William & Mary Law Review Online

Volume *2022-2023* Article 2

1-31-2023

Supreme Court Cases that Persist: The Japanese American Cases

Louis Fisher

William & Mary
Law Review Online

VOLUME 64 NO. 2, 2023

SUPREME COURT ERRORS THAT PERSIST: THE JAPANESE AMERICAN CASES

LOUIS FISHER*

TABLE OF CONTENTS

* Louis Fisher is a visiting scholar at the William & Mary Law School. From 1970 to 2010, he served at the Library of Congress as Senior Specialist in Separation of Powers at the Congressional Research Service and Specialist in Constitutional Law at the Law Library of Congress. He has testified before congressional committees more than fifty times on a range of constitutional issues. Author of thirty-two books and more than 600 articles. Many of his articles and congressional testimony are posted on his personal webpage at http://www.loufisher.org.

INTRODUCTION

As with any human institution, the United States Supreme Court makes errors that, over a period of time, need correction. By focusing on the Japanese American cases, *Hirabayashi* (1943) and *Korematsu* (1944), the record is particularly remarkable. Over many decades the Supreme Court had abundant evidence that the two decisions were defective.[1] It was not until June 26, 2018, in *Trump v. Hawaii*, that the Supreme Court announced that "*Korematsu* was gravely wrong the day it was decided."[2] If *Korematsu* was that deficient, why did it take the Court seventy-four years to admit it? Moreover, what about *Hirabayashi*? The decision in 2018 did not address the case.[3] Is *Hirabayashi* still good law?

Federal judges, legal scholars, and reporters often advance the position that the Supreme Court is the final arbiter of the Constitution's meaning.[4] In 1953, Justice Robert Jackson promoted the doctrine of judicial finality with this statement: "We are not final because we are infallible, but we are infallible only because we are final."[5] Perhaps a clever and witty turn of phrase, but at no time has the Supreme Court ever been either final or infallible. That fact should have been obvious to Jackson.

In 1940, the Court upheld a compulsory flag-salute with a majority ruling of 8-1.[6] Too lopsided a majority to be reversed? Not true.[7] The decision was subject to such public and scholarly criticism that three Justices in the majority announced, two years later, that the opinion was wrongly decided.[8] The majority on that issue was now

1. *See generally* Proclamation No. 4417, 41 Fed. Reg. 35 (Feb. 20, 1976) (proclaiming the termination of Executive Order No. 9066 which allowed for Japanese internment); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (critiquing the Supreme Court's approach to Japanese internment); Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175 (1945) (comparing the Court's treatment of *Korematsu* with *Ex parte Mitsuye Endo*).

2. 138 S. Ct. 2392, 2423 (2018).

3. *See generally id.*

4. *See, e.g.*, LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION xi (2019).

5. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

6. Minersville School District v. Gobitis, 310 U.S. 586, 600-01 (1940).

7. *See* Jones v. Opelika, 316 U.S. 584, 611 (1942).

8. *See id.* at 623-24 (Black, Douglas & Murphy, JJ., dissenting).

5-4.[9] Two Justices in the majority retired and their replacements joined the four dissenting Justices to produce a 6-3 decision in 1943 to reverse the 1940 ruling.[10] Who wrote for the Court in 1943? It happened to be Justice Robert Jackson.[11]

The record demonstrates that constitutional law is part of a broad dialogue that includes all three branches, fifty states, scholars, and the general public.[12] Corrections are often needed to take account of changes in public attitudes. In a system of self-government, these shifts can generate new constitutional values.[13] Alexander Bickel noted in 1962 that the process of developing constitutional principles in a democratic society "is evolved conversationally not perfected unilaterally."[14] Supreme Court decisions lack finality in part because human institutions, including the judiciary, are prone to miscalculation and error.[15] Accordingly, such rulings are often challenged and reversed.[16]

After being nominated to the Supreme Court in 1993, Justice Ruth Bader Ginsburg offered the following view to the Senate Judiciary Committee: "Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the president, the states, and the people."[17] Constant realization of a more perfect Union, the Constitution's aspiration, requires the widest, broadest, deepest participation on matters of government and government policy.[18] After her confirmation, Ginsburg continued demonstrating a keen understanding of the process of constitutional interpretation that involves both judicial and non-judicial participants.[19]

---

9. *See id.* at 611 (majority opinion).

10. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1940).

11. *See id.* at 625. For details on litigation affecting compulsory flag salutes, see FISHER, *supra* note 4, at 149-55.

12. *See Barnette*, 319 U.S. at 631-32.

13. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 244 (2d ed. 1986).

14. *Id.*

15. *See id.*

16. *See id.*

17. RUTH BADER GINSBURG, MY OWN WORDS 183 (2016).

18. *Id.*

19. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 648 (2007) (Ginsburg, J., dissenting).

A clear example of Justice Ginsburg's judicial philosophy is exemplified by her role in the 2007 Supreme Court decision involving a pay discrimination case brought by Lilly Ledbetter.[20] The Court was divided 5-4 in deciding that Ledbetter had untimely filed claims against her employer, Goodyear Tire.[21] Ledbetter had worked at Goodyear from 1979 to 1998 before becoming aware that she was paid substantially less than men doing the same kind of work.[22] In July 1998, Ledbetter filed a formal charge of sex discrimination under Title VII and a claim under the Equal Pay Act of 1963.[23] A federal district court dismissed the latter claim but allowed the Title VII issue to proceed to trial.[24] She prevailed and won more than $3.8 million in back pay and damages.[25] On appeal, however, the Eleventh Circuit held that she had failed to timely file charges.[26] The Supreme Court granted certiorari to decide the matter.[27]

Writing for a Supreme Court divided 5-4, Justice Alito agreed with the Eleventh Circuit.[28] Final word? No. To Alito, "current effects alone [could not] breathe life into prior, uncharged discrimination."[29] In his judgment, Ledbetter should have filed her complaint within 180 days "after each allegedly discriminatory pay decision was made and communicated to her."[30] Nevertheless, Alito's argument was undermined by a central fact: Goodyear never informed Ledbetter about the discriminatory pay decisions at issue.[31] Only two decades later did Ledbetter learn that she had been paid less than men for doing the same work.[32] She had no capacity to file a pay discrimination claim because she had no knowledge of the company's policy.[33]

---

20. *See id.*
21. *See id.* at 642-43 (majority opinion).
22. *See id.* at 621.
23. *Id.* at 621-22.
24. *Id.* at 622.
25. *Id.*
26. *Id.* at 620-21.
27. *Id.*
28. *Id.*
29. *Id.* at 628.
30. *Id.*
31. *Id.* at 645 (Ginsburg, J., dissenting).
32. *Id.*
33. *Id.*

In a dissent joined by Justices Stevens, Souter, and Breyer, Ginsburg explained the disparity between Ledbetter's monthly salary as area manager and those of her male counterparts for the end of 1997.[34] Male area managers had monthly salaries ranging from $4,286 to $5,236;[35] whereas, Ledbetter's monthly salary was only $3,727.[36] Recalling the Civil Rights Act of 1991 that overturned in whole or in part nine Supreme Court decisions, Ginsburg remarked: "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[37] Through her analysis, Ginsburg underscored that decisions by the Supreme Court on constitutional matters do not necessarily provide the final word. The elected branches had an opportunity to reverse the Court.

The Court's decision in Ledbetter's case was released on May 29, 2007.[38] In late July, the House of Representatives debated the Lilly Ledbetter Fair Pay Act to reverse the Court's decision.[39] As noted by Representative Jim McGovern of Massachusetts, Congress had developed a bipartisan solution by passing Title VII of the Civil Rights Act of 1964, but, to that legislative purpose, the Supreme Court had "in one fell swoop, completely, outrageously undermined."[40] Voting 225 to 199, the House passed the Ledbetter bill.[41]

Initially the Senate filibustered the bill, and no further action was taken until early 2009 when President-elect Barack Obama was about to occupy the White House. The House then passed the Ledbetter bill, voting 247 to 171.[42] The Senate debated the bill on January 22, after President Obama had taken office, and passed the bill, 61 to 36.[43] The House voted 250 to 177 to support the Senate bill.[44] As enacted, the bill provides that an unlawful employment practice occurs when a discriminatory compensation decision is

34. *Id.* at 643.
35. *Id.*
36. *Id.*
37. *Id.* at 661.
38. *Id.* at 618 (majority opinion).
39. 153 CONG. REC. 21388 (2007).
40. *Id.* at 21389.
41. *Id.* at 21929.
42. 155 CONG. REC. 458-59 (2009).
43. *Id.* at 1400-01.
44. *Id.* at 1671.

adopted.[45] Nothing in the statute limits an employee's right to challenge an unlawful employment practice.[46] Discriminatory actions by employers carry forth in each paycheck, permitting women to file their complaint in a timely manner to protect their constitutional rights.[47] The final word here? A statute.

I. JAPANESE AMERICAN CASES

On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, leading to a military curfew that covered all persons of Japanese descent within a designated military area.[48] They were required to be "within their place of residence between the hours of 8 P.M. and 6 A.M."[49] A month later, Congress passed legislation to ratify the executive order.[50]

Gordon Hirabayashi, a U.S. citizen of Japanese descent, was prosecuted in federal district court for violating the curfew order.[51] In *Hirabayashi v. United States* (1943), a unanimous Supreme Court upheld the government's policy.[52] The Court concluded that the decision by General John L. DeWitt, who established the curfew, "involved the exercise of his informed judgment."[53] However, DeWitt's judgment was not professionally informed. He believed that all Japanese Americans, by race alone, were disloyal.[54] Judicial deference to military judgment might be justified in some cases but not deference to pure racism.

Roosevelt's executive order resulted in the transfer of Americans of Japanese descent to what were euphemistically called "relocation centers," imprisoned solely for reasons of race.[55] Divided 6-3 in

45. *Id.*
46. *Id.*
47. For further details on this issue, see FISHER, *supra* note 4, at 73-78.
48. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).
49. Hirabayashi v. United States, 320 U.S. 81, 81 (1943).
50. Act of Mar. 21, 1942, 77 Cong. Ch. 191, 56 Stat. 173 (1942).
51. *Hirabayashi*, 320 U.S. at 83.
52. *Id.* at 81-82.
53. *Id.* at 103.
54. *See* Hirabayashi v. United States, 627 F. Supp. 1445, 1452-53 (W.D. Wash. 1986) ("There isn't such thing as a loyal Japanese, and it is just impossible to determine their loyalty by investigation." (quoting telephone conversations between General Dewitt and Major Gullion)).
55. *See* Korematsu v. United States, 323 U.S. 214, 214, 221 (1944).

Korematsu v. United States (1944), the Court supported detention camps in various parts of the country.[56] Writing for the majority, Justice Black offered this judgment: "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."[57] What were the "principles" in *Hirabayashi*? Answer: In matters of national security the Supreme Court should defer to whatever the elected branches decide is best.[58] What counted were, however erroneous, political judgments, not constitutional principles or values.[59]

In his dissent in *Korematsu*, Justice Murphy rejected the contention that the exclusion order resulted from a "bona fide military necessity."[60] Rather, Dewitt's report, which described all individuals of Japanese descent as "subversives" who belonged to "an enemy race," provided ample evidence suggesting that the order stemmed from an "erroneous assumption of racial guilt."[61] Murphy refused to accept this "legalization of racism."[62] In another dissent, Justice Jackson described the administration's position as "an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents to whom he had no choice, and belongs to a race from which there is no way to resign."[63]

Although Jackson chose to dissent, he provided grounds to support the majority's position. He said that "the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order."[64] No evidence? The Court had "no choice"? With that reasoning, why did Justice Jackson not join the majority? A Supreme

56. *See id.* at 214.
57. *Id.* at 217-18.
58. *See Hirabayashi*, 320 U.S. at 98-99.
59. *See id.*
60. *Korematsu*, 323 U.S. at 235-36 (Murphy, J., dissenting).
61. *Id.* at 235-36.
62. *Id.* at 242.
63. *Id.* at 243 (Jackson, J., dissenting).
64. *Id.* at 245.

Court Justice is not compelled to defer to a general's prejudicial belief about race.

In the same year as *Korematsu*, the Supreme Court decided the case of Mitsuye Endo, an American citizen of Japanese ancestry. Endo filed a petition for writ of habeas corpus, requesting release from imprisonment.[65] Shortly thereafter, Endo was "relocated" to Tule Lake Center and later transferred to Utah Center.[66] A unanimous Court noted that the Justice Department and the War Relocation Authority conceded she was "a loyal and law-abiding citizen," thereby rejecting the claim that all Japanese Americans are, by race, disloyal.[67] The Court agreed that a citizen "who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or saboteur."[68] Accepting Endo as a citizen with constitutional rights directly challenged the reasoning in *Hirabayashi* and *Korematsu*; nonetheless, those decisions remained in effect.

II. CHALLENGES THAT URGED JUDICIAL RETHINKING

In *Hirabayashi* and *Korematsu*, the Supreme Court decided to accept a variety of executive claims and assertions, many of which were later found to be erroneous. In an article published in 1945, Eugene Rostow was highly critical of both decisions. Treatment of Japanese Americans had been "hasty, unnecessary, and mistaken," resulting in unjustified actions that produced "both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind."[69] The Court "solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society."[70] To Rostow, it was "hard to imagine what

65. *Ex parte* Mitsuye Endo, 323 U.S. 283, 284-85 (1944).
66. *Id.*
67. *Id.* at 294.
68. *Id.* at 302.
69. Rostow, *supra* note 1, at 489.
70. *Id.* at 504.

courts are for if not to protect people against unconstitutional arrest."[71]

An article by Nanette Dembitz in 1945 objected to the Court's deference to military controls over civilians. As she pointed out, the position of General DeWitt regarding Japanese Americans meant that "no person of such ancestry could be trusted not to aid the enemy."[72] In her judgment, the decisions in *Hirabayashi* and *Korematsu* marked "a departure from opinions reviewing military judgments with respect to more customary subjects for action by the military, including even judgments made in the course of actual deployments against enemy troops."[73] She closed by pointing out that judicial review of military judgment in *Korematsu* "does not represent a fulfillment of judicial responsibility."[74] Judicial acceptance of military judgment in that case "will stand as an insidious precedent, unless corrected, for the emergencies of peace as well as of war."[75]

In 1962, an article written by Chief Justice Earl Warren offered several intriguing observations about the quality of *Hirabayashi* and *Korematsu* and the need to place limits on military power in a constitutional system. Although the military establishment is "a necessary organ of government," the reach of its power "must be carefully limited lest the delicate balance between freedom and order be upset."[76] It is necessary to consider "the corrosive effect upon liberty of exaggerated military power."[77] He then added this thought: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is."[78] This is quite a bit of judicial double-talk. Did he imply that the rulings in *Hirabayashi* and *Korematsu* were deficient and should be overruled? He decided not to take that step but certainly added a strong question mark over both decisions.

---

71. *Id.* at 511.
72. Dembitz, *supra* note 1, at 192.
73. *Id.* at 205.
74. *Id.* at 239.
75. *Id.*
76. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182 (1962).
77. *Id.*
78. *Id.* at 192-93.

On February 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans during World War II that resulted in the "uprooting of loyal Americans."[79] He spoke with great clarity and force: "We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans."[80] He called upon the American people "to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated."[81] This is a clear message that repudiated President Roosevelt's actions and invited the Supreme Court to reconsider *Hirabayashi* and *Korematsu*. The Court chose not to do that.

In 1980, Congress passed legislation to establish a commission to gather facts, determine the wrong done by Roosevelt's Executive Order 9066, and "recommend appropriate remedies."[82] In signing this bill, President Jimmy Carter explained that the Commission would "look into one of the disappointing and sometimes embarrassing occurrences in the history of our Nation."[83] He pointed out that although about 120,000 Japanese Americans were incarcerated in camps, that same policy was not directed against German Americans or Italian Americans.[84] Stating that the goal of the Commission would be to "expose clearly" what was done to "many loyal American citizens of Japanese descent," he expressed the view that no one "would doubt that injustices were done."[85]

The Commission's report, called "Personal Justice Denied," was issued in December 1982.[86] It began by stating that President Roosevelt's order "was not justified by military necessity" nor were the decisions that followed from it, including detention, "driven by

79. Proclamation No. 4417, 41 Fed. Reg. 7, 7741 (Feb. 20, 1976).

80. *Id.*

81. *Id.*

82. Pub. L. No. 96-317, 94 Stat. 964 (1980).

83. Commission on Wartime Relocation and Internment of Civilian Act, 1 PUB. PAPERS 1455 (July 31, 1980).

84. *Id.*

85. *Id.*

86. *See generally* Commission on Wartime Relocation and Internment of Citizens, Personal Justice Denied (1982).

analysis of military conditions."[87] Instead, the "causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership."[88] Furthermore, the report characterized the mistreatment as "[a] grave injustice ... to American citizens and resident aliens of Japanese ancestry."[89] The report explained that Chief Justice Warren, who—as Attorney General of California—had urged the evacuation of Japanese Americans, now stated: "I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens."[90] In the Commission's judgment, "the decision in *Korematsu* lies overruled in the court of history."[91] But the Supreme Court did not overrule that decision.

In 1988, Congress passed legislation to implement the recommendations of the Commission. The statute began by acknowledging "the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II."[92] It apologized "on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens."[93] Moreover, it provided for a public education fund to finance efforts to inform the public about the internments "so as to prevent the recurrence of any similar event."[94]

While Congress expressed clear resolve to condemn past injustices, President Reagan offered conflicting statements. Upon signing the bill, Reagan began by saying "it's not for us today to pass judgment upon those who may have made mistakes while engaged in that great struggle."[95] Reagan acknowledged that internment of Japanese Americans "was just that: a mistake."[96] In issuing its

87. *Id.* at 18.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 238.
92. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).
93. *Id.*
94. *Id.*
95. Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians, 2 PUB. PAPERS 1054 (Aug. 10, 1988) [hereinafter *Remarks on Signing the Bill*].
96. *Id.*

report, the Commission certainly passed judgment, and did not treat internment merely as a "mistake." In fact, it was an action by President Roosevelt that lacked military justification and promoted clear racial prejudice and a failure of political leadership. In his signing statement, Reagan did ultimately acknowledge that "we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law."[97] This was another opportunity for the Supreme Court to reconsider *Hirabayashi* and *Korematsu*, but no such action was taken.

III. NEW CHALLENGES IN THE LOWER COURTS

In the 1980s, Hirabayashi and Korematsu returned to court to demonstrate how newly discovered documents showed that executive officials had deceived federal courts and the general public.[98] At the time Korematsu's case was decided in 1944, Justice Department attorneys knew that a 618-page document designated "Final Report" by the War Department (prepared for General DeWitt) contained erroneous claims that Japanese Americans had been involved in espionage efforts.[99] However, the Federal Bureau of Investigation (FBI) and the Federal Communications Commission (FCC) rejected War Department assertions that some Japanese Americans had sent signals from shore to assist Japanese submarine attacks along the Pacific Coast.[100] With this evidence of executive branch officials deceiving the judiciary, Hirabayashi and Korematsu filed a writ of coram nobis, a procedure that enables courts to revisit judgments in light of new evidence that contradict earlier claims.[101] Hirabayashi and Korematsu charged the government with committing fraud against the judiciary.[102]

---

97. *Id.*

98. Louis Fisher, *How the Supreme Court Promotes Independent Presidential Power*, CATO J. (Fall 2019), https://www.cato.org/cato-journal/fall-2019/how-supreme-court-promotes-independent-presidential-power [https://perma.cc/2SHZ-TLRQ].

99. *Id.*

100. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 278-84 (1983).

101. *See* Hirabayashi v. United States, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986); Korematsu v. United States, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984).

102. *See* Hirabayashi v. United States, 828 F.2d 591, 605 (9th Cir. 1987); *Korematsu*, 584 F. Supp. 1410.

The executive branch had a professional obligation to advise the judiciary about false allegations by the government. A footnote, to be included in the Justice Department brief for *Korematsu*, should have identified errors included in the Final Report. However, the footnote was edited in a manner that courts would have been unaware that they had been misled and deceived by the executive branch.[103] In 1984, a federal district court stated that executive officials had "knowingly withheld information from the courts when they were considering the critical questions of military necessity in this case."[104] To the court, the record provided substantial evidence that the executive branch "deliberately omitted relevant information and provided misleading information in papers before the court."[105]

Given this new revelation of executive deception, the district court vacated Korematsu's conviction.[106] As to whether he represented some kind of threat to the United States, the court found no evidence to support that claim. At the time of his conviction, Korematsu "was loyal to the United States and had no dual allegiance to Japan."[107] He registered for the draft and was "willing to bear arms for the United States."[108] Although the executive branch was "not prepared to confess error," it moved to dismiss Korematsu's conviction.[109] Faced with those options, the court held that Korematsu was entitled to a writ of coram nobis to vacate his conviction because the executive branch had deliberately omitted relevant information.[110] To the district court, the Supreme Court's decision in *Korematsu* "is now recognized as having very limited application."[111] Given the false information supplied by the executive branch to the Supreme Court, why should it have any application at all?

Hirabayashi also filed a petition for writ of coram nobis, seeking to have his convictions reversed for failure to abide by President Roosevelt's curfew policy. His reason: the government "knowingly

103. IRONS, *supra* note 100, at 286-87.
104. *Korematsu*, 584 F. Supp. at 1417.
105. *Id.* at 1420.
106. *Id.*
107. *Id.* at 1409.
108. *Id.*
109. *Id.* at 1413.
110. *Id.* at 1420.
111. *Id.*

suppressed evidence favorable to him or presented evidence which it knew, or should have known, was false in order to secure those convictions or to defend them on appeal."[112] In an opinion issued on February 10, 1986, a federal district court focused on this false claim in the Final Report: "Because of the ties of race, the intense feeling of filial piety and the strong bonds of common tradition, culture and customs, [the Japanese] population presented a tightly-knit racial group."[113]

The Final Report claimed that while it was "believed that some were loyal, it was known that many were not."[114] A further assertion: "It was impossible to establish the degree of the loyal and the disloyal with any degree of safety."[115] The district court held that the decision by the executive branch to withhold evidence from the judiciary "was an error of the most fundamental character."[116] The court vacated Hirabayashi's conviction for failing to report.[117] However, it declined to vacate his conviction for violating the curfew order.[118] In response, the Ninth Circuit vacated both convictions.[119] The Justice Department chose not to appeal either case to the Supreme Court.[120]

By 1988, the Supreme Court had abundant evidence that its decisions in *Hirabayashi* and *Korematsu* had lost any credibility.[121] President Ford in 1976 apologized for the treatment of Japanese Americans.[122] The commission report issued to Congress in 1982 concluded that judicial rulings against Japanese Americans were supported by "race prejudice, war hysteria, and a failure of political leadership."[123] Legislation passed by Congress in 1988 supported the

112. Hirabayashi v. United States, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986).
113. *Id.* at 1449.
114. *Id.*
115. *Id.*
116. *Id.* at 1457.
117. *Id.*
118. *Id.* at 1457-58.
119. Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987).
120. *See infra* note 142 and accompanying text.
121. *See generally, e.g.*, *Hirabayashi*, 828 F.2d at 608; Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *Remarks on Signing the Bill*, *supra* note 95; Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).
122. *See Remarks on Signing the Bill*, *supra* note 95.
123. *See* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988). As the Commission documents, these actions were carried out without adequate security reasons and

Commission's findings.[124] That statute regarded the treatment of Japanese Americans as a "fundamental injustice" and issued a public apology.[125] Yet, the Supreme Court chose not to offer a public reevaluation or an apology for its rulings in *Hirabayashi* and *Korematsu*.

IV. CONTRIBUTIONS BY PETER IRONS

Deficiencies of Supreme Court decisions in the Japanese American cases were subject to rigorous analysis by Peter Irons, including in his 1983 book, *Justice at War*. Among other legal activities, Irons served as counsel to Fred Korematsu and Gordon Hirabayashi.[126] In conducting that research, he encountered a documentary record that revealed "a legal scandal without precedent in the history of American law. Never before has evidence emerged that shows a deliberate campaign to present tainted records to the Supreme Court."[127] In response to his Freedom of Information Act request, he learned that Justice Department files included documents in which departmental lawyers charged their superiors with "suppression of evidence" and presenting to the Supreme Court a key military report filled with "lies" and "intentional falsehoods."[128] Irons uncovered many important documents within the executive branch that had been withheld from the courts. In his judgment, the wartime internment of 120,000 Americans of Japanese ancestry resulted from "racism, war hysteria, and the failure of leadership at the highest levels of government," with the outcome of those cases reflecting "the failure of the legal system."[129]

Irons points out that the executive branch was not the only source of errors and misconceptions that resulted in the mistreatment of Japanese Americans. Leaders of the American Civil Liberties Union (ACLU) also bore "much of the blame for the outcome of the

---

without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.

124. *See id.*

125. *See id.*

126. IRONS, *supra* note 100, at viii.

127. *Id.*

128. *Id.* at viii-ix.

129. *Id.* at 365.

Japanese American cases."[130] In researching ACLU files he learned about the "personal and partisan loyalty" to President Roosevelt and the decision of the ACLU's national board "to bar such a constitutional challenge in subsequent appeals."[131] Irons explains that in *Hirabayashi* five Justices (Roberts, Reed, Douglas, Rutledge, and Murphy) had "voiced serious doubts about the legality of DeWitt's orders and their constitutional basis."[132] However, their concerns that the Court should "maintain unity in wartime" finally persuaded those Justices to make Stone's opinion unanimous.[133]

The outcomes of both *Hirabayashi* and *Korematsu* supported Irons' conclusion that there were significant deficiencies in the legal system. Why had these errors not been corrected? To Irons, the major obstacle was "the judicial principle of finality."[134] Mistakes occur in any human enterprise. The record demonstrates, however, that errors at the Supreme Court level are particularly embedded.

In an article published in 1986, Irons explained that during his effort to find important Justice Department documents he was advised that they were "lost" years ago, and no record existed "of their disposition."[135] Yet Justice Department staffers continued their search, and ultimately informed him that the missing litigation files were located in the files of the Immigration and Naturalization Service, an agency that had no involvement in the case.[136] His article provided other examples of how the executive branch sought to mislead the judiciary by withholding key documents. In analyzing oral argument before the Supreme Court on October 12, 1944, in the *Korematsu* case, Irons recognized the difficulty that Justices had in receiving straight talk from Solicitor General Charles Fahy.[137] To Irons, the complete record of oral argument in *Korematsu* left "no real doubt" that Fahy misled the Supreme Court.[138]

130. *Id.* at ix.
131. *Id.*
132. *Id.* at 250.
133. *Id.*
134. *Id.* at 366.
135. Peter Irons, *Fancy Dancing in the Marble Palace*, 3 Constitutional Commentary 35, 37 (1986).
136. *Id.*
137. *Id.* at 43-45.
138. *Id.* at 44.

In 1989, Irons published a book that includes documents on the Japanese American cases. The book contains not only judicial rulings, but also oral arguments, briefs, reports, and other documents.[139] In addition to analyzing *Hirabayashi* and *Korematsu*, the book covers an action filed by Minoru Yasui who had challenged a curfew order and spent nine months in solitary confinement while waiting for trial.[140] A unanimous Supreme Court on June 21, 1943, upheld his conviction.[141] The main purpose of Iron's book is to underscore the steps taken through the coram nobis procedure to demonstrate that the convictions of Japanese Americans were based on false and erroneous claims presented to courts by executive officials. Those documents shared with lower courts were so persuasive that the convictions of Hirabayashi and Korematsu were overturned. However, the Justice Department chose not to appeal those decisions to the Supreme Court.[142]

V. JUDICIAL ERRORS FINALLY ACKNOWLEDGED, IN PART

A step toward admitting errors in *Hirabayashi* and *Korematsu* was taken on May 20, 2011. Acting Solicitor General Neal Katyal publicly acknowledged that Solicitor General Fahy, in the Japanese American cases, had failed to inform the Supreme Court of evidence that undermined the rationale for internment.[143] By the time the two cases reached the Supreme Court, a report prepared by the Office of Naval Intelligence found that "only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody."[144] But Fahy "did

139. *See generally* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989).

140. *Id.* at 73-75.

141. *Id.*

142. For other book-length analyses of the Japanese American cases, see ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION (2d ed. 1977), ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR (2013), and RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II (2015).

143. See *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/9JP4-JANF], for Acting Solicitor General Neal Katyal's analysis.

144. *Id.*

not inform the Court of the report" despite warnings from Justice Department attorneys that failure to notify the Court "might approximate the suppression of evidence."[145]

Nor did Fahy acknowledge that the FBI and the FCC had already discredited reports that Japanese Americans had used radio transmitters to communicate with enemy submarines off the West Coast.[146] Katyal explained that, in one of the coram nobis cases, the court thought it unlikely that the Supreme Court would have decided *Hirabayashi* and *Korematsu* as they had if Fahy had "exhibited complete candor."[147] Katyal closed with these thoughts:

> Today, our Office takes this history as an important reminder that the "special credence" the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans.[148]

Korematsu was finally the subject of Supreme Court rebuke in 2018.[149] No mention was made of *Hirabayashi*.[150] Why did it take the Court more than seven decades to partially correct its record? In *Trump v. Hawaii*, issued on June 26, 2018, the Court split 5-4 in upholding a travel ban ordered by President Trump in September 2017.[151] Writing for the majority, Chief Justice Roberts held that the Immigration and Nationality Act authorized the President to restrict the entry of aliens if he determines they were inadmissible under 8 U.S.C. § 1182(f).[152] Relying on that authority, Trump imposed entry restrictions on nationals from countries not providing adequate information to allow the administration to make an informed judgment on whether such individuals posed national se-

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).
150. *See generally id.*
151. *Id.* at 2407-15.
152. *Id.* at 2403.

curity risks to the United States.[153] At issue was whether the travel ban violated the Establishment Clause of the First Amendment.

As explained by Roberts, before Trump issued his travel ban in September 2017, he had issued an executive order on that subject shortly after taking office.[154] Because of a negative response in the courts, that executive order was revoked and replaced by a second executive order.[155] This second effort expired before any litigation, and the Court, therefore, was reviewing the third travel ban.[156] Plaintiffs in the case argued that the travel ban violated the Establishment Clause because of hostile comments about Islam.[157] During his presidential campaign in 2016 and after his election, Trump often made negative statements about Muslims.[158]

For Roberts, the issue before the Court was the scope of statutory authority provided to the President. The language in § 1182(f) granted the President "broad discretion to suspend the entry of aliens into the United States."[159] Under the statute, Trump concluded that entry of certain aliens would be detrimental to the national interest.[160] To Roberts, the plaintiffs failed to demonstrate that Trump had exceeded his statutory authority.[161] For Roberts, the express language of § 1182(f) "exudes deference to the President in every clause."[162]

In section IV of his opinion, Roberts evaluated the claim that Trump's proclamation had been issued "for the unconstitutional purpose of excluding Muslims."[163] After holding that plaintiffs had

153. *Id.*
154. *Id.* at 2403-04.
155. *Id.*
156. *Id.* at 2404.
157. *Id.* at 2406.
158. CARLOS A. BALL, PRINCIPLES MATTER: THE CONSTITUTION, PROGRESSIVES, AND THE TRUMP ERA 54, 58 (2021).
159. *Trump*, 138 S. Ct. at 2408; *see also* 8 U.S.C. § 1182(f) ("Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.").
160. *Id.*
161. *See id.*
162. *Id.* at 2403-23.
163. *Id.* at 2415.

standing to challenge the exclusion of their relatives under the Establishment Clause, Roberts pointed out that Trump on the campaign trail had called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[164] During his presidential campaign in 2016, Trump stated that "Islam hates us."[165]

Toward the conclusion of his opinion, Chief Justice Roberts stated that the government had offered "a sufficient national security justification to survive rational basis review."[166] On that same page, he noted that the dissenting opinion by Justice Sotomayor, joined by Justice Ginsburg, repudiated *Korematsu*.[167] To Roberts, whatever "rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case."[168]

After having apparently excluded any consideration of that decision, Roberts proceeded to find serious flaws with it. In his judgment, the forcible relocation of Japanese Americans "to concentration camps, solely and explicitly on the basis of race," lacked any application to "a facially neutral policy denying certain foreign nationals the privilege of admission."[169] In contrast, the travel ban by President Trump was "an act that is well within executive authority and could have been taken by any other President."[170] After explaining the difference between *Korematsu* and the travel ban, Roberts stated the following: "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution."[171]

If *Korematsu* was wrong "the day it was decided,"[172] why did it take the Supreme Court seventy-four years to finally issue a

164. *Id.* at 2417.
165. *Id.*
166. *Id.* at 2423.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* (quoting Korematsu v. United States, 323 U. S. 214, 248 (1944) (Jackson, J. dissenting)).
172. *Id.*

correction? By "the court of history"[173] Roberts referred to a complex process outside the Supreme Court that often plays a fundamental role in debating and deciding constitutional issues. After the rulings in *Hirabayash*i and *Korematsu*, the decisions were subject to close examination by the elected branches, lower federal courts, and legal experts.[174] Such scrutiny resulted in the repudiation of those decisions by Presidents Ford, Carter, and Reagan; members of Congress and its committees; scholars; and lower court rulings in the 1980s that reversed the convictions of Hirabayashi and Korematsu.[175] The story of the Japanese American cases underscores how our constitutional values are shaped and decided by a broad and ongoing dialogue that often challenges and reverses decisions by the Supreme Court.[176]

In her dissent, joined by Justice Ginsburg, Justice Sotomayor concluded that evidence supported the view that Trump's proclamation "was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[177] Even before being sworn into office, then-candidate Trump stated that Islam hated the United States.[178]

VI. HOW SHOULD WE INTERPRET *TRUMP V. HAWAII*?

Because of conflicting statements by the Justices in the majority and those in dissent, scholars ask whether *Trump v. Hawaii* "constitutes an actual overturning of *Korematsu* or merely disapproving dictum of the decision."[179] In responding to *Trump v. Hawaii*, Char-

173. *Id.*

174. *See generally, e.g.*, *Hirabayashi*, 828 F.2d at 608; Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *Remarks on Signing the Bill*, *supra* note 95; Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988); IRONS, *supra* note 100, at viii.

175. *See supra* note 174 and accompanying text.

176. FISHER, *supra* note 4.

177. Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018) (Sotomayor, J. dissenting).

178. *Id.*

179. *See, e.g.*, Quinta Jurecic, *The Travel Ban Decision, and the Ghost of* Korematsu, LAWFARE (June 28, 2018), https://www.lawfareblog.com/travel-ban-decision-and-ghost-korematsu [https://web.archive.org/web/20190731080504/https://www.lawfareblog.com/travel-ban-decision-and-ghost-korematsu]; Becky Little, Korematsu *Ruling on Japanese Internment: Condemned but Not Overruled*, HISTORY (June 27, 2018), https://www.history.com/news/korematsu-japanese-internment-supreme-court#:~:text=In%20the%20Korematsu%20decision%20%20the,him%20during%20World%20War%20II [https://perma.cc/8V37-TKFV].

lie Savage referred to *Korematsu* as a "notorious precedent" that remained law "because no case gave justices a good opportunity to overrule it."[180] How should the Supreme Court respond to an earlier opinion utterly lacking in constitutional merit to have any legal value? From 1944 forward, the Court had abundant evidence from presidential statements, a congressional commission, the 1988 statute that supported the commission's findings, and lower court rulings in the 1980s that the executive branch—in order to advance its position—had withheld vital documents from the courts.[181]

After the Supreme Court in 2018 decided to discredit *Korematsu*, why did it not also repudiate *Hirabayashi*? Is the latter still "good law"? Both rulings were defective because the executive branch relied on claims that all Japanese Americans, including those who were U.S. citizens, were disloyal solely for reasons of race. It appears that the Court in 2018 would not have admitted error in *Korematsu* had Justice Sotomayor said nothing about that case in her dissent. How can the Court repudiate *Korematsu* and say nothing about *Hirabayashi*?

Neal Katyal, after issuing his critique of *Hirabayashi* and *Korematsu* while serving as Acting Solicitor General, published an article in 2019 analyzing *Trump v. Hawaii*.[182] He concluded that the decision, while supposedly overturning *Korematsu*, nevertheless promoted that ruling by providing judicial deference to executive power in the field of national security.[183] Despite supposedly overturning *Korematsu*, Katyal said the decision "perpetuates the very-near-blind deference to the executive branch that led the *Korematsu* Court astray."[184] To Katyal, both *Korematsu* and *Trump*

180. Charlie Savage, Korematsu*, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html [https://perma.cc/S4DG-R6W6].

181. *See, e.g.*, Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980) (establishing congressional commission to investigate internment of civilians during World War II); United States Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians (1982-1983), https://www.archives.gov/research/japanese-americans/justice-denied [https://perma.cc/AZ7U-3YX9] (containing official report of commission findings and recommendations).

182. *See* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J. 641, 642 (2019).

183. *Id.*

184. *Id.*

v. Hawaii placed "unbounded trust in the President when he asserts military necessity."[185] Just as the Supreme Court in *Korematsu* "ignored General DeWitt's racism and pretended the government's actions were not what they really were,"[186] *Trump v. Hawaii* "made almost every mistake in *Korematsu*'s playbook."[187]

CONCLUSION

The record of the Supreme Court provides abundant evidence that it, along with the other branches, has a history of serious errors. To sustain public confidence, it is important for the Court to admit as soon as possible that a previous decision was defective and explain why. It had that opportunity in the mid-1980s when Hirabayashi and Korematsu were both successful in the lower courts in charging fraud against the government and having their convictions reversed. Those two cases did not reach the Supreme Court.

Stare decisis is a doctrine that directs courts to adhere to principles issued in earlier rulings. We know from many historical experiences how damaging it can be to a democratic and constitutional government to bow down to all judicial precedents. Expecting courts to regularly protect constitutional liberties is ill-advised. As Chief Justice Warren explained in his law review article in 1962: "In our democracy it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution."[188] At the same time, he cautioned against excessive reliance on the elected branches: "[T]he day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen."[189] Very good advice. No single institution has the final word on constitutional values. Accepting an open dialogue among all three branches is a more realistic way to promote and preserve effective and constitutional government. Supreme Court decisions are entitled to respect,

185. *Id.* at 643.
186. *Id.* at 653.
187. *Id.* at 656.
188. Warren, *supra* note 76, at 202.
189. *Id.*

not adoration. The system of checks and balances denies the Supreme Court a final voice on constitutional issues.

In a book published in 2012, J. Harvie Wilkinson III, a federal judge on the Fourth Circuit, compared the relative performances between the Supreme Court and the elected branches. He concluded that "the elected branches succeeded far more in attacking invidious racial discrimination than the Court had on its own."[190] Women learned that their constitutional rights were protected far better by elected officials than by the courts. He pointed out that "theory-driven judges and scholars have forgotten that wisdom lies simply in knowing the limits of one's knowledge, that good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere[.]"[191] The Constitution, he stressed, "is not the courts' exclusive property. It belongs in fact to all three branches and ultimately to the people themselves."[192] Courts are "less adept than legislatures at assessing the precise content of society's values."[193] Moreover, the judicial system, "for all its virtues, is not always eager to admit its mistakes."[194]

190. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 17-18 (2012).

191. *Id.* at 115.

192. *Id.* at 22.

193. *Id.*

194. *Id.* at 24.