WATCHING THE WATCHERS: ENEMY COMBATANTS IN THE INTERNMENT'S SHADOW

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I

INTRODUCTION

> Punish him, yes. But please try to understand the defense's point of view that there is a corporate responsibility.
>
> —Lawyer for Ivan "Chip" Frederick, court-martialed for his crimes at Abu Ghraib[1]

We are fighting an indefinite war on terror. In considering the policy and practice of this war, the history of the Japanese American internment looms large. That history exists as moral parable as well as legal precedent. In *Denying Prejudice: Internment, Redress, and Denial*,[2] I sought a careful remembering of the internment by holding the judiciary accountable for its actions. That article detailed how the Supreme Court in the 1940s, using techniques often praised as "minimalist," avoided accountability on the part of the President and the Congress. With a straight face, the Court held that the internment camps were never authorized by the political branches; rather, they were an *ultra vires* frolic committed by a civilian agency called the War Relocation Authority (WRA).

Denying Prejudice also demonstrated how, in the 1980s, the Ninth Circuit Court of Appeals whitewashed history in the very act that granted extraordinary relief to the brave wartime litigants who had challenged internment. In granting the writ of error *coram nobis* and thereby overturning Gordon Hirabayashi's decades-old convictions, the Ninth Circuit simultaneously excused the wartime Supreme Court of any wrongdoing. The official explanation inscribed into the federal reports was that the Court had been duped by unethical execu-

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This piece is dedicated to those lawyers watching the watchers in our war on terror.

1. Jackie Spinner, *Soldier Given 8 Years for Abu Ghraib Abuse*, HOUS. CHRON., Oct. 22, 2004, at A21.

2. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004).

tive branch lawyers. Adopting this convenient story allowed another denial of accountability, this time on the part of the judiciary itself.

Part II of this article briefly summarizes these arguments and describes how the judiciary dodged accountability in both the wartime and *coram nobis* cases. Part III shifts focus to today's war and examines whether the judiciary is repeating this strategy of denial in the current "enemy combatant" cases. In other words, is the judiciary exploiting similar interpretive and procedural tactics in order to feed the dogs of war while creating plausible deniability for those who unleashed them? The net assessment is mixed, with good reasons for both optimism and alarm. To be clear, the goal of this article is not to provide any systematic model for judicial review of military action against terrorist threats.[3] Instead, its ambitions are more modest and focused: to help the judiciary invoke the tragedy of internment as honestly as possible, without naïveté or self-serving denial.

II
DENYING PREJUDICE

A. The Wartime Cases

The wartime Supreme Court decided four cases on the Japanese American internment—*Hirabayashi*,[4] *Yasui*,[5] *Korematsu*,[6] and *Endo*.[7] In these cases, the Court deployed an arsenal of procedural, interpretive, and avoidance techniques 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

3. Such models have been put forth elsewhere in the academic literature. *See, e.g.*, Tania Cruz, *Civil Liberties Post-September 11: Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused*," 2 SEATTLE J. SOC. JUST. 129, 152-70 (2004) (advocating a "two-tiered framework for reviewing national security civil liberty restrictions that would first determine whether a heightened level of judicial scrutiny is appropriate and then articulate the executive's burden of evidentiary proof"); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1 (2004) (arguing that, during times of war, the courts have exercised scrutiny that focuses on the institutional processes used to make the decisions at issue, rather than on the content of the underlying rights); Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004) (proposing an equity approach to judicial review); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 7 (1986) (suggesting that "except when martial law is legitimately in force, the standard of judicial review of government restrictions of civil liberties is not altered or attenuated by government claims of 'military necessity' or 'national security' as justifications for the restrictions").

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

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

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

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

> (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.[8]

1. Curfew: Hirabayashi *and* Yasui

The Japanese attacked Pearl Harbor on December 7, 1941.[9] Soon thereafter, in February 1942, President Franklin D. Roosevelt issued Executive Order 9066, which granted the Western Defense Command broad powers to exclude people from designated military areas.[10] Pursuant to this order, General John L. DeWitt issued a curfew in March 1942 that applied to all enemy aliens as well as to Japanese American citizens (called "non-aliens").[11] Later, the military issued a series of over 100 exclusion orders, which funneled Japanese Americans, neighborhood by neighborhood, first into temporary assembly centers, then to what were euphemistically called "relocation" camps.[12] Public Law 503, passed by Congress, criminalized any disobedience.[13]

To create a test case, Gordon Hirabayashi disobeyed the curfew and evacuation orders.[14] In district court, he was convicted of violating these military orders, and was given concurrent sentences for each violation. The case was appealed to the Ninth Circuit Court of Appeals, which certified the relevant legal questions to the Supreme Court. The Court took the unusual step of calling up the entire case to be decided as if on appeal.[15]

The decision came down on June 21, 1943. Eager to make the case as simple as possible, Chief Justice Harlan F. Stone *sua sponte* latched onto the happenstance of Hirabayashi's concurrent sentences and segmented the two convictions. In a classic exercise of judicial minimalism,[16] Justice Stone observed that

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8. *Kang*, *supra* note 2, at 965.

9. For a more detailed account of the internment process, see *id.* at 937-42; *see also id*. at 937 n.8 (listing historical sources).

10. The Order read:

> I hereby authorize and direct the Secretary of War, and the Military Commanders whom 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).

11. Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942).

12. *See Endo*, 323 U.S. at 288 ("Beginning on March 24, 1942, a series of 108 Civil Exclusion Orders were issued by General DeWitt pursuant to Public Proclamation Nos. 1 and 2."). In my analysis, I use terms such as "curfew," "evacuation," and "relocation" ironically, as terms of art necessary to understand the technicalities of the cases. *See Kang*, *supra* note 2, at 941 n.37.

13. *See* Act of Mar. 21, 1942, Military Areas or Zones, Restrictions Pub. L. No. 77-503, 56 Stat. 173 (1942) (criminalizing disobedience of regulations of movement and actions in military areas).

14. Historical details regarding *Hirabayashi* appear in PETER IRONS, JUSTICE AT WAR 87-93 (1993).

15. For more procedural details of the case, see *Kang*, *supra* note 2, at 944.

16. Throughout this article, I make reference to "minimalism," "minimalist virtues," and "judicial minimalism." These terms refer to a theory of judging initially advanced by Alexander Bickel, then

affirming one conviction would make discussion of the other unnecessary.[17] Not surprisingly, he focused on the easier question of curfew rather than the more troubling topic of evacuation.

Having narrowed the issue, the Court proudly pronounced that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[18] But the curfew that applied to Hirabayashi, even though he was a United States citizen, was not enacted *solely* because of his ancestry. Instead, the military had "ample ground" to be worried that ethnically-affiliated "sleeper cells"[19] would aid a Japanese invasion.[20] According to the Court, this was plain racial common sense.[21] As a result, mere curfew—a relatively minor inconvenience during military crisis—was deemed a reasonable burden for Japanese Americans to bear.

Yasui presented the identical curfew issue and was affirmed on the same grounds, on the same day.[22] In the end, with many tens of thousands of Japanese Americans behind barbed wire in prison camps, with no threat of invasion on the West Coast,[23] the Justices of the U.S. Supreme Court thought it appropriate to address only the matter of curfew, and held that curfew was all right by them.

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elaborated upon by Cass Sunstein. Roughly speaking, a minimalist judge explains only that which is absolutely necessary to justify an outcome and strives to leave as many matters undecided as possible. Such a theory of judging could make aggressive use of legal doctrines that permit avoidance of specific issues or even entire cases. For a more detailed discussion of "minimalist virtues," and why they cannot justify the Supreme Court's analysis in the wartime cases, see Kang, supra note 2, at 965-75.

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

18. *Id.* at 100.

19. "Sleeper cell" is the current term for small groups of traitors and saboteurs in our midst; during World War II, the relevant term was "Fifth Column," which was introduced during the Spanish Civil War to represent an invisible fifth column of troops supporting Franco within the city of Madrid. *See* Irons, *supra* note 14, at 21.

20. 320 U.S. at 94-96.

21. *Id.* at 101 ("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.").

22. *See* Yasui v. United States, 320 U.S. 115, 116-17 (1943).

23. The Battle of Midway, considered the decisive battle of the war in the Pacific, took place in June 1942 and shifted the offensive momentum in the war from the Japanese to the Americans and their allies.

2. Exclusion: Korematsu

Eighteen months later, on December 18, 1944,[24] the Court decided the next case: *Korematsu*. Would the legality of the massive detention of Japanese Americans now be addressed? The answer was again no, because the Court redeployed the segmentation technique. Even though the exclusion order was integrally connected to Korematsu's subsequent relocation into an internment camp, the Court refused to see it that way. In a hyper-formalistic analysis, the Court insisted that evacuation and relocation were two separate orders, and that technically Korematsu had been convicted only for refusing to evacuate.[25] Ignoring the government's own concession to the contrary,[26] the Court speculated that, had Korematsu obeyed the evacuation order, he might not have ended up in a relocation camp after all.[27] Then, cloaking itself in the mantle of self-restraint, the Court explained that it should only address evacuation: "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."[28]

Through segmentation, the sole question presented was whether the government could require Japanese Americans to evacuate their homes temporarily, for personal safety and national security. Framed this way, Korematsu was burdened little more than someone evacuated from a natural disaster. In answering this narrow question, the Court again "talked the talk" of equality without "walking the walk." Creating the foundation for what would, according to the conventional wisdom, become the rule of strict scrutiny, the Court trumpeted:

> [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 rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[29]

In application, however, the flowery words wilted into limp acceptance of time-tested racial stereotypes. It turned out that "pressing public necessity" included

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24. Although *Korematsu* had originally been certified to the Supreme Court by the Ninth Circuit along with *Hirabayashi* and *Yasui*, there was a question whether an odd sentencing posture precluded an appealable final judgment. A few weeks before deciding the curfew cases, the Court ruled that there was a final order and remanded the case, instead of addressing the merits as it could have and did in the curfew cases. *See Kang*, *supra* note 2, at 949-50 (providing procedural history).

25. *See* Korematsu v. United States, 323 U.S. 214, 221 (1944).

26. *See* Brief for the United States at 28-29, *Korematsu* (No. 22), *reprinted in* 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 197, 230-31 (Philip B. Kurland & Gerhard Casper eds., 1975) ("[H]ad [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.").

27. *See Korematsu*, 323 U.S. at 221.

28. *Id.* at 222.

29. *Id.* at 216. For a brief trace of the doctrinal evolution of strict scrutiny, see NEIL GOTANDA, THE STORY OF KOREMATSU: THE JAPANESE-AMERICAN CASES, IN CONSTITUTIONAL LAW STORIES Ch. 8 (Michael Dorff ed., 2004).

assumptions of disloyalty that would today be called racial profiling. The majority could not see these crude generalizations as "racial antagonism."[30]

The payoff of the segmentation technique executed in *Hirabayashi* was substantial. Reneging on its promise not to use *Hirabayashi* as precedent for the next case,[31] the *Korematsu* Court wrote: "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."[32] Through segmentation, the Court could frame the evacuation question as a minor extension on a case already deemed constitutionally copacetic. Indeed the precedent was so squarely on point that the Court, through double-negative circumlocutions, protested that it could not hold otherwise. As summarized in *Denying Prejudice*:

> This segmentation technique 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.[33]

3. Relocation: Endo

The fourth and final case, *Endo*, was released on the same day as *Korematsu*. The question cleanly presented was whether the government could indefinitely detain a concededly loyal American citizen. Contrary to the first three cases, in this final contest, the Japanese American litigant won—but not on the grounds one might have thought. There was no holding that the executive and legislative branches of government had deprived Mitsuye Endo, an American citizen, of her constitutional rights; rather, the Court decided the case on administrative law grounds. It held fantastically that the WRA, which maintained the camps, was never authorized to detain Endo in the first place.[34]

The Court began by examining Executive Order 9066 (delegating power to military to bar access to military areas), Executive Order 9012 (creating the WRA), and Public Law 503 (creating criminal penalties for violating duly issued military regulations).[35] Reading literally, the Court saw no mention of "detention" in any of these documents.[36] The Court further invoked the minimalist doctrine of constitutional avoidance: Steer clear of statutory readings that raise constitutional questions. Accordingly, the Court presumed that the political

30. *See Korematsu*, 323 U.S. at 219.

31. *See id.*, at 247 (Jackson, J., dissenting) ("The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding.").

32. *Id.* at 217–18 (emphasis added).

33. *Kang*, *supra* note 2, at 955.

34. *Ex parte* Endo, 323 U.S. 283, 302-04 (1944).

35. *Id.* at 285-90.

36. *Id.* at 300–01. The Court made an explicit finding that "[n]either the Act nor the orders use the language of detention." *Id.* at 300.

branches were "sensitive to and respectful of the liberties of the citizen."[37] Indeed, the Court assumed that "lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[38] To read the relevant documents otherwise

> 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 President 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."[39]

In dissent, Justice Roberts sharply criticized the majority for "ignor[ing] patent facts"[40] and for "hiding [its] head in the sand."[41] The Court's blindness cannot be attributed to faithful adherence to some consistent interpretive methodology. Contrast how the Court addressed similar authorization questions in *Hirabayashi*. There, the Court saw authorization for curfew as applied to citizens, even though Executive Order 9066 and Public Law 503 made no mention of such authority and delegated power in the vaguest of terms.[42] In other words, when convenient to see political authorization, the Court had X-ray vision; when embarrassing, the Court saw no evil.

Endo was thus a Pyrrhic victory, in that her freedom was granted through an exculpation of President Roosevelt and Congress.[43] Also, *Endo* technically released no one else: The day before the opinion's release—a Sunday of all days—the War Department somehow knew to rescind its curfew, evacuation, and exclusion orders unilaterally.[44]

B. The *Coram Nobis* Cases

The Japanese American redress movement of the 1980s was stunningly successful. The Executive branch apologized for its role in the internment.[45] Con-

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37. *See id.* at 303–04. Earlier in the opinion, the Court stated that, "[w]e have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. . . . We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen." *Id.* at 299-300.

38. *Id.* at 300.

39. *Id*. at 303-04 (emphasis added).

40. *Id.* at 309 (Roberts, J., dissenting).

41. *Id*.

42. Hirabayashi v. United States, 320 U.S. 81, 89-90 (1943).

43. One might ask why the Court in *Korematsu* bothered to segment off evacuation from relocation, when the latter would be addressed in *Endo*, released the same day. My answer appears *infra* Part III.B.1.b.

44. *See Kang*, *supra* note 2, at 964 (suggesting that Justice Frankfurter likely notified the War Department prior to the decision, allowing it to rescind its orders the day before).

45. Proclamation No. 4417, "An American Promise," 41 Fed. Reg. 7741 (Feb. 19, 1976).

gress paid reparations.[46] And the courts vacated the convictions of Korematsu, Yasui, and Hirabayashi in the extraordinary *coram nobis* cases.[47] These reversals were based on "smoking gun" evidence,[48] unearthed at the national archives, which demonstrated the lack of military necessity for the internment. At first glance, the story of redress warrants unqualified celebration—but first impressions can be deceiving.

Functionally, the writ of error *coram nobis* is cousin to the writ of habeas corpus, which was irrelevant because no petitioner remained in custody. The *coram nobis* writ clearly required a showing of extraordinary circumstances amounting to a complete miscarriage of justice.[49] What was uncertain was whether the writ also required actual prejudice—a showing that the wartime Court would have ruled otherwise but for the suppression of evidence.

Korematsu was the first *coram nobis* case to be heard, in 1984. The government filed a nonresponsive two-page letter that encouraged the court to vacate the conviction without granting the writ, and simply to "put behind us the controversy."[50] District Court Judge Marilyn Patel declined this invitation and instead granted Korematsu's petition.[51] For her, the gross miscarriage of justice was obvious. As for the prejudice issue, Judge Patel concluded that it was not necessary as a matter of law: "Whether 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."[52] This was true victory.

By contrast, in *Yasui*, the next *coram nobis* case that was decided, District Court Judge Robert Belloni complied with the government's request.[53] With the now familiar rhetoric of self-restraint, he simply vacated Yasui's criminal conviction without granting the writ. Minoru Yasui died before his appeal could be heard.

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46. Civil Liberties Act of 1988, Pub L. No. 100-383 (Aug. 10, 1988), 102 Stat. 903 (codified as amended at 50 U.S.C. app. §§ 1989-1989d (2000)).

47. *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).

48. That evidence—including DeWitt's original Final Report; exculpatory memoranda from the FCC, FBI, and the Office of Naval Intelligence; and the bowdlerized footnote in the government's brief in *Korematsu*—is summarized in *Kang*, *supra* note 2, at 976-79. Reproductions of the suppressed evidence can be found in ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 300-09 (2001).

49. *See* United States v. Morgan, 346 U.S. 502, 511-12 (1954) (stating that *coram nobis* "included errors of the most fundamental character," such that "[o]therwise a wrong may stand uncorrected which the available remedy would right").

50. Government's Response and Motion, *Korematsu* (No. CR-27635W), *reprinted in* JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 210-12 (Peter Irons ed., 1989).

51. *Korematsu*, 584 F. Supp. at 1420.

52. *Id*. at 1419.

53. YAMAMOTO ET AL., *supra* note 48, at 318.

The final *coram nobis* case was Hirabayashi's, which the federal government litigated to the hilt, in sharp contrast to the prior cases. After a full, weeks-long evidentiary hearing, the district court issued a split decision and vacated Hirabayashi's conviction on evacuation, but not on curfew. The different results turned on the question of prejudice. The gross miscarriage of justice was clear, but, contrary to Judge Patel's reading of the law, Judge Donald Voorhees held summarily that actual prejudice had to be shown.[54] In his view, the suppressed evidence would have altered how the Supreme Court handled the evacuation,[55] but not the curfew,[56] conviction.

The appeal was heard in the Ninth Circuit Court of Appeals by Judges Mary Schroeder, Alfred Goodwin, and Jerome Farris.[57] On the question whether actual prejudice was legally required, the court—again invoking the "minimalist virtues"—declined to answer. Why? Because, regardless of whether prejudice was necessary as a matter of law, sufficient prejudice had been shown as a matter of fact.[58] This finding meant affirming the trial court's vacation of Hirabayashi's evacuation conviction. It also meant reversing the trial court on the curfew conviction as clearly erroneous, because, according to the Ninth Circuit, the Supreme Court would have reversed that conviction too.

By conventional wisdom, this amounted to total vindication for Hirabayashi. But probe beneath the surface: By finding prejudice as a matter of fact, the Ninth Circuit adopted the official story that the wartime Supreme Court was an innocent, misled by duplicitous lawyers. The Court did nothing wrong; it was merely tricked. In the 1940s *Endo* opinion, the Court avoided holding Roosevelt and Congress accountable; in the 1980s *Hirabayashi* opinion, the Ninth Circuit completed the "circle of absolution,"[59] and ensured that the wartime Court would also have nothing to account for. But, this official story of "wartime Court as innocent babe" is revisionist.[60] As damning as the "smoking gun" evidence uncovered in the 1980s was, the Court would *not* have ruled otherwise on the question of evacuation, and certainly not on that of curfew. To suggest otherwise is to revise history in order to insulate the Court from corporate responsibility.

Moreover, the Ninth Circuit did not have to reach this result.[61] Given the precedent of the time, the court could simply have said that prejudice was not necessary to the *coram nobis* writ, allowing Hirabayashi to win without any

54. Hirabayashi v. United States, 627 F. Supp. 1445, 1454 (W.D. Wash. 1986) (citing *United States v. Dellinger*, 657 F.2d 140, 144 n.9 (7th Cir. 1981)), *rev'd in part*, 828 F.2d. 591 (9th Cir. 1987). There was no mention of the contrary ruling in Korematsu's *coram nobis* case, which had concluded that prejudice was not necessary.

55. *See id*. at 1457.

56. *See id.*

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

58. *Id.* at 603-04.

59. *Kang*, *supra* note 2, at 986.

60. *See id.* at 985-95 (explaining why this conception of the wartime Court is revisionist).

61. For a discussion of other paths the Ninth Circuit could have taken in the case, see *id.* at 995-97.

comment on, much less bleaching of, history. This is, in fact, current *coram nobis* law in the Ninth Circuit, post-*Hirabayashi*.[62] Still other options, none of which required accepting historical falsehoods, were available.[63]

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The full argument is much longer and nuanced.[64] Still, this sketch conveys the basic reasons why the wartime Court should be held to account for more than simply bowing to the pressure of military exigency. It also explains why the *coram nobis* "victory" should be viewed ambivalently, for the courts artfully dodged corporate responsibility. How the judiciary can manipulate legal constructs to deny political and moral responsibility is a central but unappreciated lesson of the internment. Have we finally learned that lesson? Or do we still sit in darkness?

III

ENEMY COMBATANTS

Civil libertarians and progressives have generally applauded how the "enemy combatant cases"[65] have been decided.[66] In *Rasul v. Bush*, the Supreme

62. Under current Ninth Circuit *coram nobis* law, actual prejudice is not a legal requirement. *See id.* at 996.

63. In the alternative, the Ninth Circuit could have held that actual prejudice was necessary, but since the Supreme Court would have affirmed Hirabayashi's convictions even with the suppressed evidence, no relief could be granted. This would have produced a loss for Hirabayashi but nevertheless vindicated truth. If this medicine was too bitter to swallow, still another possibility would have allowed speaking truth about history while ultimately vacating Hirabayashi's convictions—to establish a rule of law that "[a]ctual prejudice is normally required to issue the writ of *coram nobis*; however, in cases of extraordinary manifest injustice, the writ will nonetheless issue." The full argument appears in the appendix to *id.* at 1006-13.

64. If the reader has objections or seeks additional points of clarification, I hope that *Kang*, *supra* note 2, addresses them.

65. In this study, the term "enemy combatant cases" refers to three cases decided by the Supreme Court in 2004: *Rasul v. Bush*, 124 S. Ct. 2686 (2004), *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). In addition, because the Court decided *Padilla* on jurisdictional grounds, I include in my analysis the substantive portion of the Second Circuit Court of Appeals opinion in that case.

66. *See, e.g.*, Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1639-42 (2004) (*Padilla* as "an emphatic reaffirmation of the importance of the rule of law"); Timothy Lynch, *Power and Liberty in Wartime*, 2004 CATO SUP. CT. REV. 23, 24 ("Fortunately, in a triumph for liberty, the Supreme Court decisively rejected the president's reading of the law."); David Cole, Comment, *No Blank Check*, THE NATION, July 19, 2004, at 4 ("The broader significance of the rulings lies in their ringing rejection of the argument that to defeat terrorism, the executive must have unfettered discretion."); David Ignatius, Editorial, *The Balance of Justice Amid a War*, WASH. POST, July 2, 2004, at A15 ("The world went wobbly after Sept. 11. . . . Thanks to wise judges, the United States and the world may finally be returning to solid ground."); Anthony Lewis, Editorial, *The Court v. Bush*, N.Y. TIMES, June 29, 2004, at A27 ("It was as profound a day in the court as any in a long time. The justices did what they have often shied away from doing: said no to the argument that the title commander-in-chief means that the president can do whatever he says is necessary to win a war."); Jonathan Turley, Commentary, *A Near Miss For Key Rights*, L.A. TIMES, June 29, 2004, at B13 ("The outcome Monday may be the ultimate testament to founding father James Madison, who said he wanted to design a system that would work even if it were run by less than angelic beings."). *But see* Neal K. Katyal, *Executive and Judicial Overreaction in the Guantánamo Cases*, 2004 CATO SUP. CT. REV. 49, 68 ("The Guantánamo cases may be seen as a reaction, indeed an overre-

Court held that federal district courts have jurisdiction to hear habeas corpus challenges of enemy combatants detained in Guantánamo Bay.[67] In *Hamdi v. Rumsfeld*, the Court held that an American citizen, even one caught on foreign soil during combat, deserves rudimentary procedures to determine the legality of his detention.[68] Finally, in *Padilla v. Rumsfeld* , the Second Circuit Court of Appeals, the highest court to have spoken on the substance of *Padilla*'s facts, held that the President lacked unilateral power to detain indefinitely a United States citizen caught on American soil.[69] Do the internment cases cast any different light on this upbeat assessment?

A. Repetition?

1. Segmentation

Recall how the Supreme Court in the 1940s exploited the "segmentation" technique to avoid obstructing the military[70] and also to obscure the Court's own agency.[71] One could sketch a similar strategy in the enemy combatant context. For example, the Court could have found a way to stagger deciding the cases from easiest to hardest, from *Rasul* (aliens, on foreign soil), to *Hamdi* (citizen, caught on foreign soil), and finally to *Padilla* (citizen, caught on American soil). Each case could have been *ex ante* distinguished from the other, but the affirmance of the prior case could have been *ex post* used as guid-

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action, to the broad claims the administration put forth in the name of executive power. . . . [T]he administration missed an opportunity to distinguish between types of detainees and put forth a more modest argument. . . . [T]he federal courts are now going to interject themselves into many different aspects of the detention process.").

67. *Rasul*, 124 S. Ct. at 2699; *see also* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that the procedures to determine whether Guantanamo Bay detainees are "enemy combatants" violated the Fifth Amendment's Due Process Clause); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C.2004) (holding that military commissions cannot try Guantanamo detainees for war crimes).

68. *Hamdi*, 124 S. Ct. at 2648 ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

69. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003). This case was reversed by the Supreme Court for lack of jurisdiction. *Padilla*, 124 S. Ct. at 2727 ("We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice"). Given this reversal, the opinion carries no precedential weight; however, it still provides the reasoning of the highest court to have addressed the merits and thus warrants inclusion in my analysis. Padilla refiled his habeas petition in the U.S. District Court for the District of South Carolina, which was recently granted. *See* Padilla v. Hanft, 2005 WL 465691 (Feb. 28, 2005) (concluding that detention was not authorized by Congress and that the President lacked unilateral power to detain Padilla).

70. Recently, Eugene Kontorovich has made the same point about what I call segmentation. *See* Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 786-87 n.99 (2004) (referring to the general tactic of delay and avoidance in national security contexts as "*Vallandigham-Hirabayashi* abstention").

71. Even Chief Justice Rehnquist concedes "certain disingenuousness" in the sequencing of the cases, which produced differing results for the litigants Hirabayashi, Korematsu, and Endo, when there was no reason to think that they had differing loyalties to the United States. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 202 (1998).

ing precedent for affirming the next case—precisely the ploy executed in *Hirabayashi* and *Korematsu*.

Elements of a segmentation strategy can be found in the enemy combatant cases. For example, each case distinguishes itself from the others. In *Hamdi*, for instance, the Supreme Court accepted for purposes of that case a definition of "enemy combatants" that clearly excluded Padilla.[72] Conversely, in *Padilla*, the Second Circuit carefully distinguished the facts of *Hamdi*.[73] In addition, the decisions reflect choices (if not manipulation) in timing. Although all three opinions were issued on the same day, the Supreme Court delayed addressing the merits of *Padilla*, the Administration's most difficult case, by deciding the case on jurisdictional grounds.[74] Even if this was entirely correct judging, this result is reminiscent of the timing manipulation in *Korematsu*.[75]

However, mere elements do not make the strategy. The critical difference is that Hirabayashi lost, whereas Hamdi more or less won. In the wartime cases, Hirabayashi's loss on curfew provided legal momentum for *Korematsu* on evacuation. By contrast, in the enemy combatant cases, Hamdi's partial victory[76] short circuits any similar incrementalist strategy. If the Court had affirmed the Fourth Circuit's opinion and analysis, then the specter of a gradualist extension to the facts of *Padilla* would have loomed.[77] Happily, that is not the case.

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72. *Hamdi*, 124 S. Ct. at 2639 ("It has made clear, however, that, for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there. . . . We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.") (citation omitted).

73. *See Padilla*, 352 F.3d at 721 n.29 ("As we have previously noted, Judge Wilkinson, one of the authors of *Hamdi III*, remarked in his later concurrence to the decision not to rehear *Hamdi III* en banc that '[t]o compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges'") (citation omitted). As explained above, the *Padilla* case is making its way back up through the federal courts a second time. *See supra* note 69. The District Court for South Carolina also sharply distinguished *Hamdi* from *Padilla*. *See Padilla*, 2005 WL 465691, at *6.

74. On this point, the Justices sparred over the proper interpretation of *Endo*. In *Endo*, there was some question of whether Endo had properly exhausted her administrative remedies (by not completing the forms required by the WRA leave procedures) and whether jurisdiction remained since she had been moved to another camp. The government did not pursue the former argument at the High Court in the *Endo* litigation; accordingly, the Supreme Court addressed the latter argument and concluded that subsequent movement of the petitioner did not destroy jurisdiction. *See Kang*, *supra* note 2, at 959, n.142. The *Padilla* majority interpreted *Endo* for a narrow exception to the "immediate physical custodian" rule. *See Padilla*, 124 S. Ct. at 2721 (holding that a district court with jurisdiction over a habeas petitioner does not lose jurisdiction simply because the petitioner is no longer within its territorial jurisdiction). In dissent, Justice Stevens read *Endo* for "a more functional approach that focuses on the person with the power to produce the body." *Id.* at 2733 (Stevens, J., dissenting).

75. For more details on the manipulations in *Korematsu*, see *Kang*, *supra* note 2, at 949-50, nn.91, 93.

76. To be sure, what counts as a "win" or a "loss" is complicated. But no one doubts that the Supreme Court's opinion afforded Hamdi more rights than recognized by the Fourth Circuit Court of Appeals, and expressly denied the Executive Branch a "blank check."

77. *See Kang*, *supra* note 2, at 1002-03 (raising this fear of segmentation before the Supreme Court decided the enemy combatant cases).

This assessment confirms the truism that legal techniques such as segmentation generally lack intrinsic political valence. What matters instead is how these techniques are utilized, with what self-knowledge, and toward what ends. In sum, the judiciary is not using segmentation in the enemy combatant cases to allow some gradual erosion of civil liberties that avoids recognition of judicial agency or political accountability. So far, there are reasons to be optimistic: The glass looks half-full.[78]

2. Authorization

In *Endo*, the Supreme Court manipulated the question of executive and congressional authorization to deny accountability. By finding that the full-blown internment had never been authorized by the President and Congress, the suffering of Japanese Americans was never attributed to the actors in fact responsible. Congressional authorization also lies at the heart of the enemy combatant cases. And in them, historical references to the internment abound, including prominent citation to *Endo*. Is the judiciary again being willfully blind to authorization in order to avoid accountability?

Answering this question requires first identifying the instances in the enemy combatant cases in which "no authorization" was found. In *Hamdi*, that is principally Justice Souter's opinion, with passing agreement in Justice Scalia's opin-

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78. To be careful, or perhaps paranoid, I should flag one potential segmentation strategy left open. Justice O'Connor made it clear that the term "enemy combatant" was poorly defined, and accepted for purposes of this litigation that it was "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004). Further, on the critical question of whether Hamdi enjoyed a right to counsel, Justice O'Connor declined to answer. *See id.* at 2652 ("He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case."). On this point, some commentators have mistakenly read in greater constitutional protections than what the Court granted. *See, e.g.*, *Chemerinsky*, *supra* note 66, at 1641 ("[T]he Justices were explicit that Hamdi must be given a meaningful factual hearing [which a]t a minimum . . . includes . . . the right to be represented by an attorney").

In subsequent cases, pursuant to a segmentation strategy, the following could be decided:

- the definition of "enemy combatant" can be expanded slightly to include the likes of Padilla (by not requiring foreign capture);
- the Court decides that although notice and opportunity to rebut claims according to some reasonable standard of proof are required, detainees have no right to counsel;
- if the Authorization of Military Force (AUMF), discussed further *infra*, authorized Hamdi's detention, it must have authorized Padilla's detention, which was consistent with the post-9/11 fear of domestic terrorism.

Is it possible that Hamdi's partial victory sets up a Padilla loss in which both branches of government are seen as authorizing the detention of a U.S. citizen, on American soil, as long as he is granted primitive process—but *without benefit of counsel*?

Perhaps this is too much of a stretch. Specifically, on the last point of authorization, five Justices seem to suggest that the AUMF does not authorize Padilla's detention. Three Justices joined Justice Stevens in his dissent in *Padilla*, in which he wrote that there was no authorization. *See Padilla*, 124 S. Ct. at 2735 n.8 (Stevens, J., dissenting) (joined by Justices Breyer, who found authority as to Hamdi's detention, Souter, and Ginsburg). However, the body text associated with that footnote was equivocal, pointing out that "reasonable jurists may answer in different ways." *Id.* at 2735. In addition to these four, Justice Scalia, in his dissent in *Hamdi*, made clear that there was no authorization even as to Hamdi. *Hamdi*, 124 S. Ct. at 2671 (Scalia, J., dissenting).

ion. In *Padilla*, that is the Second Circuit majority opinion. Since Padilla has been reversed and remanded on jurisdictional grounds,[79] the analysis here focuses on Justice Souter's opinion.

Joined by Justice Ginsburg, Justice Souter began his analysis with the Non-Detention Act (NDA), which states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[80] He provided the relevant context of the NDA's passage. In 1971, Congress repealed the Emergency Detention Act (EDA) of 1950, a Cold War statute, to lessen the chances of another Japanese American internment.[81] But because the EDA provided some procedural protections, legislators worried that repeal would leave citizens in some ways even worse off. Accordingly, Congress enacted the NDA to complement the EDA's repeal and to require clear congressional authorization before detention of any United States citizen.[82] Moreover, as Justice Souter pointed out, the NDA was passed "in light of an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement . . . [as] unmistakably expressed in *Ex parte Endo*."[83]

Applying this clear statement standard, Justice Souter could not find authorization to detain Hamdi in the Authorization for Use of Military Force (AUMF) enacted by Congress after September 11.[84] As he pointed out, there was no mention of detention. Moreover, numerous other governmental tools could be used against the likes of Hamdi. And, by negative implication, the passage of the Patriot Act, which limits detention of *alien* terrorists to seven days, militated against statutory interpretations that would grant weaker protections to alleged *citizen* terrorists.[85]

This opinion resembles *Endo* in that both find "no authorization" to detain, but the similarity is only superficial. As detailed in the Appendix, finding "no authorization" does not always undermine accountability. In *Endo*, the finding of no authorization was made essentially after the fact—after the burden had

79. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

80. 18 U.S.C. § 4001(a) (2004).

81. *See Hamdi*, 124 S. Ct. at 2654 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (pointing out legislative history mentioning the concentration camps).

82. Referring to explicit legislative history on point, Justice Souter also rejected the government's argument that the NDA did not apply to military detentions. *Id.* at 2655-56.

83. *Id.* at 2655.

84. Pub. L. No. 107-40, 115 Stat. 224 (2001).

85. Justice Scalia, joined by Justice Stevens, took a very different line of argument in his *Hamdi* dissent, but agreed for similar reasons that the AUMF did not authorize Hamdi's detention:

> Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns; with the clarity necessary to comport with cases such as *Ex parte Endo* and *Duncan v. Kahanamoku*; or with the clarity necessary to overcome the statutory prescription that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

Hamdi, 124 S. Ct. at 2671 (Scalia, J., dissenting) (citations omitted). Finally, in *Padilla*, which addressed the slightly different facts of an American citizen *captured on American soil*, the Second Circuit Court of Appeals similarly found no statutory authorization for the detention. Padilla v. Rumsfeld, 352 F.3d 695, 718-24 (2d Cir. 2003).

been inflicted, the dirty deed done, and the only matter remaining was to assign responsibility. By finding no authorization, the Supreme Court placed all blame on a little-known agency instead of on the actual political actors responsible. Justice Roberts, concurring only in *Endo*'s result, described the tactic and its consequence:

> I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious response will be that, however much the superior executive officials knew, understood, and approved the conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one's head in the sand to assert that the detention of [Endo] resulted from an excess of authority by subordinate officials.[86]

Justice Souter's opinion does precisely the opposite. His conclusion is more injunctive than rhetorical, in the sense that it is not after the fact, but in the thick of action, and it would specifically command the military to stop continuing detention. Further, by requiring Congress to speak explicitly if it wants to empower the military to detain Hamdi, Justice Souter's opinion encourages political accountability.

Consistent with this interpretation is Justice Souter's attitude toward the constitutional avoidance doctrine. In *Endo*, to justify its ludicrous statutory interpretation, the Court waxed eloquent about this doctrine. Consider, by contrast, what Justice Souter wrote on the constitutional question of whether the President could unilaterally authorize Hamdi's detention: "I need to go no further; the Government hints of a constitutional challenge to the statute, but it presents none here."[87] Nonetheless, he continued: "I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war."[88] This willingness to engage in dictum—in order to send clear signals to the political branches about constitutional right and wrong—does not reflect the rhetorical style and complicit tone heard in the wartime cases.[89]

Hamdi provides still more evidence that the same doctrinal technique (for example, finding no authorization) can be used for varying ends (for example, to undermine or to promote accountability). It also provides additional cause for optimism: Perhaps the glass is three-quarters full. Any optimism must, of

86. *Ex parte* Endo, 323 U.S. 283, 309 (1944) (Roberts, J., concurring).

87. *Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring).

88. *Id.*

89. Similarly, in the Second Circuit's *Padilla* opinion, the majority expressly refused to invoke the canon of "constitutional avoidance." The government had encouraged reading the NDA to apply only to civilian, not military, detentions in order to avoid the constitutional question of the limits of Article II power. But the court rejected the invitation and explained that "the doctrine of constitutional avoidance has no application in the absence of statutory ambiguity." *Padilla*, 352 F.3d at 721 (citations omitted). But students of *Endo* know that ambiguity can be found when convenient.

course, be tempered by the fact that Justice Souter did not command a plurality, much less a majority.[90]

B. Rehabilitation?

The manner by which the enemy combatant cases invoke, apply, and distinguish the internment precedents (almost always ignoring the *coram nobis* cases) makes possible their rehabilitation. Precedents once disdained or forgotten could be repositioned rhetorically and legally in a more favorable light, through citation practices and subtle omissions. How are the internment cases being rehabilitated?

1. Misremembering Endo

a. Naive readings. Prompted by the briefs and perhaps by Pat Gudridge's recent article,[91] judges are now remembering *Endo*. Unfortunately, there have been some flat-out wrong recollections. For instance, in analyzing whether the NDA applies to military detentions, the Second Circuit wrote in *Padilla*:

> Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions.[92]

According to *Endo*, however, the World War II detentions were *not authorized* by the President and Congress. To be sure, curfew was authorized. So was evacuation, and maybe even temporary detention until loyalty could be determined. But according to the *Endo* Court, the internment camps writ large—notwithstanding annual funding by Congress—were never approved by the political branches. At least, that is the official line.[93]

More worrisome is the naïve manner in which *Endo* is cited for the proposition that citizen detention must be clearly authorized. For instance, in the *Hamdi* opinion, Justice Souter repeatedly cites *Endo* at face value for the propositions that Congress never authorized the internment camps during World War II[94] and that a clear statement for citizen detention is necessary.[95]

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90. Justice O'Connor's plurality opinion, which was joined by three other members of the Court, found authorization for Hamdi's detention. Justice Thomas, in his dissent, agreed on this authorization point. That means a total of five Justices found authorization. Further analysis of these "yes authorization" opinions, and their meaning in terms of accountability, is provided in the Appendix.

91. *See* Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

92. *Padilla*, 352 F.3d at 720.

93. *See Ex parte* Endo, 323 U.S. 283, 297 (1944) ("For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.").

94. Justice Souter offered no qualification of the Court's findings in *Endo*:

> [T]he internments of the 1940's were accomplished by Executive action. Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, see *Ex parte* Endo, 323

The Second Circuit's *Padilla* opinion displays an even more naïve reading. In *Padilla*, the court rejected the government's argument that congressional appropriations for detention camps constituted authorization. The court's authority was *Endo*, which held that expenditures cannot be interpreted as ratification unless there is precise earmarking of funds for the specific challenged action.[96] But that claim when it appeared back in *Endo* was preposterous. Although Congress for years funded the internment camps, the *Endo* Court remained willfully blind to ratification.[97] The Court manufactured a hyper-specificity requirement—what Justice Roberts called "an element never before thought essential to congressional ratification"—solely to shield Congress from responsibility. It is this hyper-specificity requirement that the Second Circuit *Padilla* majority relies on.[98]

Here, then, is cause for dissonance. How can opinions that promote accountability cite to *Endo*, which was deviously designed to deny accountability? Perhaps experiencing dissonance is itself naïve since, as this article has already observed, legal doctrines generally lack a single political valence.[99] To use Justice Jackson's now clichéd "loaded gun" metaphor, a gun used against civil liberties (in *Endo*) can be picked up six decades later and used in favor of civil liberties (in the enemy combatants "no authorization" opinions). To reverse another tired saying, one can use the master's tools to dismantle the master's house.

U. S. 283, 285-288 (1944), the statute said nothing whatever about the detention of those who might be removed, *id*., at 300-301; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority, see *id*., at 287-293.

Hamdi, 124 S. Ct. at 2654 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

95. *Id.* at 2656 n.2. Justice Thomas also reads *Endo* at face value. *See id.* at 2677-78 (Thomas, J., dissenting).

96. *See Padilla*, 352 F.3d at 724. The court quoted directly from *Endo*:

> [The appropriations statute] authorizes nothing beyond the expenditure of money. *Endo* unquestionably teaches that an authorization of funds devoid of language "clearly" and "unmistakably" authorizing the detention of American citizens seized here is insufficient. *See* 323 U.S. at 303 n.24 (acknowledging that Congress may ratify past actions of the Executive through appropriations acts but refusing to find in the appropriations acts at issue an intent to allow the Executive to detain a citizen indefinitely because the appropriation did not allocate funds "earmarked" for that type of detention).

Id.

97. *Endo*, 323 U.S. at 304 n.24. The Court implausibly insisted:

> [T]he 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.

Id.

98. In ruling on the refiled habeas petition, the District Court for South Carolina made the same naïve read of *Endo*. *See* Padilla v. Hanft, 2005 WL 465691 at *10 (Feb. 28, 2005) (quoting *Endo*'s language that "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.").

99. *See supra* Parts III.A.1 and 2.

Still, truth is at stake here, and the truth of *Endo* must not be denied.[100] Justice Souter's citation to *Endo* for the proposition that Congress did not authorize the internment camps reinscribes a falsehood. And, in some ways, it is more dangerous when that reinscription occurs in an opinion that promotes accountability, which invites celebration, not skepticism. After a few more repetitions,[101] who will remember anything but the official line?[102] Who will remember the truth of *Endo*?

b. Remember Endo*?* But the truth of *Endo* is contested. Specifically, Pat Gudridge remembers *Endo* much more favorably, as an essential counterpoint to *Korematsu*, which was decided on the same day. His thesis is complicated and argued in rich, evocative prose. But boiled down, the essential elements of his claim are: (i) *Korematsu* is not as important as believed—because *Endo* was decided the same day;[103] (ii) *Endo* is better than remembered—it was a "constitutional" decision that freed the Japanese; (iii) the two cases act as mutually repelling counterpoints that must be equally weighted. Because of its influence,[104] Gudridge's thesis warrants detailed engagement.

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100. I made a similar point about the value of truth in my critique of the *coram nobis* cases in *Denying Prejudice*. *See* Kang, *supra* note 2, at 997-1004.

101. Numerous amicus briefs filed in the enemy combatant cases offered naïve readings of *Endo*. *See, e.g.*, Brief of the ACLU et al. at 16-17, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696); Brief for Professors of Constitutional Law et al. at 15-16 Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027); Brief for Original Congressional Sponsors of 18 U.S.C. § 4001(A) at 22, *Padilla* (No. 03-1027); Brief for the Center for National Security Studies and the Constitution Project at 9, *Padilla* (No. 03-1027).

102. Consider, for example, the comments of Judge Shira Scheindlin, who writes: "For example, the Court decided *Hirabayashi* in the thick of World War II. Just one year later—but after American forces landed on Normandy beach and in the Philippines, and the Japanese threat had all but subsided—the Court essentially reversed itself in *Endo*." Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 839-40 (2004).

There was no "reversal" in *Endo* except in the most formal sense. For other liberal triumphalist readings of *Endo* in the amicus briefs, see, e.g., Brief of the American Bar Association at 6-7, *Hamdi* (No. 03-6696) (suggesting that the judiciary vindicated its "essential obligation to provide American citizens with meaningful review of executive detentions" in *Endo*); Brief of Washington Legal Foundation et al. at 15, *Padilla* (No. 03-1027) (citing *Endo* as authority that the Japanese Americans had been "detained based solely on racial consideration"); *see also* Alan M. Dershowitz, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 162 (2002) ("There is, however, an important difference between the detention of Japanese-American citizens and torture. The detentions were *done openly and with presidential accountability*; torture would be done secretly, with official deniability.") (emphasis added).

103. To avoid misunderstanding, let me be clear that Gudridge posits *Korematsu* as an "infernal baseline," Gudridge, *supra* note 91, at 1934, and assures us that remembering *Endo* will not make us forget the wrong of internment. *Id.* at 1939.

104. *See, e.g.*, *Issacharoff & Pildes*, *supra* note 3, at 21-23 (adopting Gudridge's analysis wholesale). The authors analyze *Endo* even more triumphantly than Gudridge:

> Evacuation and restrictions on mobility reflected military judgment (faulty or pernicious as they may have been) of what was necessary for security. Detention, however, reflected political and policy judgments, not military ones. Despite the emphasis *Korematsu* has had at the expense of *Endo*, the fact is that even during this bleak episode, the Court continued to resist executive branch actions that, at most, rested on political and policy, rather than military, judgments.

Gudridge's appreciation of *Endo* stems largely from the fact that it freed the Japanese.[105] However, this result deserves less weight than he gives it: the eventual freedom of loyal Japanese Americans after Roosevelt was re-elected and after military exigency had passed was never in question. Indeed, by late 1944, the WRA was more concerned about how it would get internees out of the camps than how it could keep them in. At greater issue was how the Court would make an accounting in 1944 for what the government had done. Indeed, since release was inevitable, the best thing that *Endo* could do for the Japanese Americans was to provide a reckoning of who did what to whom—to pronounce that (i) democratically elected leaders had authorized their imprisonment and that (ii) this imprisonment violated their constitutional rights. *Endo* did neither.

First, by finding no authorization, the Court attributed the internment camps to the lowly WRA. On this there is no dispute. Second, although Gudridge makes creative arguments on why *Endo* should be viewed as a constitutional case,[106] the Court's plain language makes clear that Japanese Americans' constitutional rights were not actually vindicated: "We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying *constitutional* issues which have been argued."[107]

Id. at 21; *see also* Patrick Baude, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: An Essay on the Spirit of Liberty in the Fog of War*, 79 NOTRE DAME L. REV. 1321, 1331 (2004) (remarking on how the author thought about *Korematsu* "before I read Patrick Gudridge's recent study of the *Endo* case").

105. This is not technically true since the military unilaterally rescinded its orders the day before *Endo* was handed down. Gudridge notes this fact. Gudridge, *supra* note 91, at 1935. That said, the reason the military acted on the specific day it did was to beat the judicial opinion to the punch. *See also Issacharoff & Pildes*, *supra* note 3, at 21 ("*Korematsu* as an actual legal decision turns out to have had no practical effect . . . . By the time the Court was deciding *Korematsu* . . . the practical question was whether continued detention was permissible. And on that, *Endo* was decisive . . . . The initial evacuation had long ago taken place; the Court could not undo that or its consequences. All the Court could do, as a practical matter, was order the end to continued detention. And that is what it did.").

106. Examining the drafting history of Justice Douglas' opinion, Gudridge notes the deletion of language that more clearly demonstrates a strategy of constitutional avoidance. Gudridge, *supra* note 91, at 1956. Relying on this sort of excavation, especially when the plain meaning of the opinion's text is accessible, is a questionable interpretive methodology; I am uncertain that we want the meanings of Supreme Court opinions to change as we find, in the future, red-line annotations in version-controlled word processing documents. Further, to the extent that this is an attempt to discern authorial intent, Douglas' own spoken words are telling and are explicitly to the contrary. As acknowledged by Gudridge, Douglas makes plain that he could not forge a majority to decide the case on constitutional grounds; therefore, he wrote the opinion the only way he could, on statutory grounds. *Id.* at 1953.

In making his case that *Endo* was a constitutional decision, Gudridge further contends that the structure of Douglas' opinion does not reflect the typical organization of constitutional avoidance arguments. The conventional organization, he suggests, is to lay out the various preconstitutional interpretive possibilities, then in order to avoid some constitutional question or concern, the Court self-consciously exercises discretion to adopt a second-best choice. Even if such a cookie-cutter template were uniformly used, there is another explanation why the Court did not list potential alternatives: the only other alternative was to suggest that President Roosevelt and Congress had authorized Endo's detention. To then publicly proclaim an exercise of judicial discretion, instead of invoking the rhetoric of (false) necessity, would have undermined the objective of shielding the political branches of responsibility. Denying corporate responsibility is not done most effectively by alerting your audience that that is what you are doing.

107. *Ex parte* Endo, 323 U.S. 283, 297 (1944) (emphasis added).

One final argument should be dispositive. Under Gudridge's favorable reading of *Endo*, what explains *Korematsu*'s tortured and implausible segmentation of evacuation from detention? Why go through such machinations, ignoring the government's own concession,[108] if on the very same day the Court would rule in *Endo* that indefinite detention was illegal? Was it just to create a riddle to be solved in the law reviews six decades later?

No, the segmentation was necessary in the Court's dodge of corporate responsibility. Recall that the Court held that Endo's detention was never authorized by the President or Congress. The only way that the Court could reach this "no authorization" conclusion was to segment detention from evacuation, which was obviously authorized. If the two orders were instead seen as facets of an organic whole, the Court could not have divined differential authorization in favor of evacuation but against detention. *Korematsu* formally severed what was in reality unseverable—not to create a "Liang gate"[109] but to open the trap door for *Endo*'s escape.[110]

Rather than emancipation and vindication for Japanese Americans, *Endo* offered exculpation for the political branches. *Endo* should not be seen as the nemesis of *Korematsu*, or as "zhengfanshu" (front and reversed writing).[111] In less recondite terms, *Korematsu* and *Endo* fit "hand in glove," reflecting a general strategy of tolerating significant "collateral damage" to racial minorities (them), in order to protect the mainstream (us), and then covering up the unpleasantries. Instead of immiscible constitutional swirls, the two cases reveal a consistent pattern of denying corporate responsibility.

c. Ironic embrace. *Endo*'s clear statement rule need not be abandoned as the fruit of some poisonous tree. *Korematsu*'s current doctrinal status provides a useful analogy. Law students are often perplexed how *Korematsu* can be disparaged like *Plessy v. Ferguson*,[112] but still never be overruled. The riddle is formally solved by distinguishing the legal rule from its application. As a legal rule, *Korematsu* remains good law, in the sense that it has never been reversed and also in the sense that "strict scrutiny" is arguably what should be applied to racially prejudiced classifications. This explains how *Korematsu* can be

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108. *See* Brief for the United States, *supra* note 26, at 28-29, *Korematsu* (No. 22).

109. Drawing on art historian Wu Hung's work, Gudridge teases out a cryptic metaphor of the two cases as symbols on the pillars of a Chinese funeral gate. Gudridge, *supra* note 91, at 1965-68.

110. I made the same argument in *Denying Prejudice*:

> 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.

Kang, *supra* note 2, at 965 n.172.

111. Gudridge, *supra* note 91, at 1966.

112. 163 U.S. 537 (1896).

prominently cited as recently as 1995 in the Supreme Court's affirmative action jurisprudence.[113]

By contrast, *Korematsu* acts as "anti-precedent" in its application of the legal rule to the facts. The application failed not only because the Court was fed bad data, as demonstrated by the *coram nobis* cases, but also because the Court, influenced by its racial schemas,[114] deferred to the racial common sense of the times. This contextualized understanding separates the baby from the bath water. The "strict scrutiny" rule can be preserved while the rubber-stamping application of the rule can be flushed.

The same should be done with *Endo*. Its "clear statement" legal rule (perfectly fine) should be distinguished from its historical application (deceitful). The legal rule, never having been overruled, remains good law. But a naïve rehabilitation of *Endo* means that its "clear statement" rule could be deployed across the board, perhaps to *deny* accountability the next time.

To put a fine point on it, suppose that the military commits a spate of horrific tortures, in the light of some ambiguous statute or Executive Order that permits highly coercive interrogation. After the fact, a court could excuse the President and Congress of any wrongdoing and instead blame low-level soldiers by finding that no one ever authorized quite this kind of barbarism. Using what authority? See *Endo*, which is being revivified in the enemy combatant cases without due care. Now, the glass appears only half-full.

2. Resurrecting Hirabayashi

Are the other wartime opinions also being resurrected? Not *Korematsu* as applied. For example, Justice O'Connor's *Hamdi* opinion explicitly cites to Justice Murphy's dissent in *Korematsu*, which argued that there must be more rigorous judicial review.[115] And to the credit of the Department of Justice, the only wartime case cited in its briefs in the enemy combatant cases was *Endo*.[116]

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113. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Reggie Oh & Frank Wu, Essay, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for Asian Americans*, 1 MICH. J. RACE & L. 165, 176-78 (1996).

114. For a more detailed discussion of racial schemas, see *Kang*, *supra* note 2, at 955-58. *See generally* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1528 (elaborating a model of racial mechanics that draws on racial schemas infused with implicit bias).

115. "[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. *Cf.* Korematsu v. United States, 323 U. S. 214, 233-234 (1944) (Murphy, J., dissenting) ('[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled')." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2649-50 (2004).

116. The government cited *Endo* on matters of habeas jurisdiction, entirely appropriate in the *Padilla* discussion. *See* Brief for Petitioners at 21 n.8, 26 n.12, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027). The government also contested *Endo's* clear statement rule to the enemy combatant cases on the grounds that *Endo* addressed civilian agency detention, in contrast to detention by the military. *See* Brief for Respondents, *Hamdi* (No. 03-6696), at 22 n.7; Petitioner's Brief at 45-46, *Padilla* (No. 03-1027). In *Padilla*, the government argued that here, the President had explicit authorization to detain enemy combatants under 10 U.S.C. § 956(5), which "grants specific authorization for

Hirabayashi, however, is being reawakened. In the Supreme Court's opinions, it makes only a cameo appearance: in Justice Thomas's dissent in *Hamdi*, for the proposition that the judiciary should defer to the factual predicates of executive branch decisionmaking as virtually conclusive.[117] But it is featured more prominently in the Second Circuit's *Padilla* opinion. The Second Circuit made clear that its conclusion turned on the fact that Congress had not authorized Padilla's detention, and that therefore, within the familiar *Youngstown* framework,[118] the President was acting at the nadir of his power. However, the court added, "[t]o be sure, when Congress and the President act together in the conduct of war, 'it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.' Hirabayashi v. United States."[119] In other words, on the authority of *Hirabayashi*, Padilla's detention would pose no constitutional problems if Congress simply said so.[120]

Imagine what happens when the next shoe drops. Suppose that Congress does speak explicitly, in the heat and fog of a major terrorist attack, and authorizes massive race or ethnicity-based detention. Even if Congress is not so explicit, imagine the courts' finding authorization in some vaguer pronouncement in a repeat of the *Hirabayashi* strategy. According to the Second Circuit and Justice Thomas, the judiciary has essentially no role to play.[121] This deference abandons a critical check on governmental abuse, especially majoritarian tyranny.[122]

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the military to expend appropriated funds of the detention of persons 'similar to prisoners of war,'" as opposed to the Congressional "lump appropriation" for the WRA's "overall program" which led to the ruling of no authorization in *Endo*. *See id.* at 39 n.15 (No. 03-1027). Also in *Padilla*, the government claimed that *Endo*'s clear statement rule did not apply, *because* (i) the Court is not being asked to find implied powers in a delegation of authority and (ii) the restraint imposed on Padilla (that is, detention) is not greater than that contemplated by the AUMF's authorization of "all necessary and appropriate force." *Id.* at 42 n.17 (No. 03-1027).

117. *Hamdi*, 124 S. Ct. at 2677 (Thomas, J., dissenting).

118. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-39 (1952) (Jackson, J., concurring).

119. Padilla v. Rumsfeld, 352 F.3d 695, 713 (2d Cir. 2003).

120. Jason Weida points out that Hirabayashi was cited in Justice Jackson's *Youngstown* framework. Jason Collins Weida, A *Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397, 1432 (2004).

121. *Cf.* Chemerinsky, *supra* note 66, at 1639 (pointing out that the Second Circuit did not answer to what extent the executive and legislative branches, acting in unison, can suspend the Bill of Rights for citizens deemed enemy combatants).

122. In this brief article, I cannot offer a more methodical defense of this plain statement. However, since 9/11, there has been an explosion of scholarship analyzing the proper role of judicial review in times of terror that does discuss its merits as a check on governmental abuse. *Compare* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (treating "extraconstitutional" action by the executive as inevitable and proposing a framework of political controls in times of crisis), *and* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 304 (2003) (exercise of power during emergencies should be extraconstitutional) *with* Laurence Tribe & Patrick Gudridge*, The Anti-Emergency Constitution,* 113 YALE L.J. 1801 (2004) (criticizing Ackerman's framework as unworkable) *and* David Cole*, The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (questioning Ackerman's lack of faith in judicial review during times of crisis); *see also* Mark Tushnet, *Response: Issues of Method in Analyzing the Policy Response to Emergencies*, 56 STAN. L REV. 1581 (2004) (deferential judicial review during times of crises reflects rebalanced cost/benefit analysis); Eric Posner & Adrian Vermeule, *Accommodating Emergencies,* 56 STAN. L. REV. 605 (2003) (arguing that judicial deference in times of crisis does not lead to "ratcheting down"

How is it possible that *Hirabayashi* can be so casually cited when cases like *Korematsu* (as applied) are placed in the same abyss as *Dred Scott* and *Plessy*? It is partly because, although *Korematsu* is valenced negatively in our constitutional culture, *Hirabayashi* is largely unknown. Its positive citation in the enemy combatant cases increases the chances that *Hirabayashi* will slip into mainstream constitutional discourse without due diligence.[123] Before that happens, here is a reminder of *Hirabayashi*'s meaning:

- It was about segmentation, which sliced and diced issues to make room for a delayed *Korematsu*.
- It was about finding authorization in ambiguous text to excuse the political branches from saying distasteful things explicitly.[124]
- It was about rejecting any notion that citizens should have to bear the burdens of war in common.[125]
- Finally, *Hirabayashi* was about the Supreme Court cruelly accepting an impossible Catch-22 for racial minorities. In the case, the Supreme Court embraced the logic that, because the United States had mistreated the Japanese, it was rational to assume that they would be more disloyal, which in turn made them a greater security threat. With heartless precision, it stated:

> 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.[126]

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civil liberties and decisionmaking based on "irrational fear"); Bernard Bell, Marbury v. Madison *and the Madisonian Vision,* 72 GEO. WASH. L. REV. 197 (2003) (judicial review should push difficult questions to politically accountable branches); John Yoo, *Judicial Review and the War on Terrorism,* 72 GEO. WASH. L. REV. 427, 429-30 (2003) (judicial review should be highly deferential, and "provide options" to executive branch in times of war).

123. *Hirabayashi* surfaced repeatedly in the amicus briefs filed with the Court, and was cited approvingly by a number of the amici. *See, e.g.*, Brief of Washington Legal Foundation, U.S. Representatives Joe Barton, Walter Jones, and Lamar Smith, and Allied Educational Foundation at 9, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696); Brief of Amicus Curiae American Center for Law & Justice at 2, 5, 16-17, 23-24, 26, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027); and Brief for Senators John Cornyn and Larry E. Craig at 17, *Padilla* (No. 03-1027).

124. There is a long history of such chicanery as applied to Asian Americans. *See, e.g.*, Keith Aoki, *No Right to Own: The Twentieth-Century Alien Land Laws as a Prelude to Internment*, 40 B.C. L. REV. 37, 55-71 (1998) (discussing the Supreme Court's upholding of Western states' alien land laws, which targeted Japanese immigrants using the term "aliens ineligible to citizenship," in order to escape the "federal judicial or legislative ire" that an explicitly racial bar would attract).

125. Six years later, Justice Jackson would make the general argument with characteristic eloquence: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949).

Drawing on the same common sense insight, Gordon Hirabayashi had argued that curfew should apply to all citizens alike or to none at all. But, the Court explained that such burdening of other Americans was irrational and unnecessary, and that the Constitution did "not compel so hard a choice." Hirabayashi v. United States, 320 U.S. 81, 95 (1943).

126. *Id.* at 96. The footnote to this quotation listed in encyclopedic detail all the *de jure* and *de facto* discriminations to which the Japanese had been subject. Moreover, as the Japanese American Citizen's

Hirabayashi's creep back into respectability should be stopped. At the level of social norms, *Hirabayashi* should be stigmatized so that attorneys, especially government attorneys, pause before citing it as support for its argument.[127] Judges and their law clerks, before cutting and pasting language from briefs into opinions, should likewise linger and question its authority, as conceived in the broadest sense.

Preventing *Hirabayashi*'s casual rehabilitation would have been easier if the *coram nobis* cases had been decided differently. If truth had been spoken to power, each citation to the *Hirabayashi* of the 1940s would have to be followed by a "but see" signal to the *Hirabayashi coram nobis* case of the 1980s with a searing parenthetical. That parenthetical would explain that the Supreme Court, even if it had been given all the suppressed evidence, would have nonetheless affirmed Hirabayashi's convictions. If this were our official history, *Hirabayashi* would be more difficult to rehabilitate. But this never happened, and *Hirabayashi* emerges from our collective ignorance. The glass is half-empty.

IV

CONCLUSION

Perhaps I am an alarmist. Only an academic would pick through the technical details of the internment, *coram nobis*, and enemy combatant cases to identify minutiae about segmentation, authorization, actual prejudice, and citation practices to cobble together some accountability bogeyman. Instead, the big picture reveals only good news: *Korematsu* bad (racist);[128] *Endo* good (Japanese

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League (JACL) argued in its amicus brief: "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." Brief of the JACL at 64-65, *Hirabayashi* (No. 870).

In his own brief, Yasui added: "[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." Brief for Appellant at 34, Yasui v. United States, 320 U.S. 115 (1943) (No. 871).

127. *Cf.* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (pointing out the anti-Asian racist underpinnings of the plenary power cases).

128. For example, Eric Muller notes that eight of nine current sitting Supreme Court Justices "have either written or concurred in opinions describing *Korematsu* as an error." *See* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002). As evidence, Muller points to statements in *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 633 (1990), *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995), and *Stenberg v. Carhart*, 530 U.S. 914 (2000). (Justice Souter is not listed, but Muller properly attributes that simply to a lack of occasion. *See* Muller, *supra*, at 586 n.75.) On the one hand, Muller is correct that, besides the Chief Justice, the current sitting Justices have not provided apologia for the results in *Korematsu*. On the other hand, we should be cautious about reading too much into the cases that Muller cites.

In two of the cases, the statements by the more conservative Justices discrediting *Korematsu* are deployed to change constitutional doctrine to strike down affirmative action programs. In *Metro Broadcasting*, Justice Kennedy dissents (with Justice Scalia joining) from the majority's decision not to apply "strict scrutiny" to federal affirmative action in broadcast license distribution. He points out that "[e]ven strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in *Korematsu*." 497 U.S. at 633. In *Adarand*, the dissent's view in *Metro Broadcasting*

Americans win); *coram nobis* opinions good (convictions vacated); and enemy combatants cases good (courts have jurisdiction and some legal process required). In caricature, the objection goes, "Don't Worry, Be Happy."[129] Stated more aggressively, the objection suggests that clear victories are being needlessly undermined as only partial, perhaps Pyrrhic. Let the people enjoy *Endo*. Let them enjoy the *coram nobis* opinions. Who cares about non-ironic embraces of precedent, whatever that might mean? Who cares about citations to *Hirabayashi* in *Padilla* when the petitioner wins? No one else sees a problem; why stir up trouble and look for one? The glass, the objection insists, is half-full.

But my concerns are not invented. The techniques of segmentation and selectively discerning authorization can be exploited in today's war to deny accountability. An inaccurate remembering of the internment cases also risks noncontextual resurrections of *Endo* and *Hirabayashi*—again, with real-world consequences.

More fundamentally, truth matters. What happened in the internment was the governmental acceptance and propagation of a racist lie—that persons of Japanese descent in America were traitors because of their race. The truth was otherwise, and that truth has surfaced over time. Only a passionate commitment to the truth has driven courageous efforts, such as the *coram nobis* litigation, to further expose the truth. My analysis of the 1940s and 1980s cases is that truth has been revealed only partially, and the judiciary—supposedly the most principled branch of government—has dodged a truthful accounting.

Even at the level of symbolism, this argument matters. For many Americans—some of whom are unaware of even the internment itself—a technical academic inquiry may have no impact. But the target audience is lawyers and law-informed policymakers who are guiding the war on terror. For them, I am contesting the broad-brushed symbolism that is taught in highly stylized and re-

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becomes the majority, and Justice O'Connor writes (with Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas joining) that, "*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification. . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." 515 U.S. at 236. Many would not take great solace in conservative Justices saying bad things about *Korematsu* in order to strike down most race-based affirmative-action programs. *See, e.g.*, YAMAMOTO ET AL., *supra* note 48, at 22; Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward A Community Of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 142 (1996).

The third case that Muller cites, *Stenberg*, addressed the constitutionality of a ban on partial-birth abortion procedures. Justice Scalia, in dissent, compared the majority's striking down of the ban as akin to *Korematsu* and *Dred Scott*. *See* 530 U.S. at 953 (Scalia, J., dissenting). Harsh words indeed, which should make Justice Scalia's subsequent embrace of *Korematsu* difficult. But these words were not written in a national security context, and no doubt the next time, the facts of military exigency will be distinguishable from World War II. Recall that the legal rule now understood to have been set by *Korematsu* remains good law: As recently articulated in *Grutter v. Bollinger*, "the lesson of *Korematsu* is that national security constitutes a 'pressing public necessity.'" 123 S. Ct. 2325, 2351 (2003).

129. For a decidedly more pessimistic view about what has happened post 9/11, see, e.g., Karen Tumlin, *Suspect First: How Terrorism is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004) (focusing on loss of immigrants' rights).

dacted form in typical constitutional law classes. The internment cases are often taught as embodying the traditional liberal vision of the rule of law working itself pure by correcting errors made by a few bad apples—as *Endo* corrected *Korematsu*, as the *coram nobis* opinions corrected the wartime cases, and so on. I offer a more critical counter-story that hones in on the judiciary, which, under the law's magnificent cloak, has covered its institutional derrière through deft legal exegesis. That counter-symbol—*not of law working itself pure, but of judges dodging corporate responsibility*—is what we must remember during these tortured times.

Many commentators suggest that we have learned our lessons from World War II, and something as grotesque as the internment will never happen again.[130] In some ways, this must be true, since the civil rights battles of each generation look different from the ones of the past. Still, those who confidently assert that we have learned our lessons must answer two questions.

First, precisely what lessons did we learn?[131] In *Denying Prejudice*, for example, I demonstrated that no one had noticed the dark underbelly of the *coram nobis* opinions, which had been previously only celebrated. In the current article, I have argued that we have misremembered *Endo*.[132]

Second, why do we assume that we learn but never forget? It is only through constant vigilance that the internment can remain a lighthouse that helps us navigate the rocky shores triangulated by freedom, equality, and security. We can never presume "never again." And as judges watch over, case-by-case, how our rights survive in a climate of anger and fear, I hope they receive guidance from the internment, as precedent and parable, without naïveté. Let us watch them.

V

APPENDIX: AUTHORIZATION AND ACCOUNTABILITY

A. The Authorization/Accountability Matrix

Recall the central complaint about *Endo*: Its finding of "no authorization" was used to deny accountability by passing off responsibility to the WRA, described as a rogue agency. Should "no authorization" thus be equated with "undermine accountability"? Not necessarily: remember *Hirabayashi*. Neither

130. *See, e.g.*, David Cole, *Judging the Next Emergency: Judicial Review in Times of Crisis*, 101 MICH. L. REV. 2565, 2575 (2003) ("In short, *Korematsu* has not proved to be the 'loaded weapon' that Justice Jackson feared. To the contrary, it has served as an object lesson in what the Court and the government ought not do in future crises."); Gudridge, *supra* note 91; Scheindlin & Schwartz, *supra* note 102.

131. *See, e.g.*, Tushnet, *supra* note 122, at 290 ("Although General DeWitt's reasons for action may have rested on racist assumptions, the decisions of the higher-ups, relying on DeWitt, were not.").

132. *See, e.g.*, Margulies, *supra* note 3, at 416 ("Cases like the Steel Seizure Case and *Ex parte Endo* reflect a pragmatic judiciary that understands exigency but does not lose sight of the values of equality and integrity that assertions of exigency can obscure."). My read of *Endo* is that equality was sacrificed in order to maintain the appearance of integrity.

Executive Order 9066 nor Public Law 503 spoke explicitly of curfews, certainly as applied to American citizens. Nevertheless, in that case, the Supreme Court found authorization in the ambiguous text, thereby excusing the political branches from explicitly authorizing such burdens, even as to American citizens, solely on the basis of ancestry.[133] This meant that the political branches got what they desired without having to spell out, in distasteful detail, racial discrimination in the U.S. Code.[134]

To untangle the relationship between authorization and accountability, consider the following matrix:

	UNDERMINE ACCOUNTABILITY	**PROMOTE ACCOUNTABILITY**
NO AUTHORIZATION	Quadrant I	Quadrant III
YES AUTHORIZATION	Quadrant II	Quadrant IV

Quadrant I is the *Endo* case (internment camps were not authorized, so neither Roosevelt nor Congress could be held accountable). Quadrant II is *Hirabayashi* (race-based curfew was authorized even as applied to citizens, so neither the Executive nor Congress required a more explicit green light). Depending on the context, either finding on the question of authorization can undermine accountability.

There is also a second column, which suggests that an interpretation about authorization can sometimes promote accountability. On the one hand (Quadrant III), finding no authorization could stop military action in its tracks and force Congress to muster up the courage and political capital to do explicitly what it was attempting to do implicitly. This could be called the anti-*Hirabayashi* case—what would have happened in an alternate universe if upon challenge, curfews as applied to citizens were struck down as unauthorized.[135]

On the other hand (Quadrant IV), just the opposite may be true: Finding authorization could promote accountability. This is the alternate universe's anti-*Endo* case. If the Supreme Court in *Endo* had held that the internment camps were authorized by F.D.R. and Congress, then it would have had to address Endo's constitutional claims. The political branches of government could not have dodged constitutional censure.[136]

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133. *See* Kang, *supra* note 2, at 963.

134. This is not to say that if such specificity were required the political branches would not have complied with subsequent clarifications, but it was even simpler not to have to. And this could create more plausible deniability later, as in *Endo*.

135. *Cf.* Bell, *supra* note 122, at 218 (characterizing clear statement rules as vindicating constitutional rights).

136. On this general point about the complexity of interpreting legislative will, Margulies notes the conflict of interpretive norms, which encourage deference on foreign affairs and national security matters but require respect of constitutional rights. *See Margulies*, *supra* note 3, at 404-05. I agree with the genuine difficulty of the interpretive enterprise in such contexts, but my emphasis is that, in the face of such ambiguity and complexity, the court has and may again flex the doctrines to deny accountability.

B. Categorizing the Opinions

This matrix helps distinguish between opinions that undermine versus promote accountability. Consider, first, the "no authorization" opinions. These are Justice Souter's and Justice Scalia's opinions in *Hamdi*, as well as the Second Circuit majority in *Padilla*.[137]

	UNDERMINE ACCOUNTABILITY	**PROMOTE ACCOUNTABILITY**
NO AUTHORIZATION	**I. Endo**	**III. anti-Hirabayashi**
YES AUTHORIZATION	II. Hirabayashi	IV. anti-Endo

Looking across the first row of the matrix, the question becomes whether these opinions replicate the *Endo* (Quadrant I) gambit, which would be troubling, or represent the anti-*Hirabayashi* strategy (Quadrant III), which would be heartening. Above, I explained why they fall into Quadrant III.[138]

However, Justice Souter's opinion did not command a majority in *Hamdi*. In fact, a total of five Justices found "yes authorization." Justice O'Connor's plurality opinion[139] provided the reasoning. Specifically, she found that Congress, in enacting the Authorization of the Use of Military Force (AUMF) after the September 11 terrorist attacks, authorized the detention of Hamdi as a necessary incident to war. It made no difference that Hamdi was a citizen.[140] Justice Thomas, although approaching the case quite differently, nonetheless agreed on the matter of authorization.

	UNDERMINE ACCOUNTABILITY	PROMOTE ACCOUNTABILITY
NO AUTHORIZATION	I. Endo	III. anti-Hirabayashi
YES AUTHORIZATION	**II. Hirabayashi**	**IV. anti-Endo**

How should we classify Justice O'Connor's "yes authorization" opinion? Applying the matrix, the two possibilities appear in the second row: Quadrants II or IV. The Quadrant II (*Hirabayashi*) strategy undermines accountability by stretching to find authorization under ambiguous circumstances. By contrast, Quadrant IV (anti-*Endo*) promotes accountability by attributing responsibility

137. Judges Pooler and B.D. Parker were in the majority. Judge Wesley concurred in part and dissented in part. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

138. *See supra* Appendix, Part A.

139. Justice O'Connor was joined in the opinion by Chief Justice Rehnquist, and Justices Kennedy and Breyer. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) ("We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.").

140. This was not an authorization of "perpetual detention"; the fact that effective operations against the Taliban were ongoing in Afghanistan meant that detention for the time being was congressionally authorized. *Hamdi*, 124 S. Ct. at 2641-42.

for lawless[141] action to the responsible political actors. Its primary effect is to speak truth to power, to force an accounting. This is what would have happened if the *Endo* Court had not laid all blame on the WRA.

Justice O'Connor's opinion does not fit neatly into either Quadrant. Viewed favorably, the opinion shows some features of Quadrant IV. The requirement of more constitutional process partly rebukes the conditions of Hamdi's detention. Moreover, her opinion puts Congress on notice that it has authorized Hamdi's detention, and if it disapproves, it should act accordingly. Viewed less charitably, however, the opinion features various qualities of Quadrant II. Justice Souter argues persuasively that the AUMF is ambiguous in authorizing Hamdi's detention. Yet, by finding authorization at least as long as "active operations" are ongoing in Afghanistan, the Court permits detention to continue, without Congress having to authorize expressly such citizen detention.[142] Of course, some due process strings are attached—to allow for "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[143]

The fairest assessment of Justice O'Connor's *Hamdi* plurality is to recognize that it straddles the two quadrants. On the one hand, it does not clearly promote accountability, which could have been achieved better by a contrary finding on authorization.[144] On the other hand, it does not clearly deny accountability either, since additional constitutional procedures are mandated regardless of the authorization.

141. "Lawless" is a slight exaggeration; it is possible that morally despicable action is both affirmatively authorized by the political branches and not negatively circumscribed by the Bill of Rights.

142. In addition, in terms of style, Justice O'Connor's opinion does not outwardly reject the doctrine of constitutional avoidance. She repeats that, because she finds authorization, she need not "reach the question whether Article II provides such authority [independently]." *Hamdi*, 124 S. Ct. at 2639. *See also id.* ("Again, because we conclude that the Government's second assertion [that AUMF authorized detention] is correct, we do not address the first [that the NDA does not apply to civilian detentions].").

143. *Hamdi*, 124 S. Ct. at 2635.

144. Requiring clear and unmistakable congressional authorization was the virtue of Justice Scalia's opinion, which brought together the ideological odd couple of Scalia and Justice Stevens. Justice Scalia argued that on these facts, Congress only had two constitutional options: prosecution for treason or suspension of the writ of habeas corpus. Congress should not shy and hide behind the shadows, and rather be forced to "pull the trigger" if it wants such detentions carried out.