding would have been consistent with Hirabayashi's legal arguments. *Taylor* could have been cited as clear authority, with the older *Robinson* case marginalized as dicta. Applying this rule of law, the Ninth Circuit could have detailed the case why the suppressed evidence would have had (regrettably) no impact on the 1940s Supreme Court. This would have placed full responsibility on the Court for what it did. However, this would not have meant that the individual petitioner would receive no succor. The court could have explained

375. 657 F.2d at 140.

376. Hirabayashi v. United States, 627 F. Supp. 1455, 1455 (W.D. Wash. 1986). As pointed out by Hirabayashi in his brief, *Dellinger* notes a prejudice requirement and cites an Eighth Circuit case, *Bateman v. United States*, which in turn cites the dissenting opinion in *Morgan*. *See* Appellant's Opening Brief at 25, Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (No. 86-3853).

377. *See supra* notes 165–167. That said, if one believed that the Supreme Court should have been doing the act of expiation, a denial of relief could have prompted certiorari as well as a definitive pronouncement by the institution most responsible. Given the discretionary nature of certiorari review, this would have been a risky strategy.

378. Compare Judge Patel's description of the case. *See* Korematsu v. United States, 584 F. Supp. 1406, 1413 (N.D. Cal. 1984) ("Fortunately, there are few instances in our judicial history when courts have been called upon to undo such profound and publicly acknowledged injustice. Such extraordinary instances require extraordinary relief, and the court is not without power to redress its own errors.").

that nevertheless, in circumstances as unique as this, the writ of *coram nobis* can and should still issue.

The line between dicta and holding is always fuzzier than we suppose. But in this particular variation, arguably nothing is dicta (at least on a narrow reading of that term). Still, I recognize that that this kind of opinion may smell funny. After all, before actually writing the opinion, the judge would have already come to the conclusion that no showing of prejudice is required in an extreme case such as this. If so, why provide the strictly unnecessary discussion of whether the Supreme Court would have done otherwise? Arguably, this option goes too far in the direction of maximalist judging. Thankfully, my goal here is less to identify the single best option (option *B*, variation on option 4, or some other possibility) and more to demonstrate that the Ninth Circuit took the worst option possible. As for the question presented—could the court have done otherwise—the answer is clearly "yes."

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