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For More Information, Contact:
Ryan Iwasaka, President
info@jabaonline.org

JABA Concerns re the United States Supreme Court Decision in Trump v. Hawaii

Four weeks ago, the United States Supreme Court upheld the President's travel ban in *Trump v. Hawaii*.[1] Since then, the Court has been lauded for criticizing *Korematsu*[2], but a close examination of the Court's apparent overruling of *Korematsu* raises deeply troubling questions.

The Court stated:

> "Finally, the dissent invokes *Korematsu v. United States*, 323 U.S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. [Citation] The entry suspension is an act that is well within the executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.
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> "The dissent's reference to *Korematsu,* however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, and has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.' 323 U.S., at 248 (Jackson, J., dissenting)." (Slip Opinion at 38 [underline added].)

But *Trump* was not inapposite to *Korematsu*. In both cases, the President invoked Executive Orders in the name of national security. "Like curfew, exclusion of those of Japanese origin was deemed necessary [by the military] because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of

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[1] *Trump, President of the United States, et al. v. Hawaii, et al.*, United States Supreme Court Docket No. 17-965, decided June 26, 2018, cited as *Trump v. Hawaii*, 585 U.S.___ (2018), hereinafter "Slip Opinion."
[2] *Korematsu v. United States*, 323 U.S.214 (1944).

the entire group was rested by the military on the same ground." (*Korematsu*, 323 U.S. at 218-219.) In upholding the travel ban, the Court ruled that under the broad authority given to the President under the Immigration and Nationality Act, Trump could impose the travel ban upon his finding that entry of all aliens from certain countries "would be detrimental to the interests of the United States" because those suspect countries were deficient in providing "adequate information- . . . to protect national security and public safety." (Slip Opinion at 11.) In other words, the wholesale exclusion of aliens from Muslim-majority countries[3] was justified based on an inability to determine the terrorists, akin to the "inability" to distinguish the loyal from the disloyal that the Court relied on in *Korematsu*.

In "overruling" *Korematsu*, the Court singularly distinguished the facts from *Trump*, then broadly stated that *Korematsu* "has been overruled in the court of history, and — to be clear — 'has no place in law under the Constitution.' 323 U.S., at 248 (Jackson, J. dissenting)." (Slip Opinion at 38). Had the *Trump* Court squarely and precisely stated why Korematsu's constitutional rights had been violated, perhaps the Court would also have soundly and squarely overruled *Hirabayashi v. United States*, 320 U.S. 81 (1944), the very decision upon which the Court relied in deciding *Korematsu.*

Equally troubling is that, compared with the facts cited by the Court in *Korematsu*, the record before the Court in *Trump* contained extrinsic evidence of discriminatory animus — President Trump's statements during the campaign calling for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on", that "Islam hates us," that the United States was "having problems with Muslims coming into the country," his post-election references to his "Muslim ban," and his tweeting of anti-Muslim propaganda videos. (Slip Opinion at 27-28.)

To this evidence, the Court stated, "The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf… [But] the issue before us is not whether to denounce these statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility." (Slip Opinion at 28-29.) "'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution' and our inquiry into matters of entry and national security is highly constrained." (Slip Opinion at 32, quoting *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976).)

The Court concluded that it "may consider plaintiffs' extrinsic evidence, but will uphold the [travel ban] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." (Slip Opinion at 32 [footnote omitted; the footnote referenced the dissent's questioning why the majority used the rational basis standard.]) The Court ruled that because there was "persuasive evidence that the entry suspension has a legitimate grounding in

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[3] The Court, in attempting to distinguish the facts underlying *Korematsu*, described the travel ban as a "facially neutral policy denying certain foreign nationals the privilege of admission" (Slip Opinion at 38), but as with the lack of individualized treatment of Japanese Americans subjected to the curfew and incarceration, the travel ban did not deny just "certain" foreign nationals; rather the ban applied to all aliens from the specified nations, albeit with limited exceptions.

national security concerns, quite apart from any religious hostility, we must accept that independent justification." (Slip Opinion at 33-34.)

JABA was one of 62 Asian Pacific American bar associations which had joined in the National Asian Pacific American Bar Association's amicus brief filed in the case, arguing that the executive order, with its anti-Muslim underpinnings, is discriminatory. To the extent that *Trump* overrules *Korematsu*, we join in the applause. But to the extent that *Trump* represents yet another example of the Court deferring to the President to rationalize a discriminatory policy in the name of national security, we look to Justice Sotomayor's statements when she described the majority's treatment of *Korematsu*:

> "This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another." (Sotomayor Dissent, Slip Opinion at 28.)

The unjust internment of over 110,000 Japanese Americans in this country 75 years ago altered the course of their lives and their families for generations to come. We are deeply concerned that the *Trump* decision signals that we are embarking on yet another dark path in our country's history.

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About the Japanese American Bar Association
The Japanese American Bar Association ("JABA") was founded over 40 years ago in Los Angeles, California. Since its inception, JABA has provided a special forum for members of the legal profession with interests and ties to the Japanese American community to discuss issues, network, and serve our community.