

When Governments Break the Law

*The Rule of Law and the Prosecution
of the Bush Administration*

EDITED BY

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Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration

STEPHEN I. VLADECK¹

Notwithstanding the force of the rhetoric employed on all sides, the contemporary debate over whether senior Bush Administration officials should be investigated (and potentially prosecuted) for their role in the U.S. government's torture of individuals detained as "enemy combatants" during the war on terrorism has been curiously indifferent to American history.² Even the most modest perusal of that history reveals—perhaps surprisingly—little precedent for holding personally to account those senior government officials most responsible for our gravest civil liberties and human rights abuses. Perhaps the most prominent example comes from one of the darkest civil liberties chapters in American history, the exclusion from the West Coast and internment of over 120,000 Japanese nationals and U.S. citizens of Japanese descent during World War II, and the implicit but unequivocal legal sanction given to these measures by the Supreme Court in a trio of rulings culminating with *Korematsu v. United States* in December 1944.³

More than just a temporal bookend, both *Korematsu's* holding and its history provide illuminating lenses through which to situate these contemporary debates. In upholding Fred Korematsu's conviction for failing to comply with an exclusion order, Justice Hugo Black's opinion for the Court concluded that the government's claim of military necessity overrode (or at least justified) the latent racial discrimination:

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 the 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.⁴

Two of the Court's senior members—Justices Owen Roberts and Frank Murphy—challenged the majority on its own terms, dissenting, *inter alia*, because of their own conclusion that the evacuations from the West Coast were not necessary, and because mass, suspicionless internment was, in their view, plainly unconstitutional.⁵ But Justice Robert H. Jackson took a different tack. Angered that the Court had crossed a substantive line he thought it had agreed to toe in the *Hirabayashi* case eighteen months earlier,⁶ Jackson argued not that the exclusion orders violated the Constitution, but that the majority opinion, in concluding to the contrary, had done even worse—and had affirmatively undermined the rule of law. As he explained, “a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.”⁷

Put another way, for Jackson, who had previously served both as FDR's Solicitor General and Attorney General, the job of the executive branch was to do what it reasonably believed to be *necessary*, whereas the job of the courts was to pronounce, after the fact, upon whether such actions were *legal*. In his words, “the courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.”⁸ Thus, as he warned in his dissent's most famous passage,

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time

has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”

In other words, according to Jackson, internment may have been a stain on America’s moral conscience, but the majority opinion, by treating the government’s claim of military necessity (which, in Jackson’s view, the Court lacked the competence to assess) as being dispositive of the measure’s legality, was a stain on the rule of law—and one that would be far more difficult to expurgate. The rule of law in Jackson’s view was not jeopardized by government abuses; it was jeopardized by their legalization in the name of necessity. To Jackson, then, the rule of law was not simply the notion that the government was bound by the law, but rather that the law could not bend to accommodate government abuses under the guise of “necessity.”

Jackson’s dissent, as Dennis Hutchinson has written, “has always been a puzzle to both his admirers and his critics.”¹⁰ Peter Irons described it as “a curious kind of judicial schizophrenia”;¹¹ writing shortly afterward, Eugene Rostow dubbed it “a fascinating and fantastic essay in nihilism.”¹² After all, even while he castigated the majority, Jackson suggested that courts should not be in the business of reviewing claims such as those that the majority sustained. Indeed, for all the damage that the majority opinion did to the rule of law, Jackson was no less concerned about the potential impact of a decision that *rejected* the claim of military necessity, since the executive branch might very well ignore such judicial pronouncements—a possibility that, however remote, risked even greater damage to judicial legitimacy.¹³

Thus, the only way around the dilemma, in Jackson’s view, was for the courts to stay out of the issue altogether; “a bet on the future,” in Hutchinson’s words, “that the excesses of the executive branch will be self-curing once the emergency expires, and as long as the judiciary withholds its formal approval of those excesses, the Constitution will remain intact.”¹⁴ As Jackson concluded his dissent,

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever

let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.¹⁵

Ironically, perhaps because of his dissent (and the two others), the future against which Jackson railed never materialized, and the moral judgments to which he referred have been, at least over time, rather unkind. *Korematsu's* reasoning has been soundly discredited (and never again invoked as authoritative);¹⁶ Fred Korematsu's conviction has been vacated;¹⁷ and the internment camps in general are today almost universally condemned as one of the darkest civil liberties chapters in modern American history—so much so that Congress formally apologized for the camps in 1988, recognizing that “these actions were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”¹⁸ As the Civil Liberties Act of 1988 concluded, “a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.”¹⁹ In the decades since, the federal government has appropriated over \$1.6 billion in reparations to the internees and their heirs.²⁰

Indeed, even after the terrorist attacks of September 11, when comparable hostility and suspicion were directed toward Muslim men of Middle Eastern national origin,²¹ the need to avoid “another *Korematsu*” seemed to have at least some effect in shaping the government's legal response, especially as it related to the extracriminal detention of individuals legally within the United States.²² To be sure, the government's record was hardly perfect in this regard, but it was, by any measure, a vast improvement over the internment example.²³

All these developments suggest that whatever damage the *Korematsu* majority might have inflicted upon the rule of law has since been vitiated by the creation of a consensus historical narrative that the suspicionless exclusion from the West Coast and detention of Japanese Americans was neither necessary nor legal, and, as significantly, that the Supreme Court grievously erred by not saying so more decisively.²⁴ As Justice Ruth Bader Ginsburg has written, “[a] *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.”²⁵

Moreover, and critically, this consensus narrative discrediting internment in general and *Korematsu* in particular has emerged even though no one was ever held personally liable for the policies that led to the camps. No military or executive branch official was prosecuted or sued for violating the internees' rights; no government lawyer was disbarred—despite proof that the Justice Department affirmatively misled the courts as to the gravity of the military threat posed by Japan, especially in the second round of briefing before the Supreme Court in *Korematsu*.²⁶

Indeed, one could even argue (unpopularly, I suspect) that internment was not clearly unconstitutional, at least based on then-extant Supreme Court jurisprudence; the Court would not formally apply modern equal protection analysis to the federal government until 1954.²⁷ It also bears remembering that thousands of German and Italian nationals were similarly detained during the war pursuant to the Alien Enemy Act of 1798,²⁸ a measure that has not been subject to nearly as much historical criticism as internment, and that would have provided comparable authority for the detention of the Issei (the first-generation Japanese Americans, many of whom were still Japanese nationals), but not their U.S. citizen offspring.²⁹ In short, we have come to accept the wrongfulness of internment, even without clarity as to the specific legal violation that internment represented or the personal liability of individual government officials for its commission. Somehow, the conclusion seems inescapable today that the rule of law in the United States eventually survived the damage wrought by *Korematsu*, notwithstanding (or perhaps thanks to) Justice Jackson's fear that it might not.

Contrast the internment experience with the contemporary debate over whether senior Bush Administration officials should be investigated (and potentially prosecuted) for their complicity in the torture of individuals detained as "enemy combatants" in the war against terrorism. Many of those who have advocated for such measures have argued that a failure to prosecute those who were responsible would promote impunity, and would thereby undermine the rule of law by weakening both formal and practical barriers to the commission of similar (if not more serious) abuses in the future.³⁰ On the other side, those who vehemently oppose what they have decried as the "criminalization of politics" have argued that first, it is not clear the specific interrogation methods used actually *were* unlawful; second, it is certainly not clear that senior government officials *knew* that the interrogation methods they were approving were unlawful; and third, in any event, use of these methods may nonetheless have been justified because they were "necessary"

to gain actionable intelligence information and to thereby prevent future terrorist attacks.³¹

One can find any number of parallels between the debates over internment during World War II and torture after September 11, including the presence of prominent public intellectuals on both sides.³² Even the majority opinion in *Korematsu*—which Jackson thought was the real problem—may have a modern counterpart in the various legal opinions prepared by the Office of Legal Counsel (OLC) that are at the heart of the current controversy, in which Justice Department lawyers adopted an incredibly narrow definition of “torture” and then separately concluded that a number of particular interrogation methods widely viewed as torturous fell outside that definition.³³ Perhaps not surprisingly, a number of scholars have argued that these opinions, rather than the underlying acts of torture documented by the International Committee of the Red Cross (among others),³⁴ represent the greatest threat to the rule of law resulting from the Bush Administration’s counterterrorism policies, echoing (if not expressly invoking) the arguments marshaled by Jackson in his *Korematsu* dissent.³⁵

The central question I want to explore in this essay is whether Jackson’s understanding of the relationship between internment and the rule of law, and the subsequent creation of internment’s historical memory, might help us to assess the stakes of today’s debate. Put another way, if, like the majority opinion in *Korematsu*, the OLC opinions—and not the acts of torture themselves—pose the real danger to the rule of law going forward, are there lessons that we can learn from the creation of internment’s historical narrative (at the expense of *Korematsu*) that will help us undo whatever damage the OLC opinions have caused?

My thesis is that the answer to this question is “yes,” that is, the internment episode provides support in identifying both the true “rule of law” problem and at least one example for how such a problem can be cured. As significantly, this history suggests that such infringements upon the rule of law *can* properly be remedied without individual criminal liability, so long as adequate information about the abuses makes its way into the public record, allowing the populace—and history—to make its own judgments. One may nevertheless have one’s own reasons for why the civil or criminal liability of individual government officers should be pursued; my point is simply that, whatever the circumstance-specific political merits of such endeavors, the rule of law can adequately be preserved without them.

To unpack this argument, I begin in Part I with Justice Jackson’s *Korematsu* dissent, and its articulation of the relationship between internment,

the courts, and the rule of law. As Part I explains, Jackson's complicated views as to the relationship between the courts and the military during wartime, which he called "the Achilles Heel of the Constitution,"³⁶ are best understood in light of his writings in each of the war powers cases to come before the World War II Court—including unpublished opinions he prepared in the case of the Nazi saboteurs and in two other internment cases.³⁷ By the time *Korematsu* was back before the Court in the fall of 1944, Jackson finally was ready to put into words not just the inherent uselessness of holding measures based upon military necessity to any kind of legal yardstick, but the perilous danger to the rule of law of doing so. There is a hard question to be asked about Jackson's conclusion, that is, whether the rule of law really does *not* require some form of legal accountability for military abuses of the war power, but Part I concludes that Jackson himself had a response to that concern.

Part II then shifts gears to a retracing of the creation of internment's memory—a movement that was already underway by the time the camps were officially closed, but that did not really reach fruition until well into the 1980s. As is clear in retrospect, although there were many barriers in the way of collective repudiation of the camps, the absence of individual criminal responsibility was never one of them. To be sure, the creation of internment's historical memory was neither easy nor painless, and took the better part of four decades to complete. But it happened nonetheless, and without any serious movement to investigate the government officials most directly responsible. And today, we understand that internment was a mistake, one we have quite publicly vowed never to repeat again. Although the government has made any number of missteps in its response to September 11, Part II concludes by demonstrating how it carefully avoided repeating the substantive error at the heart of internment, to wit: mass, race-based, suspicionless detention.

In Part III, I turn to the parallels between the creation of internment's memory and the emerging narrative concerning the mistreatment and torture of individuals detained as "enemy combatants" during the war on terrorism. Beginning with the parallels between the majority opinion in *Korematsu* and the "torture memos" prepared by the Bush Administration's OLC, Part III demonstrates how similar considerations are present in today's context. Thus, the resulting inference is that a similar narrative can be created with regard to the torture debate, and without individual criminal or civil liability for the responsible officials—but only with a full accounting of the means by which the government's misconduct received official sanction. Without such

a full historical record, as Part III concludes, it is quite possible that the same Justice Jackson might have been closer to the mark in his closing statement as lead prosecutor at Nuremberg, where, invoking the specter of Shakespeare's *Richard III*, he concluded with a siren call for criminal liability—that, “[i]f you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.”³⁸

I. Justice Jackson, Internment, and the Rule of Law

The analytical and rhetorical underpinnings of Jackson's *Korematsu* dissent are easily traced to opinions he drafted (but did not file) in two earlier war powers cases—*Ex parte Quirin*, in which the Court unanimously upheld President Roosevelt's use of a military commission to try eight Nazi saboteurs captured inside the territorial United States;³⁹ and *Hirabayashi v. United States*, in which the Court unanimously upheld the legality of the military's imposition of a curfew for individuals of Japanese descent along the West Coast.⁴⁰ As both Dennis Hutchinson and Jack Goldsmith have demonstrated, Jackson's draft opinions in these two cases—more than the opinion he actually filed in *Korematsu*—show a Justice caught between the horns of a dilemma that had military necessity on one side and the rule of law on the other.⁴¹

In *Quirin*, Chief Justice Stone's opinion for the Court relied on a strained reading of the Articles of War (precursor to today's Uniform Code of Military Justice) to find congressional authorization for the military commission, thereby avoiding more difficult questions about the scope of the president's unilateral authority during wartime.⁴² Although the Court's attempt to distinguish its 1866 decision in *Ex parte Milligan* rejecting a similar assertion of military jurisdiction⁴³ may have been somewhat disingenuous, Jackson wholeheartedly agreed on the merits that the eight saboteurs could be tried by a military commission.⁴⁴ He nevertheless drafted a separate opinion to explain why he thought the Court's foray into statutory interpretation was, in his words, “unauthorized and possibly mischievous.”⁴⁵ Specifically, Jackson's opinion raised two objections: first, that the Court's construction of the Articles might also wrongly apply to cases where the defendants were far more clearly entitled to constitutional protections, for example, servicemembers or U.S. civilians in occupied territory; and second, that the Court was trampling on the president's inherent (and possibly even *exclusive*) power to subject enemy belligerents to trial by military commission during wartime by relying on ambiguous statutory approval.⁴⁶

Instead, “[o]nce it appears that one is a legitimate prisoner of war, no court should question or review any Order the President may consider will serve the interests of this nation, whatever its effect on the life or liberty of those individuals whose service of our enemies forfeits claim to our judicial consideration.”⁴⁷ As he concluded, “[I]n the long run it seems to me that we have no more important duty than to keep clear and separate the lines of responsibility and duty of the judicial and of the executive-military arms of government. Merger of the two is the end of liberty as we in this country have known it.”⁴⁸

Perhaps because Chief Justice Stone added a passage to his opinion for the Court flagging the division among the justices over the role of congressional authorization,⁴⁹ or perhaps because the draft had been meant more for his own convincing than for the public, Jackson declined to publish his concurrence. But it would be fewer than six months before another case came to the Court implicating his concern over the separation of the military and judicial spheres during wartime—and far more prominently, at that:

In *Hirabayashi* (along with its companion case, *Yasui v. United States*),⁵⁰ the Court was asked for the first time to rule on the legality of various measures undertaken by Lieutenant General John L. DeWitt in carrying out President Roosevelt’s Executive Order 9066,⁵¹ which authorized the secretary of war or his designee “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.”⁵²

Gordon Hirabayashi challenged his conviction for two offenses: first, for violating a “curfew order” that DeWitt had imposed upon all persons of Japanese ancestry living in particular areas along the West Coast; and second, for failing to report to a “civil control station” for processing—and all-but-guaranteed relocation to an internment camp.⁵³ Although Hirabayashi’s case thus appeared to raise the constitutionality of the entire internment scheme, a procedural fortuity (that the trial judge had ordered Hirabayashi to serve his sentences concurrently rather than consecutively) allowed the Supreme Court to sidestep the constitutionality of his pending relocation in favor of his narrower challenge to the curfew.⁵⁴

Jackson nonetheless agonized over the merits, and penned a draft concurrence that, though left unfiled (he withdrew the draft once the Court had settled on the narrower ground for decision), would subsequently form the basis for most of his dissent in *Korematsu*. As he framed the issue, the question

for the Court “is whether we should sustain as an exercise of the war power a discrimination we would probably strike down as an exercise of legislative power.”⁵⁵ But, he continued, “[w]e must also make a choice between two ways of reaching such a result. One is to uphold the order, as the Court does, because such discrimination is constitutional when there is a rational basis for it; the other is to let the order stand because it is beyond our power to review.”⁵⁶

In his *Hirabayashi* draft, more than in his published *Korematsu* dissent, Jackson suggested that part of the reason for adopting the latter position was the lack of clarity on the merits, for “[i]t is worse than idle to profess that legal standards determine the present result if they are not so settled and firm that we would stand by them should they hereafter lead to a decision against the government.” Instead, “[i]f we cannot set out fairly definable legal standards to guide us, it would be better in my opinion both for the war and for the law that we refrain altogether from considering the validity of these military orders. To substitute the mere personal opinion of judges for the personal will of the Executive only substitutes a theorizing absolutism for a practical one.”⁵⁷

Specifically invoking several of President Lincoln’s more notorious civil liberties abuses during the Civil War, Jackson agreed that the country had endured “temporary excesses of executive power, but they have proved to be incidents in the larger policy of preserving and perpetuating our free institutions.”⁵⁸ Indeed, as Jackson concluded, “I do not know that the ultimate cause of liberty has suffered, and it may have been saved, by [Lincoln’s] questionable arrests. I am sure the cause would have suffered if this Court had rationalized them, as Constitutional.”⁵⁹

Thanks to his *Hirabayashi* draft, Jackson was ready when internment returned to the Court the following year in a pair of cases—those of Fred Korematsu, convicted of violating an exclusion order,⁶⁰ and Mitsuye Endo, who, having voluntarily complied with a relocation order, petitioned for a writ of habeas corpus to release her from the custody of the War Relocation Authority.⁶¹ With a majority of the Court poised to uphold the constitutionality of Korematsu’s conviction based largely on the military’s “Final Report” on the West Coast security situation (the Report raised serious concerns about the effects of possible espionage and sabotage and emphasized the difficulties of screening for individual suspicion),⁶² Jackson prepared to dissent. And although Jackson’s first draft highlighted the extent to which the majority’s analysis simply did not follow from *Hirabayashi* (and thereby crossed a line he thought the Court had agreed to observe), the draft otherwise largely reflected—and borrowed liberally from—his final draft from *Hirabayashi*.

One important addition from the *Hirabayashi* draft contained an illuminating reflection on the Civil War: Citing the Supreme Court's rejection of President Lincoln's use of military tribunals in *Ex parte Milligan*⁶³ and Chief Justice Taney's rejection of Lincoln's unilateral suspension of habeas corpus in *Ex parte Merryman*,⁶⁴ Jackson finally identified a class of war powers cases that clearly *were* meant for the courts:

If the general war power should be invoked as a mere pretext for arbitrary government or, once properly invoked, should be continued after all need for it had passed, or were perverted to the overturning of civil government, this Court in a proper case would be duty-bound to declare such abuse of the power illegitimate. Even if it lacked physical force to end the abuse, its declaration at least would absolve loyal people from the legal or moral duty of obedience to its decree.⁶⁵

Korematsu's case was different, though, because "the question here is whether the courts may be required to enforce an extraordinary and dubious order upon becoming satisfied that the military authority had reasonable grounds to adopt it as useful to military ends. This involves some inquiry into the nature and functions of the military *as well as* the judicial power,"⁶⁶ an inquiry that was beyond the Court's competence. Jackson thus appeared to believe that the risk that the executive branch would ignore the courts' invalidation of a military measure *would* be worth taking in some cases—just not this one.

Jackson's final draft, as Hutchinson has noted, left out much of the important analysis in his earlier efforts, including his various examples of prior wartime clashes between the executive branch and the courts; his intriguing discussions of the Civil War cases; and a long footnote that noted with approval some of the central arguments Roberts and Murphy would use in rebutting the military necessity claim.⁶⁷ Instead, Jackson devoted his last, published version to the rhetorical core of his rule-of-law argument, and to the proposition that the Court and the country would have been far better off had the government never taken to the civilian courts in Korematsu's case, had the Court not granted certiorari to review the Ninth Circuit, or had the majority found some way to get rid of the case without a decision on the merits. Gone from the draft were the caveats and distinctions that had allowed Jackson to explain why *Korematsu* was different from other cases where judicial intervention would be appropriate. Whereas his earlier draft invoked *Merryman* (where President Lincoln had ignored Chief Jus-

tice Taney) as a positive example, the final draft showed that he was in fact “haunted by *Merryman*,”⁶⁸ and was convinced that the rule of law could not abide history repeating itself.

Of course, the same day that the Court decided *Korematsu*, it also decided *Endo*, in which the majority (including Jackson) had no trouble distinguishing *Korematsu* and holding that the government lacked the power to detain “loyal” U.S. citizens of Japanese descent who, unlike Hirabayashi and *Korematsu*, had not committed a “crime” by violating a curfew or exclusion order.⁶⁹ In other words, *Endo* held that internment *itself* was unlawful, at least for the vast majority of internees who voluntarily submitted themselves to the relocation program. Again, Jackson penned a draft opinion (concurring), emphasizing that *Endo*’s was an “easy” case because she was not in “military custody for security reasons.” As such, “[t]he whole idea that our American citizens’ right to be at large may be conditioned or denied by community prejudice or disapproval should be rejected by this Court the first time it is heard within these walls. To fail is to betray.”⁷⁰

For reasons that remain unclear, Jackson never filed his *Endo* opinion either. But by that point it did not matter; the day before the decisions in *Korematsu* and *Endo* were publicly handed down, the Roosevelt Administration announced that the camps were to be closed. As Patrick Gudridge has explained, *Endo* was supposed to have been the more significant decision, whereas “Justice Black seems to have thought, or wanted his readers to think, that *Korematsu* addressed only an already-past short term.”⁷¹ Justice Jackson, at least, was not buying it.

Seven years later, in a celebrated address delivered at Buffalo Law School, Jackson conceded the danger of his *Korematsu* dissent: “[M]y view, if followed, would come close to a suspension of the writ of habeas corpus or recognition of a state of martial law at the time and place found proper for military control.”⁷² His dissent also predated the Court’s emphatic assertion of its own supremacy vis-à-vis federal law in *Cooper v. Aaron* in 1958,⁷³ a holding that may have mitigated, at least to some degree, the possibility of executive branch disobedience. As such, there are reasons to look skeptically today upon his view that the courts would be the better off in crisis times for doing nothing; one could just as easily argue that there is not much point in having courts if they do not intervene when it counts. But this otherwise important debate may be beside the point here, for it is a choice between two alternatives to the approach taken by the *Korematsu* majority, rather than a justification for what the majority held. At least on that point, Jackson’s thesis seems indisputable, and history would bear him out.

II. Internment, Redress, and the Politics of Memory

Justice Black's efforts to the contrary notwithstanding, *Korematsu* was destined to become the more significant case. Withering and sustained academic criticisms of the decision surfaced with surprising speed, the most important of which was, by far, the thorough and powerful denunciation by Eugene Rostow, later the Dean of Yale Law School, in the June 1945 issue of the *Yale Law Journal*. Rostow expressly followed Jackson's cue, placing the final responsibility for the internment program (which he called "hasty, unnecessary, and mistaken") not on the executive branch or the military, but on the *Korematsu* majority, concluding that their opinion "converts a piece of war-time folly into political doctrine, and a permanent part of the law."⁷⁴

Rostow was hardly alone. Other contemporary commentators also laid the blame primarily (if not exclusively) at the feet of the *Korematsu* majority rather than the Roosevelt Administration, including Nanette Dembitz, a niece of Justice Brandeis and a Justice Department lawyer during much of the internment litigation, whose article in the March 1945 *Columbia Law Review* was similarly critical of the Court.⁷⁵ Even the Court itself was far more circumspect in 1946, when it was called upon to consider the constitutionality of provost courts convened to try civilians for nonmilitary offenses in Hawaii during World War II. Striking down the practice in *Duncan v. Kahanamoku*, the Court seemed willing to accept that the entire government—including, perhaps, the judiciary—had gone a bit too far during the war.⁷⁶ Although the majority rested on its interpretation of the Hawaii Organic Act, Justice Murphy wrote separately to insist that the Court assert the primacy of the Constitution: "[The government's position] is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation."⁷⁷

Nonetheless, early attempts by the internees (and others affected by the curfew and exclusion orders) to obtain appropriate reparations ran headlong into the legal precedent set by *Korematsu*—and the federal government's unwillingness to concede that any aspect of the exclusion and relocation process had been unjustified in law or in fact. Congress *did* enact the Evacuation Claims Act in 1948, which was ostensibly designed to provide reparations for economic losses incurred as a result of the relocation, but without any concession of wrongdoing.⁷⁸ Moreover, the Act only provided restitution for "tangible" losses to real or personal property that were a foresee-

able consequence of relocation, and that could be proven (a requirement that often barred recovery where records failed to survive the war). Even then, no interest could be awarded. Thus, "Although 26,568 claims were filed for an amount totaling \$148 million, the government paid only \$37 million in compensation. Only a small percentage of people actually received compensation for their losses. The government paid about ten cents for every dollar of property lost."⁷⁹ Indeed, the Act only authorized the Attorney General to approve claims up to \$2,500; higher values presumably had to be resubmitted to Congress for approval.

For a host of reasons, the next two decades witnessed little in the way of a concerted movement for any kind of reparations from the federal government. Instead, most of the Issei (first-generation Japanese Americans) and Nisei (second-generation Japanese Americans) living along the West Coast tried to put their lives back together while leaving the past unmentioned. That trend began to change only in the late 1960s, when the Sansei (third-generation Japanese Americans) actively began to investigate the facts behind—and background to—their parents' and grandparents' plight.⁸⁰ Soon thereafter, "redress" became an increasingly prominent goal for Japanese American civic groups.⁸¹

For starters, Japanese American interest groups played a central role in advocating for the 1971 repeal of the Emergency Detention Act,⁸² a Cold War-era statute that had authorized the detention of U.S. citizens without charges in certain "internal security emergencies" as declared by the Attorney General.⁸³ Although the EDA had never been used, its continuing existence had become a source of concern among civil liberties groups, especially as anti-government protests escalated during the Vietnam War.⁸⁴ As a result, and with members of Congress invoking *Korematsu's* legacy, the bill to repeal the EDA also included an affirmative prohibition on extralegislative detention, writing into federal law the proviso that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."⁸⁵ Even though *Korematsu* himself *was* technically detained pursuant to an Act of Congress (specifically, the March 21, 1942 statute that made it a crime to violate DeWitt's exclusion order), the internees who complied with DeWitt's orders were held pursuant to no comparable authority.

Five years later, in 1976, around the time that the Japanese American Citizens League established a National Committee for Redress, President Ford took another important—albeit entirely symbolic—step, issuing a proclamation that confirmed that Executive Order 9066 had formally expired with the end of World War II, and noting that "[w]e now know what we should have

known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans.”⁸⁶ Vowing that “this kind of action shall never again be repeated,”⁸⁷ the proclamation stopped short of formally apologizing for internment.

Finally, in 1980 the redress movement culminated with the creation by Congress of the Commission on Wartime Relocation and Internment of Civilians (CWRIC). Tasked with a statutory mandate to review the facts and circumstances leading to the internment camps and to “recommend appropriate remedies,” the CWRIC held more than twenty days of hearings, took oral testimony from over 750 witnesses, and amassed a remarkable historical record documenting the true costs—economic and noneconomic—borne by the internees.

The Commission’s final report, “Personal Justice Denied,” reached a number of damning conclusions about the curfew, exclusion, and relocation orders, concluding that none of the measures actually were necessary—and that adequate, alternative remedies existed for the government to protect against sabotage and espionage on the West Coast.⁸⁸ The CWRIC thus recommended a host of additional measures to remedy the government’s missteps, including a formal apology from the U.S. government, a one-time per capita payment of \$20,000 to each surviving internee to compensate them for their losses, and the creation of a fund to educate future generations about the injustices of the internment camps.⁸⁹ Congress eventually adopted the recommendations in the Civil Liberties Act of 1988,⁹⁰ and President George H. W. Bush formally apologized on behalf of the U.S. government early in 1989.⁹¹

The work of the CWRIC was thus instrumental in (and a substantial contributor to) the creation of a narrative in which internment was discredited as a measure justified by military necessity. And such a narrative therefore served to undermine the factual foundation upon which the legal analysis of both *Hirabayashi* and *Korematsu* rested. But the Commission’s work indirectly contributed to the evisceration of the key judicial precedents, as well. In early 1981, Aiko Yoshinaga-Herzig (a CWRIC researcher) and Peter Irons uncovered incontrovertible evidence of government misconduct in the litigation of the exclusion and internment cases during the 1940s. For starters, the pair uncovered an original copy of General DeWitt’s “Final Report,” which (unlike the version publicly disclosed and cited by the government in *Korematsu*) made clear that individualized determinations of suspicion were logistically feasible in 1942; the military had simply concluded that they were unlikely to be fruitful.⁹²

Second, Yoshinaga-Herzig and Irons uncovered various contemporaneous memoranda from intelligence agencies discounting any genuine threat of espionage or sabotage from Japanese nationals and their descendants living along the West Coast, memoranda that were in the possession of the Justice Department long before the briefs were filed in *Korematsu*.⁹³ Third, and related to both of the first two discoveries, the pair uncovered an earlier version of the government's merits brief to the Supreme Court in *Korematsu*, which included language affirmatively casting doubt on the accuracy of various claims in the "Final Report" that were central to the military's assertion of military necessity (including the espionage and sabotage concerns). After intervention by the War Department, the footnote was rewritten prior to filing so as to obfuscate the Justice Department's well-founded concerns,⁹⁴ and to give the Report an authoritativeness that the Justice Department had itself disputed. Moreover, Eric Muller has since uncovered additional archival evidence suggesting that similar misrepresentations were made to the Court in the *Hirabayashi* litigation as well.⁹⁵

The evidence discovered by Yoshinaga-Herzig and Irons provided the foundation for petitions for writs of error *coram nobis* (a common law remedy allowing for the correction of fundamental errors at trial when no other avenues of relief remain available)⁹⁶ filed in the same trial courts that convicted Hirabayashi, Yasui, and Korematsu. Korematsu won a sweeping victory in a landmark opinion by the U.S. District Court for the Northern District of California;⁹⁷ Yasui's conviction was vacated by the U.S. District Court for the District of Oregon at the government's request, and without any real investigation into the circumstances of his trial;⁹⁸ and Hirabayashi, after a mixed bag in the Seattle district court,⁹⁹ eventually prevailed across the board on appeal to the Ninth Circuit.¹⁰⁰ At bottom, the *coram nobis* cases helped to cement the narrative that the redress movement had been attempting to create and that the CWRIC had adopted, that is, that the internment camps were a terrible injustice; that the government's defense thereof was not just legally unconvincing, but was actually in bad faith; and that, for one reason or another, the Supreme Court's legal rationalization of the policies could not withstand historical scrutiny.

And although it took the better part of four decades for the redress narrative to prevail, two points bear emphasis: first, the movement to create such a narrative did not really get off the ground until the mid-1970s. From that point, it took just over ten years for the full story to emerge—a relatively short period of time, in historiographical terms.

Second, notwithstanding the increasing evidence that individual officials (especially government lawyers) may have been particularly to blame in influencing the Court's legal rationalization of the exclusion and relocation policies, the redress movement never included calls for individual liability as part of its agenda. Part of that, of course, can certainly be traced to the fact that many of the most significant players had passed away well before the mid-1970s, including President Roosevelt, General DeWitt, Secretary of War Stimson, and so on. But a critical mass of key figures survived—and were called to testify before the CWRIC—including John McCloy (who, as assistant secretary of war, was centrally involved in both the implementation of the internment policies and their legal defense before the Supreme Court), Colonel Karl Bendetsen (one of the architects of internment), Philip Glick (the solicitor for the War Relocation Authority), and others. If individual liability was believed to be an instrumental component to the creation of the redress narrative (leaving aside the obvious but perhaps not fatal statute-of-limitations problems), one *could* have identified living individuals against whom such measures might plausibly have been pursued.

In a provocative 2004 article, Jerry Kang suggested that the record is still somewhat incomplete. Specifically, Kang argued that the *coram nobis* decisions, though noble to the extent that they corrected some aspects of the historical record, also allowed the Supreme Court of the 1940s to evade responsibility for its role in internment, since the central premise of the *coram nobis* cases is that the government withheld material information from the Court (and that the Court would have ruled differently, and presumably correctly, if it had known then what we know now).¹⁰¹ Whether the *Korematsu* majority's deference to the military's claim of necessity constituted willful blindness or not, though, the central point for present purposes is that the redress movement created a historical narrative that unequivocally undermined the factual and legal justifications for the exclusion and internment policies—and based on information that existed at the time, rather than becoming clear only retrospectively.

In the process, the redress movement thereby undermined the reasoning behind internment in general and *Korematsu* in particular, and vitiated the injury that, according to Justice Jackson, the majority opinion in the latter had inflicted upon the rule of law. If anything, *Korematsu* stands today as the exception that proves the rule, that is, that racial classifications are inherently pernicious and should be subjected to the most searching judicial scrutiny.¹⁰² As much as anything else, it was the work of the CWRIC that was responsible for this contemporary reality.

Thus, Justice Jackson may have been correct that the *Korematsu* majority's conflation of military necessity with legality jeopardized the rule of law, but the redress movement established as a matter of historical certainty that the measures simply *were not* necessary on the record to which the government was privy at the time, and so could not have been legal even on Justice Black's morally problematic terms. Put another way, although internment would have been wrong even without *Korematsu*, *Korematsu* itself needed repudiating on both its facts and its principle: the former with regard to its conclusion that internment was necessary; the latter with regard to its conclusion that such necessity controlled internment's legality.

Finally, perhaps the strongest proof of *Korematsu*'s repudiation comes neither from the work of the CWRIC nor the *coram nobis* decisions, but from the aftermath of the September 11 attacks. Although the U.S. government was under enormous pressure to take immediate and decisive action to protect the country from further episodes of terrorism,¹⁰³ *Korematsu* nevertheless seems to have played a role in shaping the government's counterterrorism policy vis-à-vis detention. Thus, although the government *did* temporarily detain hundreds of Muslim men of Middle Eastern descent in the days and weeks after September 11,¹⁰⁴ such detention rested on specific—and *statutory*—authorities, including, inter alia, the power to detain noncitizens facing deportation¹⁰⁵ and the power to detain individuals suspected of being material witnesses to pending criminal prosecutions.¹⁰⁶ And when two individuals within the United States were detained as “enemy combatants,” the courts considering their habeas petitions focused on whether the statutory authority relied upon by the government satisfied the 1971 Non-Detention Act.¹⁰⁷

Given the government's documented overreliance on these authorities,¹⁰⁸ and the separate but related concern that *Korematsu*-like racism nevertheless surfaced in other contexts,¹⁰⁹ these developments are not entirely satisfying. Nevertheless, the length to which the government went to avoid mass, suspicionless detention within the United States after September 11 suggests that the memory of *Korematsu* and its repudiation did in fact have something to say in the formation (and judicial review) of counterterrorism policy. As then-Chief Judge Michael Mukasey wrote early in Jose Padilla's habeas litigation,

The [government] is none too subtle in cautioning this court against going too far in the protection of this detainee's rights, suggesting at one point that permitting Padilla to consult with a lawyer “risks that plans for future attacks will go undetected.” More than a match for that are passages in the *amicus curiae* submissions in this case, where lawyers raise the specter of

Korematsu v. United States, and call Padilla's detention "a repudiation of the Magna Carta," thereby suggesting that if Padilla does not receive the full panoply of protections afforded defendants in criminal cases, a dictatorship will be upon us, the tanks will have rolled. Those to whom images of catastrophe come that easily might take comfort in recalling that it is a year and a half since September 11, 2001, and Padilla's is not only the first, but also the only case of its kind. There is every reason not only to hope, but also to expect that this case will be just another of the isolated cases, like *Quirin*, that deal with isolated events and have limited application.¹¹⁰

Whether or not Mukasey was convincing in suggesting that Padilla's case was unique, it is difficult to discount the influence that *Korematsu* had in emphasizing the need for individualized and judicially reviewable determinations in detention cases. That influence was perhaps best captured by Justice Kennedy in his opinion for the Court in *Boumediene v. Bush*, holding that the Suspension Clause guarantees noncitizens detained at Guantánamo Bay a right to habeas corpus. As he emphasized, "[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. . . . Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek."¹¹¹ As a lesson on the wrongfulness of wartime detention based upon suspicionless (and race-based) stereotypes and the concomitant importance of *meaningful* judicial review, these holdings suggest that *Korematsu's* repudiation is complete. Where history has left its work unfinished, though, is as to the more generalized danger posed by legal opinions that justify government abuses through the mantle of thinly reasoned and hypertechnical legality.

III. Torture and the Rule of Law after the Bush Administration

An enormous amount has already been written about the documented and alleged civil liberties and human rights abuses committed by U.S. government officials during the presidential administration of George W. Bush.¹¹² Even the particular role of the Justice Department has spawned its own cottage industry as to the appropriate moral, ethical, and legal obligations of government lawyers.¹¹³ And although the discussions have run the gamut of substantive topics, no other issue has galvanized public opinion and discourse to the same degree as the torture debate, and the related question of whether there is any set of circumstances under which senior government

officials should be investigated (and potentially held to account) for acts of torture and other abuses committed against terrorism suspects detained as “enemy combatants” by U.S. servicemembers, intelligence personnel, or government contractors.¹⁴

Complicating the torture debate are a series of legal opinions prepared by the OLC in which the Justice Department adopted an incredibly narrow interpretation of the federal statute prohibiting torture, and separately concluded that a number of individual techniques largely considered to be torturous do not in fact violate federal (or international) law.¹⁵ Although the central opinion (the August 1, 2002 “Bybee” or “torture” memo) was leaked to the *Washington Post* in the summer of 2004, the bulk of the other relevant memoranda did not become public until their disclosure by the Obama Administration early in 2009.¹⁶

Rather than a debate on the merits about whether particular acts of mistreatment do or do not constitute torture, the crux of the torture debate today has devolved into a fight over the substantive validity and the ethical propriety of these OLC opinions, on the theory that the opinions themselves may vitiate the liability of those who claim that they acted in good faith by relying upon the memos.¹⁷ As a result, the August 2002 memos and their successors have become the focus of an inordinate amount of attention and analysis. Although by no means providing the consensus view, David Cole’s summary is emblematic of perhaps the most widely shared position among legal scholars:

[O]n many of the specific questions the memos address, there is undoubtedly a range of plausible interpretations. What is most telling in the end, however, is that at every juncture, the memos choose the interpretation most likely to foreclose any possibility of criminal responsibility for the CIA interrogators—regardless of how strained the interpretation is. It is this consistent pattern of result-oriented reasoning, insistently maintained in secret over several years and by several lawyers—even as both the statutory law and the administration’s own public statements seemed to become more restrictive—that is ultimately the most compelling evidence of bad-faith lawyering.¹⁸

The claim that the August 2002 memos in particular were result-oriented, orchestrated to provide a “golden shield” to CIA interrogators,¹⁹ is perhaps the most damning and troubling charge of the larger episode, one that finds support, inter alia, in the speed with which the Justice Department distanced

itself from the “Bybee” memo when it became public in 2004.¹²⁰ And yet, although some of the specific analysis in the 2002 memos has been “withdrawn,” the bottom line remains that every aspect of the CIA interrogation program that is public as of today rested at least in part on a legal opinion that officially provided for its legality. Put another way,

[N]o matter how much the law changed on the surface, the Justice Department’s secret bottom line never changed. Despite the very public repudiation of the August 2002 Torture Memo, despite the passage of the “McCain amendment,” and despite repeated assurances that the U.S. “does not torture,” official U.S. policy, as reflected in the secret memos, continued to authorize the CIA to strip suspects naked, deprive them of sleep for seven to eleven days straight, slam them into walls, slap them, douse them with cold water, force them into painful stress positions and cramped boxes for hours, and waterboard them repeatedly.¹²¹

For many, this reality helps to explain why the memos themselves have posed such a threat to the rule of law. In at least a somewhat comparable manner to judicial decisions, OLC opinions do not formally have the force of law, but they do bind the executive branch.¹²² As such, OLC opinions that provide legal rationalization for particular government actions based on misrepresentations of the factual or legal justifications for that conduct raise the same specter as Supreme Court opinions that provide legal rationalizations based upon unfounded claims of military necessity.¹²³ In other words, even though OLC opinions are not binding outside the executive branch (and may, as was the case for the torture memos, be withheld from public scrutiny), and even though, as such, their legal analysis can easily be superseded by the courts, they implicate comparable rule-of-law interests so long as they remain in force. This reality helps to explain why so many in the current conversation appear more troubled by the actions of the OLC than by the actions of the CIA; to return to Jackson’s *Korematsu* dissent, “A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”¹²⁴

The comparisons to Jackson’s reaction in *Korematsu* may also help to explain the significance of the secrecy surrounding the key OLC opinions, most of which were kept classified for years; without transparency, there would be no opportunity to discredit the legal and factual predicates on which the opinions are based.¹²⁵ And yet, accepting that the OLC opinions

raise rule-of-law concerns that are at least superficially analogous to those implicated by the majority opinion in *Korematsu* is only the beginning of the inquiry; it remains to ascertain whether the same process that ameliorated the rule-of-law injury in the case of internment, that is, the redress movement, might be used to comparable effect vis-à-vis the torture debate.

As was always possible with regard to the Supreme Court and *Korematsu*, there is the chance that OLC's legal analysis will be specifically and authoritatively repudiated by the OLC itself. To a limited extent, this has already happened; in addition to withdrawing the August 1, 2002 "Bybee" memo, the OLC also filed a memorandum on January 15, 2009 (released a few weeks later) disclaiming some of the analytical underpinnings of the Bybee memo and others. As Stephen Bradbury explained in the January 15 memo, "The purpose of this memorandum is to confirm that certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office."¹²⁶ Nonetheless, Bradbury was at pains in the same memorandum to emphasize that "[t]he opinions addressed herein were issued in the wake of the atrocities of 9/11, when policy makers, fearing that additional catastrophic terrorist attacks were imminent, [strove] to employ all lawful means to protect the Nation," explaining that OLC was faced with "novel and complex legal questions in a time of great danger and under extraordinary time pressure."¹²⁷

And yet, although the Bradbury memo repudiated the theory of constitutional power that undergirded the torture memos, it did not say anything more about the specific conduct that the memos sanctioned. It is possible, of course, that a future OLC opinion might more specifically conclude that the torture memos were based on fundamentally flawed factual and legal premises, but such a result seems unlikely, especially in light of the smaller steps that the Justice Department has taken to distance itself from the earlier opinions. For many, though, such measures have simply not been enough, since they have not included any formal concession of government wrongdoing.

Another possibility is that the OLC's legal conclusions could be overridden by the federal courts in an appropriate lawsuit. Indeed, Jose Padilla's civil suit against John Yoo, which maintains that Padilla was mistreated while detained as an "enemy combatant," and that Yoo, as author of the relevant OLC memos, is responsible for the foreseeable consequences of his work product, is perhaps the best current candidate for furnishing the courts with an opportunity to establish, as a matter of law, that the conclusions reached in various OLC memos, which may have been substantially responsible for

Padilla's mistreatment, were incorrect.¹²⁸ Indeed, under qualified immunity doctrine, Padilla's suit could establish his claim even while absolving Yoo himself of individual monetary liability, so long as the court concludes that it was not "clearly established" at the time of Yoo's conduct that the actions he sanctioned were actually unlawful.

As of this writing (in spring 2010), the district court had denied Yoo's motion to dismiss, but Yoo's appeal to the U.S. Court of Appeals for the Ninth Circuit was pending. Although Padilla's suit therefore *could* provide the means for revisiting the torture memos, the odds that the courts will take up the invitation are, in the end, quite long.¹²⁹ Indeed, whereas Padilla's suit is the first to be brought against one of the OLC lawyers, civil suits brought by post-9/11 detainees against individuals more directly related to their mistreatment have been categorically unsuccessful.¹³⁰

Even so, the notion that the courts stand well-suited to disclaim the OLC's legal conclusions may also be an animating impetus behind calls for investigations of individual *criminal* liability. Just as a civil suit might provide the opportunity to establish that the OLC's conclusions were clearly unjustified, any criminal prosecution of senior government officials would presumably turn on evidence that the relevant officials did not just cross the line, but should have known that the actions that they were facilitating (through the legal justification provided in the OLC opinions) were illegal. Such evidence, if it existed, could go a long way toward undermining the factual and legal predicates to the OLC opinions in much the same way that the CWRIC's work and the research of Aiko Yoshinaga-Herzig and Peter Irons undermined the predicates to *Hirabayashi* and *Korematsu*.

But the critical lesson from the internment experience is that such evidence can just as easily (if not more easily) be ascertained *without* pursuing individual liability. After all, the question for purposes of individual civil or criminal liability inevitably reduces to the mens rea of individual officials, as opposed to government institutions. Thus, depending upon what actually transpired, different individuals could conceivably face individual accountability for the same actions by the institution—imagine two distinct scenarios: one in which the OLC memos were prepared under direct orders to reach a predetermined result; a second where they were prepared in "good faith," representing the best answer that their authors could provide under the circumstances. The memos might be just as "wrong" in either case, even though the individual responsibility might vary substantially.

Apart from these concerns, attempts to establish individual liability could also backfire. If the goal is to establish that the legal opinions were based on

fundamentally flawed legal or factual assumptions, the prosecution's inability to establish any single element of the crime may actually serve to vindicate the conduct at issue (a possibility that is also present in civil litigation). And in any event, as the current debate demonstrates, there will be any number of defenders of the targeted individuals who dismiss the pursuit of individual liability, no matter its merits, as a political witch-hunt and the worst kind of victor's justice.

What we should learn from the internment experience, I submit, is that we as a society can avoid some of these pitfalls while still attempting to establish a narrative that, where appropriate, discredits the contested government conduct. Thus, I think David Cole has it exactly right when he concludes that “[t]he first step . . . should be appointment of an independent, nonpartisan, high-caliber commission, . . . to investigate and assess responsibility for the United States’ adoption of coercive interrogation policies. Only such a commission has the possibility of rising above the partisan wrangling that any attempt to hold accountable high-level officials of the prior administration is certain to trigger.”¹³¹ Like Cole, I agree that any such body must have the subpoena power, security clearances, access to all the relevant information, and adequate funding. For Cole, such an investigation is merely the beginning, and he remains quite open to the possibility that, in light of such a commission’s findings, “disbarment proceedings, civil damages actions, or criminal prosecution may also be warranted.”¹³² Here, though, he and I part company. There may well be political or other policy-based reasons to pursue such measures in individual cases, but if the internment experience is a guide, such proceedings are *not* necessary to create a narrative that discredits the government conduct and the legal reasoning behind it. It is certainly possible that prosecutions *could*, if successful, help to create such a narrative, but prosecutions are not the only (or even the optimal) way of doing so, and would raise their own unique challenges as well.

Instead, the goal for preserving the rule of law, and not just a means to some distinct end, should be the creation of a comprehensive and unassailable historical record that documents both the nature and origins of the relevant government abuses, and that also allows for a reevaluation of the legal analysis concluding that such abuses were in fact “lawful.” It may not be ideal in any number of respects, but it is a candid admission that Justice Jackson was at least partially correct in *Korematsu*—that the rule of law is not invariably jeopardized when our government crosses the line; it is threatened especially when the relevant actors manufacture unconvincing legal justifications to excuse rather than accept the illicit consequences, depriving history, in Jackson’s words, of the chance to form its own moral judgments.

Finally, one last lesson from the internment experience should also be heeded today: when redress efforts finally gained momentum in the 1970s, it was the narrative of the victims, as retold by the Sansei, that helped to catalyze the movement. Any effort toward the creation of a comparable narrative with regard to the torture debate should similarly aspire to incorporate the perspective of the victims, a task that will be all the more complicated owing to the reality that these individuals, as noncitizens residing outside the United States, generally lack any kind of meaningful political constituency. The burden will rest only that much more squarely on NGOs and other similarly situated groups to speak for the victims, and on the public to ensure that such voices are heard.

To briefly recap, there are striking parallels between the OLC memos and their legal rationalization of torture on the one hand, and the *Korematsu* majority's legal rationalization of internment on the other. And although any attempt to reach a consensus definition of the "rule of law" is inevitably fraught with peril, I think it is safe to agree with Justice Jackson that the *Korematsu* Court damaged the rule of law perhaps more gravely than anyone directly associated with internment itself, and to further conclude that history, as traced in Part II, has largely—if slowly and painfully—repaired that damage.

The fundamental paradox of this kind of historical collective (rather than individual) accountability, though, is the impossibility of handicapping its likelihood in the immediate aftermath of the abuses. The best we can do, then, is help to speed up the process. And while prosecutions may contribute to the formation of such a narrative, the internment experience and the redress movement suggest that other (and better) means exist for achieving the same end.

Conclusion

For most (albeit not all) of the period since the end of World War II, the United States has been one of the driving forces behind the movement for individual criminal accountability at the international level. And perhaps the central normative justification for international criminal law as a field is the belief that impunity begets violence to the rule of law, removing law as both a formal and practical barrier to future atrocities. Thus, where a country is either unable or unwilling to investigate its own officials for certain particularly serious offenses, the response has been the creation of an independent transnational institution that is empowered to do so, including the *ad hoc*

criminal tribunals for the former Yugoslavia and Rwanda, and, later, the permanent International Criminal Court. The United States was instrumental in the creation of the former, and remains decisively, if enigmatically, opposed to the latter.

This distinction embodies the United States' oft-perplexing position vis-à-vis the project of international criminal justice: as one of its champions when other countries' officials are involved, and as one of its fiercest opponents when it comes to the potential liability of U.S. personnel—an opposition that has been codified in the American Service-Members' Protection Act of 2002, which commands the use of the military to retrieve by force any U.S. service-member subjected to the ICC's jurisdiction.¹³³ Is it hypocrisy, or is it justified by a belief, however difficult to prove, that the relationship between individual criminal accountability and the rule of law might be more attenuated in the United States than elsewhere?

In the preceding pages, I have attempted to suggest that, using the internment experience as a foil, the rule of law in the United States may best be vindicated by the historical (and moral) acceptance of legal justifications for government conduct rather than by the individual liability of particular government officers for specific abuses. If true, such a conclusion not only bolsters the context-specific argument that criminal investigations of the Bush Administration are unnecessary in order to preserve the rule of law (whether or not they are politically desirable, a question that will surely divide reasonable readers), but it might also provide the basis for rethinking our broader understanding of the relationship between impunity, the role of courts in our legal system, and the rule of law.

In a constitutional system in which judicial independence is the linchpin, we have an almost blind faith that those who issue legal pronouncements do so in the best tradition of the legal profession, even when they get the answer terribly wrong. When that faith is tested, the rule of law is jeopardized,¹³⁴ if for no other reason than because their judgments, unlike those of our elected officials, are not easily overturned. We should still struggle against Justice Jackson's suggestion in his *Korematsu* dissent that, as a result, the better move for the courts will often be to stay on the sidelines of our most significant disputes during times of crisis. But if one thing is clear, it is that Jackson was unequivocally correct that the courts—and any official who has the power to say what the law is in any meaningful respect—have an incredibly awesome and delicate responsibility should they choose to intervene.

NOTES

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2. For a lucid summary of the debate, see David Cole, *The Torture Memos: Rationalizing the Unthinkable* (New York: New Press, 2009), 1–40.

3. *Korematsu v. United States*, 323 U.S. 214 (1944). The earlier cases were *Yasui v. United States*, 320 U.S. 115 (1943), and *Hirabayashi v. United States*, 320 U.S. 81 (1943).

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

5. *Ibid.* at 225–33 (Rutledge, J., dissenting); *ibid.* at 233–42 (Murphy, J., dissenting).

6. *Hirabayashi v. United States*, 320 U.S. 81 (1943). For Jackson's anger over the broken deal, see Dennis J. Hutchinson, "'The Achilles Heel' of the Constitution: Justice Jackson and the Japanese Exclusion Cases," *Supreme Court Review* 2002 (2003): 480–82.

7. *Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

8. *Ibid.* at 247.

9. *Ibid.* at 245–46.

10. Hutchinson, "Achilles Heel," at 455.

11. Peter Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (Berkeley: University of California Press, 1983), 332.

12. Eugene V. Rostow, "The Japanese-American Cases—A Disaster," *Yale Law Journal* 54 (June 1945): 511.

13. Hutchinson, "Achilles Heel," at 485, 489.

14. *Ibid.* at 493.

15. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

16. The only aspect of *Korematsu* that survives in contemporary constitutional law is the principle, first hinted at six years earlier in the *Carolene Products* case, that race-based classifications should be subjected to the "most rigid" (or "strict") judicial scrutiny. *Ibid.* at 216 (majority opinion). Even that principle, though, is almost never cited to *Korematsu*. Hutchinson, "Achilles Heel," at 485 n.99.

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

18. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989a(a) (2000).

19. *Ibid.*

20. Jerry Kang, "Denying Prejudice: Internment, Redress, and Denial," *UCLA Law Review* 51 (April 2004): 975–76; Peter Irons, *Justice Delayed: The Record of the Japanese American Internment Cases* (Middletown: Wesleyan University Press, 1989), 3–46.

21. Aya Gruber, "Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World," *University of Kansas Law Review* 54 (January 2006): 309–11.

22. As explained in more detail below, the government only detained three individuals within the United States under authority unrelated to either criminal or immigration law—U.S. citizens Yaser Hamdi and Jose Padilla, and foreign national Ali al-Marri. None of the three remain in military detention; Hamdi was released late in 2004, and Padilla and al-Marri were both transferred to the civilian criminal justice system, where Padilla was convicted and al-Marri pleaded guilty to terrorism-related crimes.

23. Eric L. Muller, “Inference or Impact? Racial Profiling and the Internment’s True Legacy,” *Ohio State Journal of Criminal Law* 1 (Fall 2003): 104–09.

24. *Korematsu’s* companion case, *Ex parte Endo*, 323 U.S. 283 (1944), actually *did* conclude that internment was unlawful in those cases where (1) the government conceded that the internee was “loyal”; and (2) the internee had not violated a curfew or exclusion order. But the tragic irony of both decisions is that the Roosevelt Administration had announced, the day before the two opinions were released, that the camps were to be closed. For the entire story, see Patrick O. Gudridge, “Remember *Endo*?” *Harvard Law Review* 116 (May 2003): 1933–39.

25. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).

26. Irons, *Justice Delayed*, at 4–5.

27. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, the Court extended the logic of *Brown v. Board of Ed.*—that racially segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment—to public schools in the District of Columbia, to which the Fifth Amendment (which does not have its own Equal Protection Clause), and not the Fourteenth, applied.

28. 50 U.S.C. §§ 21–24 (2000). The Supreme Court upheld the constitutionality of the Act, even as applied to detention subsequent to the cessation of hostilities, in *Ludecke v. Watkins*, 335 U.S. 160 (1948). For criticism, see Stephen I. Vladeck, “*Ludecke’s* Lengthening Shadow: The Disturbing Prospect of War without End,” *Journal of National Security Law & Policy* 2 (2006): 53.

29. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Knopf, 1998), 209–11.

30. Cole, *The Torture Memos*, at 36–37.

31. Stuart Taylor, “Torture: Stop Harassing the Lawyers,” *National Journal* (Sept. 12, 2009); Michael Hayden & Michael B. Mukasey, “The President Ties His Own Hands on Terror,” *Wall Street Journal* (Apr. 17, 2009): A13; Jack Goldsmith, “No New Torture Probes,” *Washington Post* (Nov. 26, 2008): A13.

32. The acclaimed constitutional historian Charles Fairman famously defended the internment camps, albeit to his eventual discredit. Harry N. Scheiber & Jane L. Scheiber, “Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai’i, 1941–1946,” *University of Hawaii Law Review* 19 (Fall 1997), 533–34. For Fairman’s original work, see Charles Fairman, “The Law of Martial Rule and the National Emergency,” *Harvard Law Review* 55 (June 1942): 1299–1302.

33. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter “Bybee Memo”]; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to John Rizzo, Acting General Counsel, CIA, Regarding Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter “Rizzo Memo”].

34. Mark Danner, "U.S. Torture: Voices from the Black Sites," *New York Review of Books* (Apr. 9, 2009).
35. Daniel Kanstroom, "On 'Waterboarding': Legal Interpretation and the Continuing Struggle for Human Rights," *Boston College International & Comparative Law Review* 32 (Spring 2009): 215–16.
36. Hutchinson, "Achilles Heel," at 467–68.
37. The case of the Nazi saboteurs is *Ex parte Quirin*, 317 U.S. 1 (1942). The other two internment cases in which Jackson prepared—but did not file—opinions were *Hirabayashi* and *Ex parte Endo*.
38. *Trial of the Major War Criminals before the International Military Tribunal 19* (Nuremberg: International Military Tribunal, 1948), 432.
39. 317 U.S. 1 (1942).
40. 320 U.S. 81 (1943).
41. Hutchinson, "Achilles Heel," at 457–76; Jack L. Goldsmith, "Justice Jackson's Unpublished Opinion in *Ex parte Quirin*," *Green Bag* (2d series) 9 (Spring 2006): 226–30.
42. *Quirin*, 317 U.S. at 27–29. For a full accounting of why the decision in *Quirin* was (and remains) controversial, see Carlos M. Vázquez, "'Not a Happy Precedent': The Story of *Ex parte Quirin*," in *Federal Courts Stories*, eds. Vicki Jackson & Judith Resnik (New York: Foundation Press, 2009), 219.
43. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
44. Goldsmith, "Jackson's Unpublished Opinion," at 226–30.
45. *Ibid.* at 233.
46. *Ibid.* at 233–38.
47. *Ibid.* at 238.
48. *Ibid.* at 241.
49. *Quirin*, 317 U.S. at 47–48 ("[A] majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.").
50. 320 U.S. 115 (1943).
51. Exec. Order 9066, 7 FED. REG. 1407 (Feb. 19, 1942).
52. *Ibid.*
53. *Hirabayashi v. United States*, 320 U.S. 81, 83–85 (1943).
54. Under the then-extant "concurrent sentence doctrine," a valid conviction on any one count would vitiate the need to consider the validity of the other counts, since the single valid conviction justified the entire sentence. *Benton v. Maryland*, 395 U.S. 784, 787–90 (1969).
55. Hutchinson, "Achilles Heel," at 469.
56. *Ibid.*

57. *Ibid.* at 471.
58. *Ibid.* at 473–74 (footnote omitted).
59. *Ibid.* at 474 n.9.
60. *Korematsu v. United States*, 140 F.2d 289 (9th Cir. 1943).
61. *Ex parte Endo*, 323 U.S. 283, 285 (1944).
62. *Korematsu v. United States*, 323 U.S. 214, 218–19 & n.1 (1944) (citing the Final Report).
63. 71 U.S. (4 Wall.) 2 (1866).
64. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).
65. Draft Opinion of Justice Jackson, *Korematsu v. United States*, No. 22, at 5 (Nov. 13, 1944). It is possible that *Merryman* was not as clear-cut as Jackson believed. For an alternative theory that would have vindicated both Taney and Lincoln, see Stephen I. Vladeck, “The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act,” *Temple Law Review* 80 (Summer 2007): 391–439.
66. Draft Opinion of Justice Jackson, *Korematsu*, at 6 (emphasis added).
67. Hutchinson, “Achilles Heel,” at 480.
68. *Ibid.* at 490.
69. Gudridge, “Remember *Endo*?” at 1933–34.
70. Hutchinson, “Achilles Heel,” at 484.
71. Gudridge, “Remember *Endo*?” at 1934.
72. Robert H. Jackson, “Wartime Security and Liberty under Law,” *Buffalo Law Review* 55 (January 2008), 1105.
73. *Cooper v. Aaron*, 358 U.S. 1 (1958).
74. Rostow, “The Japanese-American Cases,” at 491.
75. Nanette Dembitz, “Racial Discrimination and the Military Judgment: The Supreme Court’s *Korematsu* and *Endo* Decisions,” *Columbia Law Review* 45 (1945): 175.
76. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The Court was less circumspect about line-crossing where the treatment of enemy soldiers was concerned, as embodied in the *Yamashita* decision earlier in 1946, upholding a conviction by an American military commission in the Philippines despite numerous procedural and substantive shortcomings that provoked angry dissents from Justices Murphy and Rutledge. *In re Yamashita*, 327 U.S. 1 (1946).
77. *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).
78. American-Japanese Evacuation Claims Act, 50 U.S.C. app. §§ 1981–87 (2000).
79. Wendy Ng, *Japanese American Internment during World War II: A History and Reference Guide* (Westport: Greenwood Press, 2002), 100.
80. *Ibid.* at 105–06.
81. *Ibid.* at 106–07.
82. Emergency Detention Act of 1950, Pub. L. No. 81-31, ch. 1024, tit. II, 64 Stat. 987, 1019–31 (1950) (repealed 1971).
83. Stephen I. Vladeck, “The Detention Power,” *Yale Law and Policy Review* 22 (Winter 2004): 176–80.
84. *Ibid.*
85. 18 U.S.C. § 4001(a) (2000). Ironically, this provision would be at the heart of the post-September 11 lawsuits brought by the two U.S. citizens detained as “enemy combatants.” *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

86. Proclamation No. 4417 (Feb. 19, 1976), 41 FED. REG. 7741 (Feb. 20, 1976).
87. *Ibid.*
88. *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Washington: CWRIC, 1982). The report is also accessible online at http://www.nps.gov/history/history/online_books/personal_justice_denied/index.htm.
89. *Ibid.*
90. 50 U.S.C. app. §§ 1989–1989d (2000).
91. Ng, *Japanese American Internment during World War II*, at 109.
92. Kang, “Denying Prejudice,” at 976–77.
93. *Ibid.* at 977–78.
94. *Ibid.* at 978–79.
95. Eric L. Muller, “*Hirabayashi*: The Biggest Lie of the Greatest Generation,” unpublished working paper, Aug. 18, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233682.
96. For a recent discussion, see *United States v. Denedo*, 129 S. Ct. 2213, 2220–21 (2009).
97. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).
98. *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985) (discussing the district court’s unpublished order).
99. *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986).
100. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).
101. Kang, “Denying Prejudice,” at 985–95.
102. For proof, consider the varying opinions penned in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which virtually all the justices criticized *Korematsu*, and the majority applied strict scrutiny even to a federal statute that created a benefit for historically disadvantaged racial minorities.
103. Apparently, the Bush Administration even floated the idea of formally suspending habeas corpus, only to be rebuffed by Rep. James Sensenbrenner, then the Republican chair of the House Judiciary Committee. For more, see Amanda Tyler, “Suspension as a Political Question,” *Stanford Law Review* 59 (November 2006): 347 & n.80.
104. For a summary of the roundup, see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943 (2009).
105. *Ibid.*
106. 18 U.S.C. § 3144 (2000). The Second Circuit upheld this practice in *Awadallah v. United States*, 349 F.3d 42 (2d Cir. 2003).
107. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003); *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). The government also detained U.S. citizen Yaser Hamdi within the United States, even though he was initially detained in Afghanistan. In his case too, the Non-Detention Act played a central role. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517–24 (2004) (plurality).
108. *al-Kidd v. Ashcroft*, 580 F.3d 949, 954–55 & n.5 (9th Cir. 2009).
109. Elbert Lin, “*Korematsu* Continued . . .,” *Yale Law Journal* 112 (May 2003): 1911–18.
110. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 57 (S.D.N.Y. 2003) (citations omitted).
111. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).
112. On the torture issue alone, three important examples include Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004); Philippe Sands, *Torture Team: Rumsfeld’s Memo and the Betrayal of American*

Values (New York: Palgrave Macmillan, 2008); and Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008). For an insider's perspective, consider Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W. W. Norton, 2007).

113. For exemplar works, see Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (Lawrence: University Press of Kansas, 2009); David Luban, "The Torture Lawyers of Washington," in *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007), 162–205; Peter Margulies, "True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers," *University of Maryland Law Review* 68 (2008): 1–88; and Kathleen Clark, "Ethical Issues Raised by the OLC Torture Memorandum," *Journal of National Security Law & Policy* 1 (Winter 2005): 455–72.

114. Cole, *The Torture Memos*, at 38–40.

115. The two memos filed on August 1, 2002, are cited in full in note 33, and are reprinted in Cole, *The Torture Memos*, at 41–127.

116. The full timeline is recounted in a narrative prepared by Senator John D. Rockefeller IV, Chairman of the Select Committee on Intelligence, and reprinted in Cole, *The Torture Memos*, at 277–91.

117. Cole, *The Torture Memos*, at 37–38 & n.67.

118. *Ibid.* at 20.

119. Bruff, *Bad Advice*, at 239–47.

120. *Ibid.*

121. Cole, *The Torture Memos*, at 11.

122. Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," *Administrative Law Review* 52 (Fall 2000): 1308–09.

123. For more on this argument, see George C. Harris, "The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11," *Journal of National Security Law & Policy* 1 (Winter 2005): 450–53.

124. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

125. Thus, for example, some in Congress have introduced legislation to require that OLC at least report to certain congressional committees when it adopts an opinion concluding that the executive branch is not bound by particular acts of Congress. See, for example, the OLC Reporting Act of 2009, H.R. 278, 111th Cong. (2009).

126. Memorandum from Stephen G. Bradbury to Files Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), at 1.

127. *Ibid.*

128. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (denying, in relevant part, Yoo's motion to dismiss).

129. In light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), it seems unlikely that Padilla's claims will survive summary judgment absent the production of evidence that far more directly links Yoo's memo to Padilla's alleged mistreatment. And in any event, the Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), would allow the district court to dismiss on the basis of qualified immunity *without* first holding that Yoo was in fact responsible for the violation of Padilla's rights.

130. For three important examples (among many others), consider *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir.2009) (en banc) (affirming the dismissal of a lawsuit brought by an

innocent victim of the government's "extraordinary rendition" program); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (affirming the dismissal of a lawsuit brought by former Guantánamo detainees claiming that they were tortured); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (holding that the "State Secrets privilege" bars consideration of a lawsuit brought by an innocent victim of "extraordinary rendition"). As this essay went to print, a federal district judge in Washington also threw out a civil suit arising out of the suspicious deaths of several inmates at Guantánamo. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010).

131. Cole, *The Torture Memos*, at 39.

132. *Ibid.* at 40.

133. 22 U.S.C. §§ 7421–7433 (2006). In particular, § 7427 provides "authority to free members of the armed forces of the United States . . . detained or imprisoned by or on behalf of the International Criminal Court."

134. Thus, in 2009 the Supreme Court held that the Due Process Clause required an elected state judge to recuse himself from a lawsuit in which one of the parties had been a major donor to that judge's recent campaign culminating in his election. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). Noting that codes of ethical conduct "serve to maintain the integrity of the judiciary and the rule of law," *ibid.* at 2266, Justice Kennedy went on to explain that "[c]ourts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Ibid.* at 2266–67 (internal quotation marks omitted).