Trump v. Hawaii is *Korematsu* All Over Again

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"Remember the *Federalist* papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions?"

Henry Hart and Herbert Wechsler[1]

Introduction

In *Trump v. Hawaii,*[2] the Supreme Court upheld the third iteration of President Trump's travel ban.[3] The presidential proclamation banned entry of aliens from a number of Muslim-majority countries.[4] Chief Justice Roberts railed against Justice Sotomayor's dissent that compared the travel ban decision to *Korematsu v. United States.*[5] *Korematsu* upheld a World War II order excluding Japanese Americans from the western United States.[6] In response to the dissent,

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[1] Henry M. Hart & Herbert Wechsler, The Federal Courts and the Federal System 336 (Foundation Press, Inc. 1953). Ironically, Herbert Wechsler, besides being a prominent legal scholar, was of one the attorneys for the United States in *Korematsu v. United States*, 323 U.S. 214 (1944).

[2] 138 S. Ct. 2392 (2018).

[3] Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161, 45165 (Sept. 24, 2017). The constitutional infirmities with the first two versions of the ban are discussed in Robert S. Chang, *White Washing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 Case W. Res. L. Rev. 1183 (2018).

[4] As to the named countries, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45165-71, superseded regular immigration procedures.

[5] *Trump*, 138 S. Ct. at 243; *Korematsu*, 323 U.S. 214 (1944).

[6] *Trump*, 138 S. Ct. at 2423. *Korematsu* was, of course, an infamous decision—so much so that the Chief Justice Roberts felt compelled not only to distinguish it but even to overrule it. "Korematsu is a case that has come to live in infamy." Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 631 n. 4 (14th ed. 2001). It is often lumped with *Dred Scott*, *Plessy*, and *Lochner*. Constitutional Stupidities, Constitutional Tragedies 124 (William Eskridge Jr. & Sanford Levinson eds. 1998).

Chief Justice Roberts claimed that ". . . *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[7] But the language and reasoning of the two decisions are eerily similar. *Korematsu* did not address the issue of detention in "concentration camps"; it addressed whether "exclusion" provisions of executive orders were constitutional.[8] On the contrary, the real issue in both cases was the constitutionality of means to sort out the "bad actors" from the larger group. In *Korematsu*, the larger group was all persons of Japanese descent in the western United States, with the "bad actors" being the disloyal ones.[9] In *Trump*, the larger group was citizens of only eight countries, with the "bad actors" being possible terrorists within that population.[10] In both cases, the Supreme Court abandoned judicial review over alleged infringement of constitutional rights asserted by American citizens arising from screening procedures. *Trump v. Hawaii* is *Korematsu* all over again.

I. BACKGROUND

A. *Basic Facts of* Korematsu v. United States

During WWII, there was deep concern about Japanese and German citizens living within the United States.[11] The United States did not have a uniform solution to address the population of German and Japanese citizens.[12] The "solution" we remember today, which gave rise to the *Korematsu* case, was the one adopted in the western states.[13] There, *all* persons of Japanese descent were deemed to represent risks sufficient to warrant negative treatment along racial

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[7] *Trump*, 138 S. Ct. at 2423.

[8] 323 U.S. at 216–17.

[9] *See id.* at 217.

[10] *See* 138 S. Ct. at 2403.

[11] *See A Brief History of Japanese American Relocation During World War II*, NAT'L PARKS SERV. (Apr. 1, 2016) https://www.nps.gov/articles/historyinternment.htm.

[12] There was no forced assembly provisions or detention for Japanese Americans in military areas outside of the Western United States. *See* Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 492–98 (1945). Rostow was a noted professor at Yale Law School. This was the first academic criticism of *Korematsu* after the war and is now considered a classic article about constitutional liberties in war time.

[13] Rostow, *supra* note 12, at 490–91, 496–97.

lines.[14] Germans on the east coast were not treated like this.[15] They were individually examined and those considered dangerous were identified and arrested.[16] The same was true in Hawaii where there were 160,000 persons of Japanese descent but only 2,000 of them were identified as dangerous and sent to relocation centers on the mainland.[17] Yet in the western states there were no such attempts at individual identification.[18]

This "system" was put into place by Executive Orders, affirmed by legislation and implemented by numerous proclamations. Executive Order No. 9066 issued on February 19, 1942, declared that "the successful prosecution of the war requires every possible protection against espionage . . . "[19] It permitted military commanders' wide discretion in protecting against espionage—including prohibiting which persons were to be excluded from their areas of command.[20] On March 21, 1942, Congress enacted a statute making it illegal for anyone to enter or remain in a military zone contrary to the order of the military commander in that area.[21] A series of proclamations were made pursuant to the Executive Order. In Public Proclamation No. 1,[22] issued by Lt. General DeWitt, Military Commander of the Western Defense Command, it was determined that the entire Pacific Coast was particularly subject to attack and required military measures to safeguard against enemy operations.[23] Similarly, there were another 107 proclamations to follow.[24] For example, there was a "curfew" proclamation requiring Japanese Americans in prescribed areas to remain in their residences from 8 p.m. to 6 a.m.[25] Moreover, Proc-

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14 *Id.* at 497.

15 *See id.* at 497–98.

16 *Id.* at 492.

17 *Id.*

18 *Id.* at 494.

19 Executive Order Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 25, 1942).

20 Rostow, *supra* note 12, at 497.

21 18 U.S.C. § 97a (West 1942) (amended 1970, repealed 1976).

22 Military Areas Nos. 1 and 2 Designated and Established, 7 Fed. Reg. 2320, 2321 (Mar. 26, 1942).

23 Military Areas Nos. 1 and 2 Designated and Established, 7 Fed. Reg. at 2321.

24 *See* Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. L. R. 983, 994, n. 38 (2011) (explaining that Lt. DeWitt issued 108 proclamations).

25 Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. 2543, 2453 (Apr. 2, 1942). This was upheld in Hirabayashi v. U.S., 320 U.S. 81, 103–04 (1943).

lamation No. 3 was an "exclusion" order precluding people of Japanese descent even from being in the Western command's area.[26] There were separate orders requiring those of Japanese descent to "assemble" and since they could not be in areas of Western command, both temporary and permanent relocation centers (detention centers) were established.[27] Both the "exclusion" order and orders resulting in "detention" were challenged in two separate cases. Both cases were argued on the same day before the Supreme Court[28] and decided on the same day by the Supreme Court.[29]

Korematsu was the "exclusion" case.[30] Mr. Korematsu had admittedly violated Exclusion Order No. 34.[31] His crime was being in California, even though he was a United States citizen.[32]

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order.[33]

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26 Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. at 2543.

27 Persons of Japanese Ancestry Evacuation for Employment in Idaho and Oregon, 8 Fed. Reg. 984, 984 (June 9, 1942); Persons of Japanese Ancestry Evacuation for Employment in Idaho and Montana, 8 Fed. Reg. 984, 984 (June 11, 1942); Persons of Japanese Ancestry Evacuation for Employment in Box Elder County, Utah, 8 Fed. Reg. 984, 984 (June 12, 1942).

28 *See* Daniel F. Tritter, *In the Defense of Fred Korematsu: Vox Claimants in Deserto Curiarum*, 27 T. JEFFERSON L. REV. 255, 271 (2005) (explaining that *Korematsu* and *Ex Parte Endo* were companion cases that corresponded to the detention and exclusion orders and were both argued on October 11 and 12, 1944).

29 *See* Lorraine K. Bannai, *Taking the Stand: The Three Men Who Took American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1, 15 n. 77 (2005) (explaining that the companion cases were both decided on December 18, 1944).

30 Korematsu v. United States, 323 U.S. 214, 216 (1944).

31 *Id*. at 216–17.

32 He was only charged under the exclusion order. *See id*. at 215–16. There were other orders he could have been charged with violating, like failure to assemble to be transferred to a detention center. *See* Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942).

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

Justice Black, a famous civil libertarian, wrote the 6-3 Majority decision upholding the exclusion order.[34] Justice William O. Douglas, another famous civil libertarian, joined the Majority.[35]

The other case decided that day was *Ex parte Mitsuye Endo*.[36] *Endo* involved a Japanese American held in a detention center during World War II.[37] In a unanimous opinion, the Supreme Court found that detention was *not* warranted under statutes and executive orders where the loyalty of the citizen was conceded.[38] This decision was explicitly not made on constitutional grounds.[39]

The Supreme Court never sanctioned detention of Japanese American citizens on the basis of race in *Korematsu*.[40] Indeed, in *Endo*, the Supreme Court struck that practice down.[41] However, it did sanction forcing Japanese Americans to be excluded from parts of the United States on the basis of race.[42] This distinction between exclusion and detention is not some after-the-fact analysis. It played out in real time—so much so that the American Civil Liberties Union (ACLU) supported Endo in his detention claim, but did not support Korematsu in his exclusion case.[43] The ACLU did not think it was appropriate to challenge the exclusion provisions.[44] Instead, the ACLU instructed its northern California affiliate to withdraw from Korematsu's representation.[45] The Supreme Court's split decisions in the two cases were consistent with the ACLU's split positions on them.[46]

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34 *Id.* at 219. *See generally* Bruce Murphy, "Wild Bill: The Legend and Life of William O. Douglas" (2003).

35 *Korematsu*, 323 U.S. at 219. *See generally* Roger K. Newman, "Hugo Black: A Biography" (1994).

36 323 U.S. 283 (1944).

37 *Id.*

38 *Id.* at 295, 302. For a fuller discussion of *Endo*, *see also* Patrick O. Gudridge, *Remember Endo*, 116 HARV. L. REV. 1933 (2003).

39 *Mitsuye Endo*, 323 U.S. at 297, 299. There were concurrences by Justices Murphy and Roberts on constitutional grounds.

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

41 *Mitsuye Endo*, 323 U.S. at 302–04.

42 *See id.* at 302.

43 CHARLES WOLLENBERG, REBEL LAWYER: WAYNE COLLINS AND THE DEFENSE OF JAPANESE AMERICAN RIGHTS 28 (2018); *A Quiet Civil Rights Hero: Mitsuye Endo's Landmark Supreme Court Case*, CAL. HISTORICAL SOC'Y, (Apr. 27, 2017) https://californiahistoricalsociety.blogspot.com/2017/04/a-quiet-civil-rights-hero-mitsuye-endos_27.html.

44 *Id.* at 27.

45 *Id*. at 28.

46 *Id.* at 38.

For this reason, the characterization of *Korematsu* as a detention case involving "concentration camps"[47] by the Supreme Court in *Trump* is wrong. *Korematsu* was an "exclusion" case. It had nothing to do with concentration camps. *Endo* was the detention case. But it did not have to be overruled since the Supreme Court had long ago found the detention of Japanese Americans was not warranted.[48]

B. *Basic Summary of* Trump v. Hawaii

Although *Trump v. Hawaii* did not arise during war, similarities between it and *Korematsu* are striking. During the 2016 Presidential campaign, then candidate Donald Trump made a number of anti-Muslim statements including a "Statement on Preventing Muslim Immigration" which called for a "total and complete shutdown of Muslims entering the United States . . ."[49] A fuller recitation of anti-Muslim statements made by candidate Trump was set forth in the majority opinion.[50] In 2017, shortly after taking office, President Trump issued Executive Order No. 13769—his first attempt at a travel ban against seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[51] Each of the countries had previously been identified by Congress—or prior administrations—as "posing heightened terrorism risks."[52] Nationals of these countries were banned from entering the United States for ninety days pending review of the adequacy of information from these countries.[53] That order had a short life when a temporary restraining order was granted[54] and upheld by the Ninth Circuit.[55] Rather than continue litigation, the President withdrew the order.[56] He replaced it with a second order, Executive Order 13780, which restricted the entry of nationals from six countries.[57] Iraq was dropped for the original list.[58] It was challenged and enjoined by two

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47 *Trump*, 138 S. Ct. at 2423.

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

49 *Trump*, 138 S. Ct. at 2417.

50 *Id*.

51 *Id.* at 2403.

52 *Id.*

53 *Id.*

54 Washington v. Trump, Case No. C17-0141JLR, 2017 WL 462040 at *2 (W.D. Wash. 2017).

55 Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (*per curiam*).

56 Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017).

57 *Id.*

58 *Id.*

district courts on different grounds and both cases were initially affirmed by the respective circuit court of appeals. In *Washington v. Trump*, the Court of Appeals for the Ninth Circuit affirmed a finding that the ban exceeded the scope of the authority delegated to the President and that there were insufficient findings to justify the ban.[59] And in *International Refugee Assistance Project v. Trump*, the Court of Appeals for the Fourth Circuit affirmed a finding that the ban violated the establishment clause.[60] The Supreme Court granted certiorari and stayed the injunctions.[61] The injunctions expired before the Supreme Court's review and were vacated as moot.[62]

Finally, on September 24, 2017, the President issued the Proclamation No. 9645, which was at issue before the Supreme Court in *Trump v. Hawaii*.[63] The Proclamation was meant to allow President Trump to temporarily prohibit entry into the United States of foreign nationals from countries which allegedly had inadequate information sharing regarding those individuals who posed "public safety threats."[64] The Proclamation placed a range of restrictions that varied by country.[65] The nationals of some countries were barred entirely (North Korea and Syria).[66] Nationals of Iran were restricted to nonimmigrant students and exchange visas.[67] Nationals of Chad, Libya and Yemen could not seek immigrant and nonimmigrant business or tourist visas.[68]

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59 Washington v. Trump, 847 F.3d 1151, 1166 (9th Cir. 2017).

60 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 593–94 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and *vacated and remanded* Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017).

61 Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2082 (2017).

62 *See* Trump v. Int'l Refugee Assistance Project, 138 S.Ct. 353, 353 (2017); Trump v. Hawaii, 138 S. Ct. 377, 377 (2017).

63 Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45161.

64 *Trump*, 138 S. Ct. at 2404. *See* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45162-63.

65 *See* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45164.

66 Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45166.

67 Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45165.

68 Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. at 45165-67.

The lawsuit arose when the State of Hawaii, three individuals, and the Muslim Associations of Hawaii challenged the Proclamation for a variety of reasons[69] arguing that the Proclamation exceeded the President's authority under § 1182(f) and that it conflicted with the statutory scheme passed by Congress. Plaintiffs also alleged that the Proclamation violated the Establishment Clause of the First Amendment regarding religion.[70] These plaintiffs claimed that "the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims."[71] The Court granted a nationwide preliminary injunction finding that the Proclamation violated provisions of the Immigration and Nationality Act, *Hawaii v. Trump*.[72] The Court of Appeals for the Ninth Circuit upheld this decision.[73] Neither decision addressed the merits of the Establishment Clause argument.[74] The Supreme Court reversed the appellate court's opinion, rejecting the lower court's statutory interpretations and upholding the President's power to issue the Proclamation at issue.[75] The Court addressed, but did not evaluate the merits of, the Establishment Clause argument advanced by the plaintiffs.[76]

II. ANALYSIS

A. *The Issue in Both* Korematsu *and* Trump *was the Constitutionality of Exclusionary Systems*

The key issue in both *Korematsu* and *Trump* was the constitutionality of government programs to cull the bad from the greater number, both in World War II and now.[77] In *Korematsu*, the military authorities concluded there were disloyal Japanese American citizens who could not be readily identified:

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69 *See Trump*, 138 S. Ct. at 2406–08 (challenging the provisions as they applied to all countries, except North Korea and Venezuela).

70 *See id.* at 2416–17.

71 *Id.* at 2417.

72 265 F. Supp. 3d 1140, 1155–59 (D. Haw. 2017).

73 Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017).

74 *Id.* at 702; Hawaii v. Trump, 265 F. Supp. 3d. at 1154.

75 *See Trump*, 138 S. Ct. at 2423.

76 *See id.* at 2419–20.

77 *See Trump*, 138 S. Ct. at 2418; *Korematsu*, 323 U.S. at 218.

> Here, as in the Hirabayashi case, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[78]

In *Trump*, the Court concluded that the Proclamation set forth-

> [E]xtensive findings describing how deficiencies in the practices of select foreign governments- several of which are state sponsors of terrorism- deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information . . .[79]

B. Korematsu *Did Not Weigh the Exercise of War Powers Against the Constitutional Rights of Japanese American Citizens*

The two cases differ on the depth of the Supreme Court's examination of the constitutionality of the procedures put in place. In *Korematsu*, the majority did not examine at all the constitutionality of exclusion of Japanese American citizens from the western states.[80] Justice Black noted–

> [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 restriction; racial antagonism never can.[81]

Justice Black then remarkably concluded that this was war and therefore no racial prejudice existed.

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78 *Korematsu*, 323 U.S. at 218.
79 *Trump*, 138 S. Ct. at 2408 (internal citations omitted).
80 *Korematsu*, 323 U.S. at 216.
81 *Id.*

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures . . .[82]

The net effect was that there was no judicial review of the exclusion order.[83] Racial classifications are suspect and are entitled to rigid scrutiny—unless the military says something to the contrary.[84] There was no weighing of those rights against the military order. Three Justices dissented, finding stark racial prejudice and a clear violation of constitutional rights.[85]

C. Trump v. Hawaii *Does Not Weigh the Immigration Regulations in Dispute Against the Establishment of Religion Clause*

Trump is not a war powers case because it relates to the screening of aliens in peacetime.[86] But similar to the Supreme Court's lack of proper weighing of government interests and individual citizens' interests in *Korematsu*, the Court in *Trump* did not review the constitutional claims advanced against the travel ban.[87] The history of the virulence of the President's anti-Muslim rhetoric, both during and after the election, was fully documented in the opinion.[88] The Majority quickly concluded that the regulations were within the authority of the President.[89] It next assumed that the plaintiffs had standing to

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[82] *Id.* at 223.

[83] *Id.*

[84] *See id.* JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 251 (W.W. Norton & Co. 1975). In Felix Frankfurter's diary of June 5, 1943, he provided a detailed summary of the Supreme Court conference on the *Hirabayashi* case, explaining that, "Black expressed the view that in time of war somebody has to exercise authority and he did not think that the courts could review anything the military does." That view was exactly what he wrote a year later in *Korematsu*.

[85] *See* Rostow, *supra* note 12, at 509–12 for a detailed analysis of Justices Owen Roberts, Justice Frank Murphy and Justice Robert Jackson's dissents.

[86] *See Trump*, 138 S. Ct. at 2403.

[87] *Id.* at 2416–17.

[88] *Id.* at 2417.

[89] *Id.* at 2408.

raise an establishment of religion argument.[90] The Court then evaluated the merits of that argument.[91] Based on two immigration cases, it gave substantial deference to the executive in its administration of the immigration system.[92] The Court asked whether the regulations were facially legitimate and bona fide.[93] Concluding that they were, the Court ended its inquiry.[94] However, it did not consider whether the actual application of the regulations was bona fide, nor did it examine the purpose behind the regulations or the history that gave rise to them and whether that purpose violated the Establishment Clause.[95]

The first immigration case relied on by the court was *Kleindienst v. Mandel*.[96] A well-known Belgium journalist had been invited to participate in an academic conference in the United States.[97] The U.S. State Department recommended that he be permitted to enter the country; but the Immigration and Naturalization Service (INS), acting on behalf of the Attorney General, ruled that he should not be admitted.[98] Of course, as a nonresident alien, he had no constitutional right to enter the country.[99] But a group of American professors wishing to hear him speak asserted a violation of their constitutional rights to hear him speak.[100] The Majority found,

> In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under §212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[101]

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90 *Id.* at 2416.
91 *Id.*
92 Trump v. Hawaii, 138 S. Ct. 2392, 2418–20 (2018).
93 *Id.* at 2420.
94 *Id.*
95 *Id.*
96 Kleindienst v. Mandel, 408 U.S. 753 (1972).
97 *Id.* at 756–57.
98 *Id.* at 759.
99 *Id.* at 762.
100 *Id.* at 764–65.
101 *Id.* at 769–70.

Justice Marshall dissented and specifically objected to this standard:

> Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights restricted because the Attorney General has given a "facially legitimate and bona fide reason" for refusing to waive Mandel's visa ineligibility. I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.[102]

The rights of Americans to hear the views of aliens were not challenged, but the Court would not weigh those rights against immigration decisions made by the INS.[103]

That is also essentially what happened in *Kerry v. Din*.[104] Din, an American citizen, petitioned to have her husband, a resident of Afghanistan, classified as an "immediate relative" entitled to priority immigration status.[105] A State Department official denied the request.[106] A federal district court initially affirmed the denial, but the Ninth Circuit reversed, holding that Din had a protected liberty interest in her marriage that entitled her to a review of the visa denial.[107] Nonetheless, the Supreme Court reversed the Ninth Circuit's decision.[108] In the plurality opinion written by Justice Scalia, the Court found no such constitutional right involved.[109] In a concurring decision, Justice Kennedy adopted the deference argument of *Kleindeinst*:

> The reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate

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102 Kleindienst v. Mandel, 408 U.S. 753, 777–78 (1972) (Marshall, J., dissenting).
103 *Id.* at 768–69.
104 135 S. Ct. 2128 (2015).
105 *Id.* at 2132.
106 *Id.*
107 *Id.*
108 *Id.* at 2138.
109 *Id.*

> authority to the Attorney General to exercise substantial discretion in that field. *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made "on the basis of a facially legitimate and bona fide reason." Once this standard is met, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" the constitutional interests of citizens the visa denial might implicate. This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.[110]

Justice Breyer dissented, echoing Justice Marshall's dissent in *Mandel*:

> Justice KENNEDY also looks for support to the fact that Congress specifically exempted the section here at issue, § 1182(a)(3)(B), from the statutory provision requiring the State Department to provide a reason for visa denials. § 1182(b)(3). An exception from a statutory demand for a reason, however, is not a command to do the opposite; rather, at most, it leaves open the question whether other law requires a reason. Here that other law is the Constitution, not a statute. In my view, the Due Process Clause requires the Department to provide an adequate reason. And, I believe it has failed to do so.[111]

Trump was *Kleindienst* and *Din* all over again. The Supreme Court did not look at how the regulations at issue were applied in the real world, nor did it inquire into the purpose behind the regulations as it impacted the establishment of religion argument.[112] Was this the correct decision? The Rostow article offers key analysis that applies to *Trump* just as it did to *Korematsu*.[113] Rostow's basic criticism of *Korematsu* was that the decision "upheld an act of military power without a factual record in which the justification for the act was analyzed."[114] He argues there must be objective evidence to show a reasonable ground for the action taken.[115]

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110 *Kerry*, 135 S. Ct. at 2140 (citing Kleindienst v. Mandel, 480 U.S. 753, 770 (1972)) (Kennedy, J., concurring) (internal citations omitted).

111 *Id.* at 2147 (Marshall, J., dissenting).

112 *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

113 *See* Rostow, *supra* note 12, at 491.

114 *Id.*

115 *Id.* at 515–16.

> Applied to the circumstances of the Japanese exclusion cases, these precedents require that there be a showing to the trial court of the evidence upon which General DeWitt acted, or evidence which justifies his action under the statute and the constitution. Nor will it do to say that there need be only enough evidence to prove his good faith, or to provide a possible basis for the decision. This was the contention expressly overruled in *Mitchell v. Harmony*.[116]

Korematsu involved American citizens who were being deprived of constitutional rights.[117] The *Trump* plaintiffs were also American citizens raising a claim that the challenged actions violated the First Amendment prescription against the establishment of religion.[118] While aliens may have no constitutional rights while they are outside the United States,[119] and it may be relatively easy to prohibit their entry,[120] that tenuous status should not be used to bar the evaluation of a First Amendment claim by a U.S. citizen who has standing to make a claim from the same facts. This approach in *Trump* is particularly disturbing because the standard in establishment of religion cases involves a determination of the "purpose" of the challenged conduct.[121] *McCreary County, Kentucky v. ACLU* summarizes the law that requires the purpose of the government action to be "understood in light of context."[122] The *McCreary* Court noted that "our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' "[123]

The Majority in *Trump* never looked at the "purpose" of the ban.[124] The Court recited the overwhelming evidence showing the motivation of Muslim bias,[125] but it did not consider such in its decision because of the absolute discretion paid to immigration regula-

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116 *Id.* at 519.

117 *See Korematsu*, 323 U.S. at 215–16.

118 *See Trump*, 138 S. Ct. at 2403.

119 *See Kleindienst,* 408 U.S. at 762.

120 *See Kerry,* 135 S. Ct. at 2140 (citing *Kleindienst*, 480 U.S. at 770).

121 Elizabeth Slattery, *Overview of the Supreme Court's 2018–2019 Term,* THE HERITAGE FOUND.: LEGAL MEMORANDUM, Sept. 18, 2018 at 6, DIALOG, File No. 235.

122 545 U.S. 844, 874 (2005)

123 *Id.* at 866 (quoting Santa Fe Indep. Sch. Dist. v. Doe*,* 530 U.S. 290, 315 (1984)).

124 *See Trump*, 138 S. Ct. at 2403–23.

125 The Fourth Circuit had held that the Plaintiffs were likely to succeed on their Establishment Clause claim, finding that "an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation - to exclude Muslims from the United States." Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 593–94 (4th Cir.

tion.[126] The Court failed to directly address an Establishment Clause argument because it found a rational basis for the regulations as written.[127] Similarly, *Korematsu* did not examine petitioner's constitutional claim of racial prejudice, even though strict scrutiny was involved, and gave total deference to the finding by the military.[128]

CONCLUSION

We think negatively of *Korematsu* because it was a race-based determination arising from war hysteria with no consideration of the merits of the constitutional claims. Although *Trump* arises without the same war hysteria, as far as American citizens' constitutional rights are concerned, this is exactly what happened. In the guise of immigration powers vested in the President, the Court upheld President Trump's Proclamation without assessing the merits of the Establishment Clause claim.[129] It did not even attempt to evaluate the purpose of the ban or other more concrete, factual evidence.[130] Similarly, *Korematsu* closed its eyes to racial discrimination. The real issue in both *Korematsu* and *Trump* was the constitutionality of means to sort out "bad actors" from a larger group.[131] In the absence of factual evidence showing a reasonable ground for taking such a drastic measure, *Trump* deprives these plaintiffs' constitutional rights just as *Korematsu* did. For that reason, *Trump* will look just as bad in 70 years—if not well before—as *Korematsu* does to us today.

2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and *vacated and remanded* Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017).

126 This "deference" has been referred to in Chang as "Immigration Exceptionalism" and "National Security Exceptionalism." Chang, *supra* note 3, at 1190–1213. Both *Korematsu* and *Trump* fall neatly within these categories.

127 *Trump,* 138 S. Ct. at 2423.

128 *See Korematsu*, 323 U.S. at 217–18.

129 *See Trump*, 138 S. Ct. at 2416–23.

130 *See id.* 2403–23.

131 *See generally Trump*, 138 S. Ct. 2392; *Korematsu*, 323 U.S. 214.