

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 92

JUNE 2017

NUMBER 3

MADISON LECTURE

CONSTITUTIONAL INTEGRITY: LESSONS FROM THE SHADOWS

THE HONORABLE SANDRA L. LYNCH*

INTRODUCTION	623
I. GOVERNMENT SURVEILLANCE AND THE SNOWDEN LEAKS	624
II. THE HISTORY OF <i>KOREMATSU</i>	628
III. THE LESSONS OF <i>KOREMATSU</i>	634

INTRODUCTION

Good evening. My thanks to Dean Morrison, Professor Dorsen, and NYU for this invitation. I am deeply honored. I appreciate the opportunity to talk about something I think important. And I would like to acknowledge the presence tonight of Jon Newman of the Second Circuit, a great judge.

When Professor Dorsen asked me, in November 2014, to give this lecture, I thought it would be useful to talk about what happens when the Executive Branch, to put it politely, shadows the truth to the Supreme Court. Specifically, I wanted to tell the disturbing story of the government's lack of candor to the Court in *Korematsu v. United States*,¹ the 1944 Japanese internment case. Until recently, I had not known that history myself. It was Justice Souter who told me the story and suggested that its history deserved to be told again. The topic was important because what happened in *Korematsu* could happen again

* Copyright © 2017 by Sandra L. Lynch, Judge, U.S. Court of Appeals for the First Circuit.

¹ 323 U.S. 214 (1944).

and, in turn, could lead to a loss of trust in the judiciary. Indeed, I have been saddened to see a growing loss of public trust in the government.

I had no idea when I chose the subject of the speech that the topic of lying would become so much a part of the present political discourse. Perhaps the recent cover of *The Economist* has captured the national mood best.² The cover of its September 10, 2016 issue is white, except for the dark profile of a man with forked tongue, and bold lettering in dark gray, which says, “Art of the Lie.”³ The feature article refers to “post-truth politics in the age of social media.”⁴ The article distinguishes the legal system as one of the institutional mechanisms that “allows some level of consensus over what is true.”⁵

I also had no idea when I accepted this invitation that the themes of stereotyping predicated on race, national origin, or religion, would be an important current topic. Perhaps I had taken for granted that ascribing fault to a person solely on the basis of that person’s parentage, without looking at that individual’s own life, was a thing of the past.

But I was concerned, as I am now, that rising fear from our post-9/11 “war on terror” would be so pungent. There is good reason for that fear. The photos of the ISIS beheadings show barbaric behavior.⁶ Indeed, polls confirm that fear in this country is at its highest levels since the earliest days after 9/11.⁷ But we cannot allow fear to distort and displace reason. As I stand here today, there is good cause to be concerned.

I

GOVERNMENT SURVEILLANCE AND THE SNOWDEN LEAKS

The lessons of the past are pertinent now. In 1822, James Madison wrote that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”⁸ Madison continued, saying, “Knowledge

² *ECONOMIST*, Sept. 10–16, 2016, <http://www.economist.com/printedition/covers/2016-09-08/ap-e-eu-la-me-na-uk> (cover image).

³ *Id.*

⁴ *Yes, I’d Lie to You: The Post-Truth World*, *ECONOMIST*, Sept. 10–16, 2016, at 20.

⁵ *Id.*

⁶ *See, e.g.*, Rukmini Callimachi, *Militant Group Says It Killed American Journalist in Syria*, *N.Y. TIMES* (Aug. 19, 2014), <http://nyti.ms/1oXRB94>.

⁷ *See, e.g.*, Jackie Salo, *Americans’ Fear of Terrorism at Its Peak Since 9/11, New Poll Says*, *INT’L BUS. TIMES* (Dec. 10, 2015, 8:38 PM), <http://www.ibtimes.com/americans-fear-terrorism-its-peak-911-new-poll-says-2221155>.

⁸ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *1 THE FOUNDERS’ CONSTITUTION* 690, 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”⁹ As Benjamin Franklin more prosaically put it in 1731, “when truth and error have fair play, the former is always an overmatch for the latter.”¹⁰ What happens when truth is not given fair play?

I began to worry more about the problem of the courts not being given accurate information as the extent of the National Security Agency’s surveillance programs came into focus, following Edward Snowden’s infamous leak of thousands of classified documents.¹¹ As we learned from Mr. Snowden that there was widespread government surveillance of electronic and phone usage by Americans,¹² there was also a strong sense in our society that the public trust was breached.

Just months before the Snowden disclosures first broke in June 2013, the Supreme Court had handed down its 6–3 decision in *Clapper v. Amnesty International*.¹³ *Clapper*, which involved a constitutional challenge to section 702 of the Foreign Intelligence Surveillance Act of 2008 (“FISA”),¹⁴ rejected, on a motion to dismiss, claims that the government was spying on the plaintiffs’ attorneys, journalists, and activists who worked with those abroad.¹⁵ A majority of the Court concluded that the plaintiffs lacked standing largely because their claims of surveillance rested on speculation about choices to be made by independent actors in other branches.¹⁶ Thanks in large part to Mr. Snowden’s disclosures, we now know that the fears of some plaintiffs had a basis, and the picture that the government painted to the Court was not entirely accurate.

⁹ *Id.*

¹⁰ BENJAMIN FRANKLIN, AN APOLOGY FOR PRINTERS 5 (Randolph Goodman et al. eds., 1955).

¹¹ See Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES (June 9, 2013), <http://nyti.ms/17X88ZQ>; see also Archive of Articles on Edward Snowden, GUARDIAN, <http://www.theguardian.com/world/edward-snowden> (last visited Feb. 28, 2017). While the subject of “leaks” is related to this lecture, it is not the central focus. For a thought-provoking discussion of the phenomenon of “leaks,” see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

¹² See Mazzetti & Schmidt, *supra* note 11 (“[I]t was revealed in May that the Justice Department had secretly obtained phone logs for reporters at The Associated Press and Fox News . . .”).

¹³ 133 S. Ct. 1138 (2013).

¹⁴ 50 U.S.C. § 1881a (2012).

¹⁵ *Clapper*, 133 S. Ct. at 1147. The Supreme Court decided the case on February 26, 2013. *Id.* The Snowden scandal began in June 2013. *Edward Snowden: Leaks That Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), <http://www.bbc.com/news/world-us-canada-23123964>.

¹⁶ *Clapper*, 133 S. Ct. at 1148.

We learned at least two pieces of information that called into question the government's position in *Clapper*. A key question was: If the plaintiffs did not have standing, did anyone else? First, the Solicitor General had represented to the Court, believing it to be true, that the government had given notices to criminal defendants where warrantless surveillance had been the source of evidence against them.¹⁷ And persons who received such notices would, unlike the *Clapper* plaintiffs, properly have standing.¹⁸ But in fact prosecutors did not always give such notices to defendants.¹⁹ It is quite possible that line prosecutors were not told if such surveillance was involved. To its credit, the DOJ changed its practices, but it took some time for it to do so.

The second was that the government was intercepting communications between American citizens even if the intelligence target was neither the sender nor the recipient,²⁰ a fact later substantiated by the FISA court.²¹ The government had been engaging in much broader

¹⁷ Transcript of Oral Argument at 4–5, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025); Brief for the Petitioners at 8, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025); cf. *Clapper*, 133 S. Ct. at 1154 & n.8 (dismissing concerns that the Court's holding "insulate[d] § 1881a from judicial review," partly because "if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent").

¹⁸ See *Clapper*, 133 S. Ct. at 1154 (explaining how a viable claim of standing might arise if the government made such a disclosure).

¹⁹ Compare Charlie Savage, *Justice Dept. Criticized on Spying Statements*, N.Y. TIMES (May 13, 2014), <http://www.nytimes.com/2014/05/14/us/justice-dept-criticized-on-spying-statements.html> ("It emerged that the Justice Department was not notifying defendants in situations when warrantless surveillance had led in turn to a wiretap order on an individual that produced evidence used in court."), Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> (discussing how the Justice Department "had not been alerting such defendants that evidence in their cases had stemmed from wiretapping their conversations without a warrant"), and Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. TIMES (Oct. 26, 2013), <http://www.nytimes.com/2013/10/27/us/federal-prosecutors-in-a-policy-shift-cite-warrantless-wiretaps-as-evidence.html> ("[I]t remains unclear how many other cases—including closed matters in which convicts are already service [sic] prison sentences—involved evidence derived from warrantless wiretapping in which the National Security Division did not provide full notice to defendants, nor whether the department will belatedly notify them."), with *Clapper*, 133 S. Ct. at 1154.

²⁰ Compare sources cited *supra* note 19, and Charlie Savage, *N.S.A. Said to Search Content of Messages to and from U.S.*, N.Y. TIMES (Aug. 8, 2013), <http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html> (discussing how the NSA "seeks to acquire communications about the target that are not to or from the target" (quoting from classified materials leaked by Snowden)), with *Clapper*, 133 S. Ct. at 1154.

²¹ Memorandum Opinion, Foreign Intelligence Surveillance Court 5, 36 (Oct. 3, 2011), <https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and%20Order-20140716.pdf>.

interception than it had previously represented in what it called “upstream collection.”²²

Concerned, several U.S. Senators wrote a letter to the DOJ accusing it of having been less than forthright with the *Clapper* Court.²³ No matter what one thinks of how Mr. Snowden went about his disclosures and the harm they did, at least in some respects, the disclosures have had value²⁴ and continuing impact.²⁵ The Second

²² *Id.* at 72.

²³ See Letter from Mark Udall, Ron Wyden, and Martin Heinrich, U.S. Senators, to Donald Verrilli Jr., Solicitor Gen., U.S. Dep’t of Justice (Nov. 20, 2013), <http://www.scribd.com/doc/186024665/Udall-Wyden-Heinrich-Urge-Solicitor-General-to-Set-Record-Straight-on-Misrepresentations-to-U-S-Supreme-Court-in-Clapper-v-Amnesty> (expressing “concern[] that the Court’s decision was not informed by a complete understanding of how the FISA Amendments Act (FAA) has been interpreted and implemented”).

²⁴ President Obama called for review of two of the programs that Mr. Snowden exposed. President Barack Obama, Remarks by the President in a Press Conference (Aug. 9, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/08/09/remarks-president-press-conference>; see Jack Goldsmith, *Three Years Later: How Snowden Helped the U.S. Intelligence Community*, LAWFARE (June 6, 2016, 9:32 AM), <https://www.lawfareblog.com/three-years-later-how-snowden-helped-us-intelligence-community>; see also PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014), <https://www.pclob.gov/library/702-Report.pdf> (providing information about a study conducted on two NSA programs following the Snowden leaks); Sarah Childress, *How the NSA Spying Programs Have Changed Since Snowden*, FRONTLINE (Feb. 9, 2015), <http://www.pbs.org/wgbh/frontline/article/how-the-nsa-spying-programs-have-changed-since-snowden> (“In the wake of Edward Snowden’s June 2013 leaks, President Barack Obama promised to review the government’s surveillance programs and consider reforms.”). The review was carried out by the Privacy and Civil Liberties Oversight Board, an independent agency established in 2007 to review certain executive actions for privacy and civil liberties concerns. See *About the Board*, PRIVACY & C.L. OVERSIGHT BOARD, <https://www.pclob.gov/about-us.html> (last visited Jan. 29, 2017) (providing information about the Privacy and Civil Liberties Oversight Board).

²⁵ The reverberations of the disclosures continue. For example, concerns about the balance between safety and privacy animated the showdown between Apple, Inc. and the FBI over whether Apple should provide access to the encrypted contents of a suspected terrorist’s phone following a shooting in California. See *The Apple-FBI Debate over Encryption*, NPR, <http://www.npr.org/series/469827708/the-apple-fbi-debate-over-encryption> (last visited Nov. 11, 2016) (collecting articles on the debate). Such concerns continue to animate debates regarding the permissibility of certain encryption technologies employed by private sector technology companies and proposed legislation addressing cross-border data requests. See *Worldwide Threats to the Homeland: ISIS and the New Wave of Terror: Hearing Before the H. Comm. on Homeland Sec.*, 114th Cong. (2016), <https://homeland.house.gov/hearing/worldwide-threats-homeland-isis-new-wave-terror-2>; David Kris, *U.S. Government Presents Draft Legislation for Cross-Border Data Requests*, LAWFARE (July 16, 2016, 8:07 AM), <https://www.lawfareblog.com/us-government-presents-draft-legislation-cross-border-data-requests>.

Circuit, in 2015, for example, held the telephone metadata program was illegal.²⁶

One could question whether the Supreme Court's role in providing a check to executive power had been undermined in *Clapper*, as Madison had warned.²⁷ A judiciary, without the facts or an independent means of acquiring them, stands in danger of being manipulated by the very political branches it was designed to control.²⁸ That happened in *Korematsu*.

II

THE HISTORY OF *KOREMATSU*

The Executive Branch shadowed the truth to the judiciary in *Korematsu*. *Korematsu* was a case in which the Supreme Court, by a vote of 6–3, upheld the constitutionality of a military order requiring persons of Japanese descent to remain out of certain areas and to report to detention centers.²⁹ The Supreme Court upheld the military order, which resulted in the evacuation and internment of over 110,000 persons of Japanese ancestry—70,000 of whom were American citizens.³⁰ Furthermore, one of the dissenting opinions referred to the camps as “concentration camps,” even as the majority opinion refused to do so.³¹ These camps operated for more than two years, with the last one closing in 1946.³² Many scholars have discussed *Korematsu*.³³ I offer the perspective of a working judge.

Many now accept that the internment of those of Japanese descent in camps surrounded by barbed-wire fences was wrong and,

²⁶ See *ACLU v. Clapper*, 785 F.3d 787, 821, 826 (2d Cir. 2015). After the Second Circuit opinion, Congress passed the USA Freedom Act, which ended the NSA's bulk data collection program. USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

²⁷ See Letter from James Madison, *supra* note 8.

²⁸ See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 87 (2015) (“Insofar as the public sees the Court as one of the few remaining bulwarks against abuse, the Court of necessity may find itself more involved in security-related matters. But that involvement will help build confidence in our public institutions only if the Court can reach sound conclusions.”).

²⁹ *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

³⁰ 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, 1 (1986).

³¹ *Korematsu*, 323 U.S. at 230 (Roberts, J., dissenting).

³² Alan Taylor, *World War II: Internment of Japanese Americans*, ATLANTIC (Aug. 21, 2011), <http://www.theatlantic.com/photo/2011/08/world-war-ii-internment-of-japanese-americans/100132>.

³³ See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

indeed, unconscionable. “*Korematsu* is a case that has come to live in infamy” is how Kathleen Sullivan puts it.³⁴ But *Korematsu* has not been overruled by the Supreme Court³⁵ and is cited occasionally as the origin of the strict scrutiny test under the Equal Protection Clause.³⁶

Yet not all agree with Sullivan’s “infamy” statement. A Virginia mayor recently said, of relocation of Syrian refugees in America, that he was “reminded that President Franklin D. Roosevelt felt compelled to sequester Japanese foreign nationals after the bombing of Pearl Harbor, and it appears that the threat of harm to America from ISIS is just as real and serious as that from our enemies then.”³⁷ Very recent polls also show many voters still approve of that Japanese internment.³⁸

What most people do not know about the Supreme Court decision is that attorneys for the government withheld substantial material evidence from the Court.³⁹ That evidence contradicted the government’s stated position that the detention orders were required by military necessity, in order to avoid both sabotage and espionage.⁴⁰

The following is some brief background to *Korematsu*. About three months after the Pearl Harbor attacks, President Roosevelt signed Executive Order 9066.⁴¹ This order authorized and directed “the Secretary of War, and the Military Commanders . . . to prescribe

³⁴ KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 631 n.4 (14th ed. 2001); see also Greene, *supra* note 33, at 380 (calling *Korematsu* a “stock answer” in “identifying the Supreme Court’s worst decisions”).

³⁵ For an argument that *Korematsu* has “already been overruled sub rosa,” see Noah Feldman, Opinion, *Why Korematsu Is Not a Precedent*, N.Y. TIMES (Nov. 18, 2016), <http://nyti.ms/2ePYkJE>.

³⁶ See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422–23 (2013) (Thomas, J., concurring) (“The Court first articulated the strict-scrutiny standard in *Korematsu v. United States.*”); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citing *Korematsu* when describing strict scrutiny analysis under the Equal Protection Clause).

³⁷ Frances Kai-Hwa Wang, *Virginia Mayor Cites Japanese Internment in Statement on Barring Refugees*, NBC NEWS (Nov. 18, 2015, 6:57 PM), <http://www.nbcnews.com/news/asian-america/virginia-mayor-compares-barring-syrian-refugees-japanese-american-internment-n465877>.

³⁸ Charles M. Blow, Opinion, *About the ‘Basket of Deplorables,’* N.Y. TIMES (Sept. 12, 2016), <http://www.nytimes.com/2016/09/12/opinion/about-the-basket-of-deplorables.html> (describing a February 2016 Public Policy Polling survey of South Carolina supporters of one presidential candidate that found 32% supported the policy of Japanese internment during World War II).

³⁹ See *infra* notes 65–71 and accompanying text.

⁴⁰ See Brief for the United States at 19–20, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) (arguing that the order was “a protective measure necessary to meet the threat of sabotage and espionage”); Yamamoto, *supra* note 30, at 1 (stating that the government asserted in *Korematsu* that the internment was justified due to “military necessity”).

⁴¹ Exec. Order No. 9066, 3 C.F.R. § 1092 (1938–1943).

military areas . . . from which any or all persons may be excluded.”⁴² It gave discretion to the Military Commander.⁴³ Soon after, the Secretary of War designated Lieutenant General J.L. DeWitt as Military Commander of the Western Defense Command.⁴⁴ In 1942, DeWitt issued a series of public proclamations designating military areas “from which any or all persons may be excluded.”⁴⁵ He released a report justifying his actions called the DeWitt Report.⁴⁶

Congress, in turn, had authorized penalties for violating the military curfew and other restrictions. The curfew had already been upheld by the Court in the case *Hirabayashi v. United States*.⁴⁷ And the Court had faced difficult questions in earlier cases, such as the German saboteur cases,⁴⁸ as to whether the President’s war power exceeded Congressional authorization.⁴⁹ But this case raised no such question. Both Congress and the President had authorized these actions—a point emphasized by the Court.⁵⁰

Defendant Fred Korematsu was a native-born American citizen of Japanese descent, who was conceded to be loyal.⁵¹ He was criminally charged with remaining in a designated military area in violation of an exclusion order.⁵² He was found guilty and was sentenced to five years of probation.⁵³ The Ninth Circuit affirmed.⁵⁴ Fred Korematsu argued to the Supreme Court that his conviction was unconstitutional because it was based on racial prejudice.⁵⁵ He argued that the govern-

⁴² *Id.*

⁴³ *See id.* (stating that the decision shall be made as “the appropriate Military Commander may determine”).

⁴⁴ *Timeline: Japanese Americans During World War II*, NAT’L PARK SERV., <https://www.nps.gov/min/learn/upload/WWIIJATimelinemin.pdf> (last visited Jan. 29, 2017). DeWitt was appointed on December 11, 1941. *Id.*

⁴⁵ *Id.* On March 21, 1942, Congress passed Public Law 503, which “made the knowing violation of a military order a misdemeanor punishable by prison and a fine.” Pub. L. No. 503, 56 Stat. 173 (1942). Beginning two days later, DeWitt issued 108 Civilian Exclusion Orders relating to specified areas. Yamamoto, *supra* note 30, at 9 n.24.

⁴⁶ JOHN L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943), <https://archive.org/details/japaneseevacuati00dewi>.

⁴⁷ 320 U.S. 81, 104–05 (1943) (upholding criminal conviction of Gordon Hirabayashi for violating the curfews).

⁴⁸ *See, e.g., Ex parte Quirin*, 317 U.S. 1 (1942) (involving alleged traitorous activities of German-born, naturalized American citizens).

⁴⁹ *See generally* DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 286 (2016).

⁵⁰ *See Hirabayashi*, 320 U.S. at 92 (noting that the President and Congress authorized the military curfew).

⁵¹ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁵² *Korematsu v. United States*, 140 F.2d 289, 289 (9th Cir. 1943), *aff’d*, 323 U.S. 214 (1944).

⁵³ *Id.*

⁵⁴ *Id.* at 290.

⁵⁵ *Korematsu*, 323 U.S. at 217–19.

ment had presented no evidence substantiating “the existence of a clear and present or potential danger to our military and defense resources from citizens of Japanese pedigree or from the aliens who were evacuated.”⁵⁶

Justice Black, writing for the Court, announced the strict scrutiny standard but concluded that Korematsu was properly convicted.⁵⁷ That was:

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, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.⁵⁸

Justice Black stressed that the military had to act under time pressure—so individual loyalty determinations could not be made—and that the Court would look only at the time the military entered the order.⁵⁹ Justice Frankfurter concurred that the Constitution gave the Executive and Congress this power, and that essentially ended the matter.⁶⁰

Justices Roberts and Murphy, dissenting, said there was no justification other than racial prejudice for the actions of the military.⁶¹ Justice Murphy noted there was a controversy as to whether the DeWitt Report was correct and that the Court should not blindly defer to the military.⁶² Justice Jackson, also in dissent, eloquently stated that what Korematsu did was “a crime only if his parents were of Japanese birth,” and that “*if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.*”⁶³ “[H]ere is an attempt,”

⁵⁶ Brief for Appellant at 57, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22).

⁵⁷ *Korematsu*, 323 U.S. at 216, 223–24.

⁵⁸ *Id.* at 223. There were military mechanisms for the release of individuals from the camps, as described in *Ex parte Endo*, 323 U.S. 283, 291–93 (1944). *Endo* held that a habeas corpus petitioner, whom both the Department of Justice and the War Relocation Authority conceded was a loyal and law-abiding citizen, could not be held by a civil authority and had to be released. *Id.* at 294, 302, 304.

⁵⁹ *Korematsu*, 323 U.S. at 218–20.

⁶⁰ *Id.* at 224–25 (Frankfurter, J., concurring).

⁶¹ *Id.* at 225–26 (Roberts, J., dissenting) (arguing that the order was unconstitutional because it allowed the military to make decisions solely based on an individual’s ancestry and not their loyalty); *id.* at 242 (Murphy, J., dissenting) (arguing that the majority’s decision to uphold the order was an affirmation of racism).

⁶² *Id.* at 234–40 (Murphy, J., dissenting).

⁶³ *Id.* at 243 (Jackson, J., dissenting) (emphasis added).

Jackson wrote, “to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.”⁶⁴

So what was the failure of candor by the government’s lawyers in *Korematsu*? They maintained that the military evacuation order was justified because of the findings of the DeWitt Report that (1) pervasive disloyalty existed among those of Japanese descent, with no practicable way to separate the loyal from the disloyal; and (2) there were instances of espionage and sabotage, particularly cases of illicit radio and light signaling along the West Coast.⁶⁵ The Court was not told, although the DOJ knew, that several American intelligence agencies had flatly contradicted the factual underpinnings of DeWitt’s claims.⁶⁶

Primarily, the Court was never told of the contrary conclusions reached in the Ringle Report, from the Office of Naval Intelligence, in early 1942.⁶⁷ The Ringle Report concluded that those of Japanese descent did *not* pose a serious threat to national security and that “the entire ‘Japanese Problem’ ha[d] been magnified out of its true proportion, largely because of the physical characteristics of the people.”⁶⁸ The Ringle Report stated that individual determinations of disloyalty were feasible, and recommended that course of action.⁶⁹

Significantly, the Court was never told that the FBI agreed with the Ringle Report. Indeed, its Director, J. Edgar Hoover, had person-

⁶⁴ *Id.* Indeed, the *Korematsu* Court’s sanction of prejudice toward those of Japanese ancestry should not be explained away by war. As Judge Jed Rakoff has said: “Say the word ‘war’ and the rule of law often implodes, with courts frequently employing sophistry to avoid any interference with governmental conduct.” Jed S. Rakoff, “*Terror*” and *Everybody’s Rights*, N.Y. REV. BOOKS (Sept. 29, 2016), <http://www.nybooks.com/articles/2016/09/29/terror-and-everybodys-rights> (book review).

⁶⁵ *Korematsu*, 323 U.S. at 218. Military curfews had been upheld earlier in *Hirabayashi*, 320 U.S. 81, 104–05 (1943). The government extended that reasoning in arguing *Korematsu*, and the Court accepted it. *See Korematsu*, 323 U.S. at 218–19 (“Like curfew, exclusion of those of Japanese origin was deemed necessary because . . . we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal”); *see also* *Hohri v. United States*, 782 F.2d 227, 236 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987); Peter Irons, *How Solicitor General Charles Fahy Misled the Supreme Court in the Japanese American Internment Cases: A Reply to Charles Sheehan*, 55 AM. J. LEGAL HIST. 208, 215 (2015).

⁶⁶ *See, e.g.*, Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T JUST. (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> (publicly apologizing for the Office of the Solicitor General’s withholding of pertinent information regarding the validity of claims in General DeWitt’s report).

⁶⁷ U.S. NAVY, LA1055, REPORT ON JAPANESE QUESTION (1942), <http://library.uoregon.edu/ec/e-asia/read/ringle.pdf>.

⁶⁸ Yamamoto, *supra* note 30, at 13–14 (citing U.S. NAVY, *supra* note 67); *see also Hohri*, 782 F.2d at 233–34 (same); Irons, *supra* note 65, at 211 (same).

⁶⁹ Irons, *supra* note 65, at 211; *see also Hohri*, 782 F.2d at 234.

ally informed Attorney General Francis Biddle that “the necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data.”⁷⁰ Further, the Court was not told that the Federal Communications Commission, which monitored transmissions along the West Coast, had informed Biddle that it had no evidence to substantiate DeWitt’s claims of illicit signaling by Japanese-Americans on the West Coast.⁷¹

There were some heroes. Some of the government’s lawyers did attempt to inform the Court of this contrary evidence. Edward Ennis, the author of the government’s brief, and his assistant, John Burling, attempted to add a footnote to warn the Court about the reports that contradicted DeWitt’s conclusions.⁷² To both Assistant Attorney General Herbert Wechsler and Solicitor General Charles Fahy, Ennis emphasized the “wilful [sic] historical inaccuracies of the [DeWitt] report,” and stressed the attorneys’ “ethical obligation to the Court.”⁷³ Burling pointedly stated that the FBI and FCC reports left “no doubt that [DeWitt’s statements concerning radio transmitters and ship-to-shore signaling] were intentional falsehoods.”⁷⁴ Ultimately, the brief to the Court included a footnote—footnote 2—but it was edited, at the behest of the War Department, to exclude any reference to the contradictory reports. And so the final version undercut the footnote’s intended purpose.⁷⁵

⁷⁰ Yamamoto, *supra* note 30, at 14 (quoting Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigation, to Francis Biddle, Solicitor Gen., Dep’t of Justice (Feb. 2, 1942), *reprinted in* COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 73 (1983)); *see also* Hohri v. United States, 586 F. Supp. 769, 779 (D.D.C. 1984).

⁷¹ *See Hohri*, 586 F. Supp. at 778; *see also* Irons, *supra* note 65, at 215.

⁷² Yamamoto, *supra* note 30, at 17. The footnote, as originally drafted, read as follows: The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry [sic], in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not asks [sic] the Court to take judicial notice of the recital of those facts contained in the Report.

Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

⁷³ Memorandum from Edward J. Ennis, Dep’t of Justice, to Herbert Wechsler, Assistant Attorney Gen., War Div., Dep’t of Justice (Sept. 30, 1944), *cited in Korematsu*, 584 F. Supp. app. A, at 1421.

⁷⁴ Memorandum from J.L. Burling, Dep’t of Justice, to Herbert Wechsler, Assistant Attorney Gen., War Div., Dep’t of Justice (Sept. 11, 1944), *cited in Korematsu*, 584 F. Supp. app. B, at 1424.

⁷⁵ *Hohri*, 586 F. Supp. at 780–81. The footnote that ultimately appeared in the brief read as follows:

Solicitor General Fahy maintained the misleading government line even at oral argument. When pressed about the government's reliance on the DeWitt Report, and the cryptic language of footnote 2, Solicitor General Fahy "denied that the footnote was a repudiation of the military necessity of the evacuation."⁷⁶

The lack of candor in *Korematsu* is all the more egregious given that the government did not take the position that disclosure of contrary information was barred under the state secrets doctrine, or that withholding information was necessary to protect the government.⁷⁷ *Korematsu* did not involve state secrets. The same day that *Korematsu* was issued, the Court also issued a decision in *Ex parte Endo*,⁷⁸ holding that an interned person whom the government conceded was loyal was entitled to an "unconditional release by the War Relocation Authority."⁷⁹ The effect of *Endo* was to close the camps.⁸⁰

III

THE LESSONS OF *KOREMATSU*

Why am I so confident about these facts? Three later investigations have confirmed the failure of the government to provide the Supreme Court with the accurate facts. The 1980 Commission on Wartime Relocation and Internment of Civilians, established by Congress, reached the "unanimous" conclusion that the DeWitt

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final* [sic] *Report* only to the extent that it relates to such facts.

Brief for the United States at 11 n.2, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22).

⁷⁶ *Hirabayashi v. United States*, 828 F.2d 591, 603 (9th Cir. 1987).

⁷⁷ The state secrets doctrine is an evidentiary privilege that permits the government to withhold certain types of highly sensitive evidence. See Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 790 (2010). It was first formally recognized in *United States v. Reynolds*, 345 U.S. 1 (1953), in which the Court accepted the government's claim that an official investigation report related to an Air Force Bomber crash had a reasonable possibility of containing military secrets. *Id.* at 11. Almost fifty years later, it was discovered that the report contained nothing that dealt with any military or national security secrets. See Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES (Apr. 19, 2004), <http://articles.latimes.com/2004/apr/19/nation/na-b29parttwo19> (reporting on the efforts of the daughter of one of the victims of the Air Force Bomber crash to uncover the contents of the crash's investigation report).

⁷⁸ 323 U.S. 283 (1944).

⁷⁹ *Id.* at 304.

⁸⁰ Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003).

Report was contradicted by “substantial credible evidence from a number of federal civilian and military agencies.”⁸¹

Courts in the Ninth Circuit granted writs of *coram nobis* to Korematsu and Hirabayashi and annulled their convictions.⁸² They found that the government’s omission of relevant evidence and its presentation of “misleading information” and a “selective record” were “deliberate[].”⁸³ Still, the government was not ready in the early 1980s to confess error.

It was not until 2011—about seventy years after the decisions—that Acting Solicitor General Neal Katyal, to his credit, issued a confession of error⁸⁴ in both *Hirabayashi* and *Korematsu*, acknowledging that Solicitor General Fahy had known about and withheld the Ringle Report from the Court. One might ask whether these failures of candor mattered. As a working judge, I tend to believe the disclosures—had they been made—would have changed the outcome, or, at the very least, the reasoning in the case.

So, what are some of the lessons to be drawn from this shadowing of the truth?

First, we should not think the problems faced in *Korematsu* will never reoccur. There is a tendency to think of the *Korematsu* decision as a one-off. But I think that is incorrect. The case was about the actions taken by authorities in response to an attack on this country. There is no reason to think that the country will not be subject to attack again. After all, we were attacked on 9/11, the authorities responded, and their responses resulted in much litigation.⁸⁵ The Supreme Court recently reviewed a Second Circuit case involving qualified immunity for the actions taken by high level officials in immediate response to 9/11.⁸⁶

Second, do not underestimate the Executive’s motivation to protect the country from terrorist attacks in this post-9/11 era. There are enormous pressures on that branch to take actions to protect the public in times of war and terrorism.

⁸¹ *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984); *see also* COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 70, at 8–9.

⁸² *Hirabayashi v. United States*, 828 F.2d 591, 604–08 (9th Cir. 1987); *Korematsu*, 584 F. Supp. at 1420.

⁸³ *Korematsu*, 584 F. Supp. at 1419–20; *accord Hirabayashi*, 828 F.2d at 601–04 (granting writ of *coram nobis*).

⁸⁴ Katyal, *supra* note 66.

⁸⁵ *See, e.g.,* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

⁸⁶ *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *rev’d in part and vacated in part sub nom. Ziglar v. Abassi*, 15-1358 (U.S. June 19, 2017) (alleging abuse of a class of Muslim and Arab noncitizens during post-9/11 detentions).

Third, the courts must recognize those pressures and bear their own responsibility for getting at the truth. The courts' questioning should be much more rigorous. Recently, we have seen hard questioning of government's justifications.⁸⁷ Such justifications may not be taken at face value.

The Supreme Court, of necessity, relies heavily on the accuracy of what the Solicitor General says to it, but it must recognize that error will be inevitable. In *Clapper*, the failures likely came about from the complexity of the various surveillance programs under FISA and from the lack of information. The Solicitor General continues to confess error several times a year, but often too late.⁸⁸ And a confession of error does not overrule a case that was wrongly decided.

Fourth, the last lesson is the most important and the simplest. Truth matters and matters enormously. It is the obligation of lawyers to tell the truth and to be accurate.⁸⁹ It is also the obligation of judges to be honest and accurate. The integrity of our system of justice depends on it. There is no room in our legal system for "post truth politics in the age of social media," as *The Economist* puts it.⁹⁰ It is indeed the job of our Third Branch to allow there to be a national consensus on what is true.

We should remember the past so that we are not condemned to repeat it. Thank you so much.

⁸⁷ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12 (2016) (noting unsubstantiated evidence for Texas's justifications for abortion clinic regulations).

⁸⁸ "Since Taft, all Solicitors General—it doesn't matter whether they are appointed by a Republican or a Democrat—have confessed error, roughly at the pace of two to three times per Supreme Court term." Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 *FORDHAM L. REV.* 3027, 3030 (2013); see also Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, *WALL ST. J.* (Aug. 30, 2016, 3:48 PM), <http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756>.

⁸⁹ See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2016).

⁹⁰ *ECONOMIST*, *supra* note 2.