

ENEMIES OF THE STATE

By Paul A. Kramer



This week's Supreme Court decision to uphold the Trump administration's travel ban, in *Trump v. Hawaii*, hinges on a convenient and long-standing but faulty claim: the idea that the pursuit of national security can easily be separated from racial and religious prejudice. The court's five conservative members said the ban wasn't about prejudice because it was "facially neutral," and that it was, instead, about the president's legitimate exercise of his powers to defend the United States through immigration controls.

While the Justices separated the pursuit of national security and racial and religious prejudice, the fact is that they're inseparable.

The problem is that claims of national security and forms of racial and religious discrimination have always been thoroughly enmeshed. Indeed, they're inseparable: All national ideologies have been shaped by social hierarchies, which inform their sense

of what—and *who*—constitutes a threat. The maneuver to separate security and prejudice only works if the relationship is deliberately obscured and disavowed.

It's telling that the clashing opinions of Chief Justice John Roberts, writing for the majority, and Justice Sonia Sotomayor, in her dissent, each pivoted around the same dichotomy. For Roberts, the case was about security; for Sotomayor, it was about discrimination.

These issues led the justices to revisit 1940s-era struggles over racism, war, and national defense. In her dissent, Sotomayor spoke of "stark parallels" between the majority's reasoning in *Trump v. Hawaii* and the *Korematsu v. United States* ruling of 1944, which upheld the mass removal of Japanese Americans during World War II. In both, an "ill-defined national security threat" had been used to justify "an exclusionary policy of sweeping proportion" against a disfavored group.

Roberts disagreed. It was "wholly inapt" to liken Japanese removal, a "morally repugnant order," to what he called a "facially neutral policy denying certain foreign nationals the privilege of admission." (The Trump administration had, in an unobvious bid for facial neutrality, dropped Iraq and Sudan from the ban, added Chad, North Korea, and Venezuela, and on paper, anyway, provided for individual visa waivers.) Roberts tried to distance his opinion in the travel ban case even further from Japanese removal by overturning *Korematsu*: The earlier decision was "gravely wrong the day it was decided," he wrote, having been "overruled in the court of history."

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Ironically, Roberts' claim that discrimination had no legally salient role in the travel ban has precedent: Justice Hugo Black's 1944 majority opinion in defense of Japanese removal, in *Korematsu*.

Like Roberts on the travel ban, Black contended Japanese removal hadn't been about racism. Fred Korematsu, a Japanese-American man who had been arrested in San Leandro, California, in May 1942 for defying a relocation order, had not been compelled to leave the West Coast "because of hostility to him or his race." The issue had been national security: the war with Japan, authorities'

fear of invasion, and a sense of “military urgency,” which “demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.”

Black was unequivocal: Racism and national security were distinctly separate matters; removal of the Japanese had been strictly about protecting America during wartime. “To cast this case into outlines of racial prejudice,” he wrote, “without reference to the real military dangers that were presented, merely confuses the issue.”

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Though Roberts and Black deny it in their respective cases, racial animus and national security have long been bound, with fateful effects for immigrants and their communities, and for U.S. immigration policy. In fact, the fusing of race and security was instrumental to the Supreme Court’s foundational 1889

decision to grant Congress exclusive, “plenary” control over immigration legislation. Chae Chan Ping, a Chinese man, had been working in San Francisco for 12 years when he decided to return home. He traveled with a U.S.-issued certificate entitling him to return to America, but while he was abroad, Congress passed the Scott Act, which invalidated these documents, and Ping was barred from re-entry.

He sued, and his case eventually made its way to the Supreme Court, which decided against him. In the process, it transformed the relationship between the judicial and legislative branches regarding immigration control. The court stated that immigration should be seen as closely related to military defense against external threats because of the racial undesirability of the migrants in question. “[T]he presence of foreigners of a different race in this country, who will not assimilate with us,” it said, “was dangerous to its peace and security.”

According to the court, a nation’s highest duty was to preserve its independence against foreign dangers; it did not matter “in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.” The existence

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of Chinese immigrants like Ping in the United States, in and of itself, represented a kind of persistent, undeclared war; their exclusion and deportation were legally analogous to the repelling of an invasion.

Since then, the United States has linked immigration with wars, whether real or imagined, and in the process has transformed “foreign” populations into geopolitical dangers. The rise of Japan as a military and colonial competitor in the Pacific in the early 20th century helped give rise to anti-Japanese violence and exclusion on the West Coast. During World War I, government agencies surveilled and detained German immigrants and promoted the suppression of German culture. The Cold War saw the arrest, exclusion, and deportation of immigrants possessing even the thinnest affiliations with communist movements. The “war on terror” brought the mass detention and surveillance of Muslims, Arabs, and South Asians on the grounds of shadowy associations between a person’s ethnic background, religion, regional origin, politics, and propensity for violence.

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One striking aspect of these wars against immigrants, especially since the mid-20th century, has been efforts to legitimate them through “facial neutrality.” Even in 1942, Franklin Roosevelt’s Executive Order 9066 authorizing Japanese removal made no mention whatsoever of Japanese Americans or any other specific group, referring only to military areas “from which any or all persons may be excluded.” In the wake of 9/11, as FBI agents traced the license plates of cars

parked at mosques, George W. Bush earnestly asserted that the United States was not at war with Islam, but rather with “terrorists,” a category that happened to be populated, for Bush and others, mostly by Muslims.

Among the key instruments of facial neutrality was the language of “national security” itself. In the wake of World War II and with the advent of the Cold War, national security rationales enhanced the discretionary power of the executive branch and exempted it from accountability. The exercise of this power was often informed by racial, religious, and civilizationist thinking, but it was increasingly cloaked in national security’s seemingly neutral terms.

By the early 21st century, facial neutrality was one of the main features and moral preconditions of modern-day racism and empire. Seen in this way, the Supreme Court’s belated, off-handed overturning of *Korematsu* inside the travel ban decision should not be taken merely at face value. Otherwise critical observers hailed it as the decision’s only silver lining, since it denied Trump violent political tools he might have used. But it also functions as moral cleansing, a strategy to assure skeptics of the majority’s good intentions. Old wars needed to be expunged to enable new ones.

By the standards used by the Supreme Court this week, the executive order for Japanese removal was “facially neutral.” But even in 1944, efforts to mask racism did not go unopposed. In his dissent in the *Korematsu* decision, Justice Frank Murphy insisted that removal of Japanese people from the West Coast had resulted in good measure from what he called an “erroneous assumption of racial guilt” rather than “bona fide military necessity.” He cited a commanding general’s report on West Coast evacuation that referred to all individuals of Japanese descent as an “enemy race” whose “racial strains are undiluted.”

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Justice Murphy insisted on seeing what was plainly in front of him: *Korematsu* was, he wrote, a “legalization of racism.” A free people found presumptions of treachery and danger across whole groups “utterly revolting,” with “no justifiable part whatever in our democratic way of life.” If the Supreme Court sanctioned such suspicion and hatred, he warned, it would “encourage and open the door to discriminatory actions against other minority

groups in the passions of tomorrow.” As the nation and the world learned on Tuesday, he was not wrong.

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