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Korematsu, Hirabayashi, and the Second Monster

Eric L. Muller*

Introduction

It is a trope at least as old as Beowulf: the unexpected second monster. Beowulf arrives in Heorot to take on Grendel, the demon who has been terrorizing the Ring-Danes’ mead-hall. He bests the monster in battle and Grendel slinks off, one-armed and bloodied, to die. The Ring-Danes honor Beowulf with a great banquet; he has slaughtered their nemesis and there is much to celebrate. Full of mead and a newfound sense of safety, the revelers drift off to sleep. That is when a terrible new monster bursts upon the scene—Grendel’s mother, the beast that brought Grendel into the world. The Ring-Danes will suffer further death and havoc until Beowulf can subdue her.

Unexpected second monsters can appear in real life as well, and the Supreme Court’s recent opinion in Trump v. Hawaii1 may have set us up for one. In his opinion for the Court, Chief Justice Roberts put the long-enfeebled precedent of Korematsu v. United States2 out of its—and our—misery. Of that notorious decision upholding the mass removal of Japanese-Americans from the West Coast, the Chief Justice said this: it “was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”3

A nemesis has been slaughtered and there is much to celebrate.4 But this is not a moment for mead and peaceful slumber. Around the corner awaits another monster, a bigger threat than Korematsu itself. I am referring to Hirabayashi v. United States,5 the Supreme Court’s 1943 decision unanimously upholding the dusk-to-dawn curfew imposed on Japanese-Americans a few weeks before the mass removal orders of Korematsu. The Hirabayashi decision preceded Korematsu by eighteen months and did the doctrinal work necessary to support the military’s actions; the Justices in the

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2. 323 U.S. 214 (1944).
4. As will be noted, not everyone’s mood has been celebratory. See infra note 69 and accompanying text.
5. 320 U.S. 81 (1943).
Korematsu majority made clear that they felt constrained to uphold mass removal “in light of the principles we announced in the Hirabayashi case.”

Hirabayashi was Korematsu’s progenitor as Grendel’s mother was Grendel’s.

Yet Hirabayashi has gone unnoticed. In the decades after the war, Korematsu drew all of the attention, perhaps because the burdens it endorsed were the more extreme, or perhaps because it formulated its legal rule a bit more crisply, or perhaps because it—rather than Hirabayashi—was the case that generations of law students encountered in their constitutional law casebooks. Until Trump v. Hawaii, we were ominously reminded time and again in the literature that Korematsu had “never actually been overruled.”

We find no such reminder in those pages about Hirabayashi. This is troubling on its own, and even more so because judges and lawyers have continued to cite Hirabayashi without evident shame.

This Essay is a warning. Some today are celebrating Korematsu’s demise; others maintain that Trump v. Hawaii actually revived it. But all of that is a distraction. While the debate swirls, the dangerous Hirabayashi decision hides in plain sight, its reasoning unexamined and its holding unassailed. We should attend to Korematsu’s mother now, lest she attend to us later.

I. Enter the First Monster

Korematsu v. United States was a constitutional challenge to an Army-imposed order on all West Coast people of Japanese ancestry under the authority of President Roosevelt’s Executive Order 9066. The order required them to leave military zones the Army established along the coast after the Japanese attack on Pearl Harbor—effectively the whole of the three states bordering the Pacific Ocean along with a slice of Arizona.

Fred Korematsu,


7. See COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 239 (Univ. of Wash. Press 1997) (relating to the government’s own findings of lack of military necessity); David A. Harris, On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women,” 76 Mo. L. Rev. 1, 12 (2011) (noting “Korematsu remains ‘good law’”); Dean Masaru Hashimoto, The Legacy of Korematsu v. United States: A Dangerous Narrative Retold, 4 ASIAN PAC. AM. L.J. 72, 84 (1996) (“The celebration of the end of Korematsu’s reign is premature; Korematsu lives.”); Sandra L. Lynch, Constitutional Integrity: Lessons from the Shadows, 92 N.Y.U. L. Rev. 623, 635–36 (2017) (suggesting that a mere “confession of error” by a Solicitor General “does not overrule a case that was wrongly decided”); see also United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (citing Korematsu to support the proposition that “freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place”).

8. See infra notes 119–126 and accompanying text.


10. See Korematsu, 323 U.S. at 214, 220 (referencing “Civilian Exclusion Order No. 34” as the order violated by Fred Korematsu).
a twenty-three-year-old American citizen of Japanese ancestry, defied the order by going into hiding in early May of 1942 rather than presenting himself for removal.\(^\text{11}\) Later that month he was apprehended on a street in San Leandro.\(^\text{12}\) The federal prosecutor charged him with the federal misdemeanor\(^\text{13}\) of “knowingly . . . remain[ing] in th[e] . . . [m]ilitary [a]rea . . . which all persons of Japanese ancestry are excluded from.”\(^\text{14}\) A different Army order required people of Japanese ancestry to submit to detention at what the government euphemistically called “assembly centers,”\(^\text{15}\) but the prosecutor did not charge Korematsu with violating that order.\(^\text{16}\) A trial in a San Francisco federal district court in September 1942 resulted in his conviction.\(^\text{17}\)

After a first trip to the Supreme Court in 1943 on a procedural question,\(^\text{18}\) Korematsu’s challenge to his conviction went before the Supreme Court in oral argument on October 11 and 12, 1944.\(^\text{19}\) Korematsu attacked the constitutionality of not only the order excluding him from his home but also the order requiring him to report for detention; the two, he argued, operated in tandem.\(^\text{20}\) Excluded Japanese-Americans could not wander where they wished, he argued; they could only submit to detention.\(^\text{21}\) The government, on the other hand, urged the Court to address only the misconduct that was charged in the information—his defiance of the exclusion order.\(^\text{22}\)

On December 18, 1944, by a 6–3 vote, the Court upheld the constitutionality of the exclusion order,\(^\text{23}\) breaking off the question of detention for resolution in a different case on the same day,\(^\text{24}\) *Ex parte Endo*.\(^\text{25}\)

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12. *Id.* at 93.
13. Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173. This statute made it a federal offense for a person to knowingly defy an Army order entered pursuant to Executive Order 9066.
16. See Docket Filing 1, supra note 14, at 1–2 (charging Korematsu with a violation of a different order, “Civilian Exclusion Order No. 34”).
17. IRONS, supra note 11, at 152–53.
18. Korematsu v. United States, 319 U.S. 432, 435–36 (1943). The procedural question was whether an order imposing a sentence of probation was “final and appealable.” The Court held that it was. Id. at 436.
21. Id. at 28–30.
24. 323 U.S. 283 (1944). The *Endo* Court held that the War Relocation Authority had no statutory power to continue to detain loyal Japanese-Americans in the camps. *Id.* at 297. Though one often hears it said that the Supreme Court upheld the “internment” of Japanese-Americans in
Justice Black’s opinion for the Court opened with the words that would ensure its spot in generations of law school case books: “It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”25 This was something new, at least in linguistic formulation—the first appearance of what would come to be called “strict scrutiny.” One might see this as the moment when the Court made good on its famously footnoted hint of six years earlier that a “more searching judicial inquiry” might be appropriate in cases challenging government action “directed at particular . . . racial minorities.”26

But it was all downhill from there. Korematsu argued, among other things,27 that Congress had not “authorize[d] the military commander to select citizens upon an ancestral basis for removal from military areas, to segregate and quarantine them and to detain them in concentration camps,”28 that the exclusion order did not provide even the rudiments of fair process,29 and that the order embodied racial discrimination barred by the equality norms of due process.30 He pointed out to the Court that there were no Army orders excluding American citizens of German or Italian ancestry from any zone, even though the nation was at war with Germany and Italy.31 And he emphasized that there was no valid reason to cast indiscriminate suspicion of disloyalty and subversiveness on every Japanese-American.32

The “most rigid scrutiny” promised by the Court turned out to be anything but. Justice Black could not find a government assertion about the necessity of the exclusion order that he would not credit. There was, according to military authorities, “an unascertained number of disloyal members of the group”33 along the coast, and “it was impossible to bring

Korematsu v. United States, that is mistaken. Korematsu said nothing about the constitutionality of detention, and when the Court did address detention, it disapproved of it on non-constitutional grounds. Korematsu, 323 U.S. at 222–23.

27. Korematsu’s attorney unleashed a barrage of constitutional claims in his brief, most of which were spurious. See Brief for Appellant, supra note 20, at 46–50 (arguing, among other things, that the exclusion order amounted to slavery and cruel punishment in violation of the 8th and 13th Amendments).
28. Brief for Appellant, supra note 20, at 42.
29. Id. at 49.
30. Id. at 48. The “reverse incorporation” of the equal protection clause—making it applicable to the federal government through the Due Process Clause of the Fifth Amendment—was still ten years away. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (“[R]acial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”).
31. Brief for Appellant, supra note 20, at 57, 64.
32. Id. at 65.
about an immediate segregation of the disloyal from the loyal.”  

34. Id. at 219.

35. Id. at 223.

36. Id. at 219.

37. Id. at 223.

38. Id.

39. Id.

40. Id. at 246 (Jackson, J., dissenting).

41. Id.

42. Id.

government never again uprooted and relocated a racial group, so no case “on all fours” ever materialized. Scholarly assessment of the Korematsu decision started out critical—in 1945, Eugene Rostow called it “a disaster” in the Yale Law Journal\textsuperscript{44}—and it only grew worse from there.\textsuperscript{45} The excesses of the Second Red Scare eroded public support for the arrest and detention of American citizens on national security grounds.\textsuperscript{46} A 1980s congressional commission examining the wartime removal and detention of Japanese-Americans harshly condemned the Korematsu ruling.\textsuperscript{47} And of course the whole fabric of equal protection law was rewoven and tightened in the decades after the war, leaving the Korematsu Court’s oddly lenient application of strict scrutiny ever more peculiar.\textsuperscript{48}

Another blow came late in 1983, when a federal district court granted Fred Korematsu a writ of error coram nobis invalidating his 1942 conviction.\textsuperscript{49} Intrepid archival work by activists and historians revealed that in litigating the case in the Supreme Court, the Department of Justice suppressed information casting doubt on some of its evidence that Japanese-Americans posed a security risk.\textsuperscript{50} In particular, a key government report justifying exclusion alleged that Japanese-Americans had been involved in ship-to-shore signaling with Japanese submarines; the Justice Department

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\textsuperscript{44} Eugene V. Rostow, The Japanese-American Cases—A Disaster, 54 YALE L.J. 489 (1945); see also Nanette Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions, 45 COLUM. L. REV. 175, 183 (1945) (calling Korematsu a “dangerous opinion . . . not in fact justified by considerations of sound policy lying either within or without the issues of the case”).


\textsuperscript{46} By passing the Non-Detention Act in 1971, 18 U.S.C. § 4001(a), which repealed the McCarran Internal Security Act of 1950 and forbade the federal detention of a citizen except pursuant to an Act of Congress, legislators invoked the memory of the removal and imprisonment of Japanese-Americans. 117 CONG. REC. 31, 541 (1971).

\textsuperscript{47} Comm’n on Wartime Relocation and Internment of Civilians, supra note 7, at 237–39.

\textsuperscript{48} See DONALD W. JACKSON, EVEN THE CHILDREN OF STRANGERS: EQUALITY UNDER THE U.S. CONSTITUTION 83 (1992) (noting that “[t]he wartime Japanese-American cases aside,” the Supreme Court was coming to view race as an “inappropriate basis for treating people differently”). This was the case even before Brown v. Board of Education, 347 U.S. 483 (1954).

\textsuperscript{49} Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

\textsuperscript{50} IRONS, supra note 11, at 202–06.
had evidence that this was erroneous but did not alert the Supreme Court.\footnote{See id. at 282–84, 286.} As well, the government failed to inform the Court that an anonymously published intelligence report asserting that Japanese-Americans were overwhelmingly loyal was actually a product of the Office of Naval Intelligence.\footnote{It is often said that the government “suppressed” the report itself, but that is misleading. The report was published as an article in Harper’s in October of 1942 as the work of an anonymous intelligence officer who had permission from the military to go public with it. The Japanese in America: The Problem and the Solution, HARPER’S MAG., Oct. 1942, at 489–90. Two amicus curiae briefs brought the Harper’s article to the Supreme Court’s attention, so the report itself was not in any meaningful sense “suppressed.” Brief for the ACLU as Amicus Curiae Supporting Petitioner at 23 n.11, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22); Brief of Japanese American Citizens League as Amicus Curiae Supporting Petitioner at 107–08, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22). The Solicitor General failed to alert the Court that the report was authentic and the work of a well-regarded officer in the Office of Naval Intelligence, Kenneth Ringle. IRONS, supra note 11, at 202, 205–06.} On the strength of these deceptions, Judge Marilyn Hall Patel of the U.S. District Court for the Northern District of California concluded that Korematsu’s conviction must be set aside.\footnote{Korematsu, 584 F. Supp. at 1420.} The government did not appeal. Of course, the coram nobis writ could wipe away only Fred Korematsu’s criminal conviction from 1942, not the Supreme Court’s 1944 decision affirming it. But there is little doubt that the disclosures of government misconduct underlying the coram nobis writ had the effect of further sapping the Supreme Court opinion of vitality.


The death blow to Korematsu finally came in June 2018 when the Supreme Court decided Trump v. Hawaii, the challenge to the so-called “travel ban” on entry to the United States that the Trump Administration imposed on noncitizens from certain mostly Muslim-majority nations. After
a campaign featuring frequent unabashed calls to end immigration by Muslims, President Trump signed an Executive Order banning entry into the United States by, among others, all noncitizens arriving from seven Muslim-majority countries. A massive public outcry and a federal district court decision enjoining the enforcement of the order on Establishment Clause and other grounds led government lawyers back to the drawing board. Over the succeeding months, they placed revised orders and proclamations on the president’s desk to supplant the original order. These added several non-Muslim-majority countries to the list, removed an exception for members of Christian minorities in majority-Muslim lands, and otherwise enhanced the surface neutrality of the program.

A five-Judge majority upheld the revised program over objections that it exceeded presidential statutory powers and violated the First Amendment. The majority, emphasizing the enormity of the President’s powers over immigration and the facial neutrality of the program, rejected the idea that President Trump’s actions warranted strict judicial scrutiny.

The four dissenters questioned the correctness of applying only “rational basis” scrutiny to the President’s actions, either explicitly in the case of Justices Sotomayor and Ginsburg or implicitly in the case of Justices Breyer and Kagan. Justice Sotomayor went further, waking the sleeping monster of Korematsu, at least for purpose of display. The majority’s holding, she argued, was “troubling given the stark parallels between [its] reasoning . . . and that of Korematsu.” She ticked off a list of those parallels:


60. Trump, 138 S. Ct. at 2418–20 (discussing how Supreme Court precedent mandates the use of a rational basis standard of review when an executive action is facially neutral).

61. See id. at 2441 (Sotomayor, J., dissenting) (noting that in other Establishment Clause cases the Court has imposed a higher level of scrutiny than rational basis).

62. See id. at 2429–33 (Breyer, J., dissenting). While the Breyer dissent does not speak the language of scrutiny levels, the analysis to which it subjects the immigration program under review has all the markings of heightened scrutiny.

63. Id. at 2447 (Sotomayor, J., dissenting).
odious racial discrimination in an executive order; (b) accepting stereotypes about a minority group’s supposed inability to assimilate; (c) permitting the government to rely on a vaguely stated national security threat without revealing the intelligence supporting it; and (d) ignoring “strong evidence that impermissible hostility and animus motivated the Government’s policy.” The majority, she asserted, was “redeploy[ing] the same dangerous logic underlying Korematsu and merely replac[ing] one ‘gravely wrong’ decision with another.”

This provocative attack led Chief Justice Roberts to take out a sword to finish off the monster of Korematsu. The Chief Justice parried Sotomayor’s analogy of the travel ban to the military orders affecting Japanese-Americans. Korematsu, he argued, was a case about “forcibl[y] relocat[ing]...U.S. citizens to concentration camps, solely and explicitly on the basis of race,” an action that was “objectively unlawful and outside the scope of Presidential authority.” Trump v. Hawaii, by contrast, was a case about “a facially neutral policy denying certain foreign nationals the privilege of admission” to the United States, an act “well within executive authority.” Despite the dissimilarities, though, the Chief Justice seized the opportunity to “make express what is already obvious”: the Korematsu decision was “gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’

Thus was the monster slain, without a hint of hesitation from any of the Court’s four other conservatives who joined the Chief Justice’s opinion.

III. Yes, the First Monster Is Dead

When Grendel was slain, the Ring-Danes burst into feasting and celebration. One might have expected the same reaction to Trump v. Hawaii—that after decades of decrying the fact that Korematsu had never been overruled, critics would thrill at its overruling. Oddly, the reaction to the death of Korematsu has not been joyful. In fact, many critics maintain that Korematsu did not really die, but just shape-shifted to a new form in Trump v. Hawaii.

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64. Id.
65. Id. at 2448 (quoting the majority’s admission that Korematsu is “gravely wrong”).
66. Id. at 2423 (majority opinion).
67. Id.
68. Id. (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).
69. See Neal Kumar Katyal, Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu, 238 YALE L.J. 641, 648 (2019), https://www.yalelawjournal.org/forum/trump-v-hawaii ([https://perma.cc/4YD3-BMGZ]) ("Taken together, the opinions in Hawaii read like a modern-day adaptation of Korematsu."); Quinta Jurecic, The Travel Ban Decision and the Ghost of Korematsu, LAWFARE (June 28, 2018, 8:19 AM), https://www.lawfareblog.com/travel-ban-decision-and-ghost-korematsu [https://perma.cc/KZW7-9KEC] ("Now that the opinions are written, however, the connection is clear enough, and both the majority..."
This is not a fair characterization of either *Trump v. Hawaii* or *Korematsu*. The *Korematsu* decision now stands overruled. Perhaps the best evidence for this proposition comes from Justice Sotomayor, who woke the monster in the first place. She had every opportunity to contradict the majority’s assertion that it had successfully overruled *Korematsu*. Yet she did not. She did the opposite. “Today,” she wrote, “the Court takes the important step of finally overruling *Korematsu*.” 70 “This formal repudiation of a shameful precedent,” she added, “is laudable and long overdue.” 71 Those are not the words of someone who doubts the death of *Korematsu*.

More importantly, there are just too many differences between President Trump’s 2017 immigration orders and Lieutenant General John DeWitt’s 1942 exclusion orders to characterize *Trump v. Hawaii* as a stealth revival of *Korematsu*. The *Korematsu* case was about the power of the federal government over citizens; 72 *Trump v. Hawaii* was about the power of the


70. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting). Sotomayor might have quibbled with the majority’s statement in a different way; she might have argued that the majority’s “overruling” of *Korematsu* was ineffective because it was dictum. This would have been an obvious point for her to make. Chief Justice Roberts could not have been clearer that he did not see the travel ban case as presenting the same constitutional issue as *Korematsu*, which makes his words about *Korematsu* dictum by definition. *Id.* at 2423 (majority opinion). That neither Justice Sotomayor nor any other Justice raised this concern implies that they all view the blow inflicted on *Korematsu* as genuinely lethal.

71. *Id.* at 2448 (Sotomayor, J., dissenting).

72. Jamal Greene, Eric Yamamoto, and Rachel Oyama note that the exclusion order in *Korematsu* applied to citizens and noncitizens alike. See Jamal Greene, *Is Korematsu Good Law?*, 128 Yale L.J. 629, 634 (2019), https://www.yalelawjournal.org/forum/is-korematsu-good-law [https://perma.cc/29SU-Y5BN] (“The exclusion order also, and pointedly, did not distinguish between U.S. citizens and noncitizen Japanese nationals.”); Eric Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 Yale L.J. 688, 714 (2019), https://www.yalelawjournal.org/forum/masquerading-behind-a-facade-of-national-security [https://perma.cc/8NY4-PYTN] (“Second, the forced removal, like Trump’s exclusion orders, targeted foreign nationals, too. *Korematsu* was not only about abuse of ‘U.S. citizens.’”). They appear to suggest that the *Trump* Court, in casting *Korematsu* as a case about the exclusion just of citizens, may have misapprehended the reach of the *Korematsu* holding and implicitly left the door open to the racial classification of noncitizens. But if that door is open, it is not *Korematsu* that opened it. *Korematsu* was plainly about the exclusion of people in the position of Fred Korematsu—citizens—and not about noncitizens, even though the military order applied to both. In his opinion for the Court, Justice Black said:
Korematsu v. United States, 323 U.S. 214, 219 (1944) (emphasis added). Justice Black’s “cf.” citation to his opinion for the Court in the 1942 Kawato decision is significant because it concerned the wartime rights of Japanese aliens; the citation signals that the Korematsu Court understood the situation of noncitizens to present distinct issues. Later, continuing his emphasis on citizenship, Justice Black added that the Court’s “task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice.” Id. at 223 (emphasis added). The dissenting opinions of Justice Roberts and Justice Jackson similarly focus closely and repeatedly on the order’s application to citizens. See, e.g., id. at 229 (Roberts, J., dissenting) (“The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.”) (emphasis added); id. at 242 (Jackson, J., dissenting) (“Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity . . . .”) (emphasis added). That the Court treated the case as posing a question about the exclusion of citizens and not noncitizens is not surprising; that is exactly how Korematsu’s attorney framed it. See Brief for Appellant, supra note 20, at 5–6 (“[Korematsu] has no dual citizenship. He is a loyal citizen who has exercised the rights and performed the duties of citizenship. . . . More could not be asked or expected of any citizen.”) (emphasis added). The Trump Court should not be faulted for understanding Korematsu as a case about the rights of citizens because that is what it was. This is not to say that the question of the rights of noncitizens is unimportant or that classifying them on racial lines is or should be permissible. It is simply to note that the holding of Korematsu does not resolve that question.

73. To be sure, Donald Trump said reprehensible things about Muslims on the campaign trail and after becoming President, things that leave little doubt about his own invidious sentiments. See, e.g., Jenna Johnson & David Weigel, Donald Trump Calls for “Total” Ban on Muslims Entering United States, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/politics/2015/12/07/e562666f-9d2b-11e5-8728-1af6af208198_story.html?noredirectson&utm_term=9bbe702e8ddc [https://perma.cc/B5FN-FMW7]. The Executive Order that the Court considered, however, was neutral on its face, and the Supreme Court has a long history of drawing sharp distinctions between laws that draw explicit racial or religious lines and laws that do not. Indeed, the Supreme Court even has a history of setting aside concerns about invidious motivation for facially neutral actions. See Palmer v. Thompson, 403 U.S. 217, 225 (1971) (“It is difficult or impossible for any court to determine the ‘sole’ or ‘dominant’ motivation behind the choices of a group of legislators.”).
a person arriving for crucial medical care and a person arriving for a vacation. Each of these is a meaningful distinction.

In short, it is easy to imagine a world that rationally distinguishes the government’s ability to push a citizen from place to place inside the country from its ability to prevent a noncitizen from entering the country. We can differentiate the two without relying on Korematsu’s endorsement of the mass exclusion of American citizens from the West Coast.

If there is a disturbing point of connection between Korematsu and Trump v. Hawaii, it lies not in the language of the challenged orders or the nature of the burdens the orders impose, but in the Court’s trusting posture toward the Executive on national security matters. There is a troubling credulity to the majority opinions in both cases. In Korematsu, the government offered none of its own surveillance data on the supposed dangers Japanese-Americans posed and no actual military data about the nature of the looming military threat to the U.S. mainland. Instead, the government simply asked the Court to take judicial notice of a range of public records and statements purporting to document those things. And the Court agreed—something it would later come to regret when archival research a generation later revealed that the Justice Department had not been candid.

Similarly, in Trump v. Hawaii, the Court looked only at the veneer of neutrality that government lawyers tacked on to the President’s oft-stated and oft-tweeted confessions of animus against Muslims.

In this one way, Trump v. Hawaii does extend the spirit, if not the letter, of Korematsu. But that is not the same thing as saying that the former fails to

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74. This is not to say that a bar to entry does not cause harm to individuals—even great harm to those kept from joining family in the United States. It is simply to say that all Japanese-Americans experienced a baseline of extreme harm by being kicked out of their homes, whereas the harms suffered by those excluded by the travel ban were variable, and in some cases, such as those seeking to enter the United States for tourism, comparatively minor.

75. Aziz Huq rejects the idea of a meaningful distinction between the impact of the military orders in Korematsu and the impact of the travel ban on a person seeking entry to the United States. See Aziz Huq, Article II and Antidiscrimination Norms, 118 MICH. L. REV. 47, 90–93 (2019). Both, he points out, eventuated in detention, or at least were capable of doing so, which makes the distinction “less crisp than first appears.” Id. at 91. The key trouble with this position is that by focusing on the fact or risk of detention, it significantly underdescribes the impacts of the orders. The military order in Korematsu forced people to abandon their homes and displaced them by hundreds of miles to places they never wanted to be. The ban in Trump v. Hawaii applies to people who choose to leave their homes and choose to travel to a place they do want to be. Of course, in neither context did or do the impacted people choose the detention at the end of the line. But the only way to avoid a meaningful distinction between the overall impact of the government’s actions in the two contexts is to ignore everything about the affected person’s experience before detention.


77. Brief for the United States, supra note 22, at 11 n.2.

78. IRONS, supra note 11, at 202–06.

overrule the latter. On this point—credulity in the face of cursory and unsubstantiated allegations of threats to national security—*Korematsu* does not stand alone. Far from it. In many cases the Supreme Court has accepted government representations about national security threats rather than demanding the underlying data. In national security contexts the executive often cannot open its records to scrutiny and its agents to examination without endangering people, strategy, tactics, and even the well-being of the country itself. The majority’s credulity in *Trump v. Hawaii*, however blinkered it may be, has roots in many cases, not just *Korematsu*.

So yes, the first monster has been slain. *Korematsu* has been overruled. Never again can a government lawyer cite it to support a decision to force a racial, ethnic, or religious group away from the place it calls home.

There is, however, something odd—and importantly so—about the way in which Chief Justice Roberts went about the task of overruling *Korematsu*. Yes, the Chief Justice said that *Korematsu* was gravely wrong the day it was decided. But why? What exactly was wrong with it?

If one were to ask this question to any law school graduate of the last forty or fifty years, she would say that the Court’s error was to promise a rigorous form of scrutiny of the military’s exclusion orders and then use a tepid one. “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” said Justice Black right out of the gate; “courts must subject them to the most rigid scrutiny.” This form of judicial review insists that the government can draw racial lines to address only the most pressing of public problems and to affect only those people who are

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82. I do not mean to suggest that the *Trump v. Hawaii* decision is not itself a monster of a different sort—a dangerous precedent in immigration law, perhaps a revival of the troubling-but-never-overruled decision of *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), also known as the Chinese Exclusion Case. This is a point that many are making in the literature. See Michael Kagan, *Is the Chinese Exclusion Case Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. 80, 80 (2017), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1002&context=nljforum (drawing parallels between the two cases); Garrett Epps, *The Ghost of Chae Chan Ping*, ATLANTIC (Jan. 20, 2018), https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/ (raising concerns about the revival of the Chinese Exclusion Case). That, however, is not what this Essay is about.
83. But cf. infra note 134 and accompanying text (discussing *Korematsu*’s surprising resilience in intra-governmental policy discussions in the post-9/11 era).
causing them. This, surely, was the Court’s error in Korematsu. Protecting the country from an invasion by hostile forces was, of course, a pressing need.\footnote{But see infra note 116 and accompanying text (noting that the Solicitor General misrepresented the threat of invasion in presenting the Hirabayashi case to the Supreme Court).} But even if we stipulate that some American citizens of Japanese ancestry posed a threat of espionage or sabotage,\footnote{This is arguably a counterfactual assumption, as the government never arrested an American citizen of Japanese ancestry on charges of espionage or other forms of subversion. \textit{See David Cole, Enemy Aliens 97} (2003) (“None of the interned Japanese was ever charged with, much less convicted of, espionage, sabotage, or treason.”). But see Eric L. Muller, \textit{Betrayal on Trial: Japanese-American “Treason” in World War II}, 82 N.C. L. REV. 1759, 1794 (2004) (relating the story of the prosecution of three Japanese-American sisters for treason for assisting the escape of German prisoners of war in Colorado in 1943).} we can be confident that they did not include the ill Japanese-Americans transported to the camps on stretchers from West Coast hospitals\footnote{See, for example, a photograph of a physician examining an elderly patient in a War Relocation Authority emergency hospital for evacuees of Japanese ancestry, Clem Albers, \textit{Manzanar, Calif.—Dr. James Goto, ONLINE ARCHIVE OF CAL.} (Apr. 2, 1942), https://oac.cdlib.org/ark:/13030/tf0580021n/?brand=oac4 [https://perma.cc/YW3B-KYXV].} or Japanese-American soldiers serving with distinction in the armed forces.\footnote{See generally C. Douglas Sterner, \textit{Go For Broke} (2008).} Neither, we can say with confidence, did they include the Japanese-American children who were shipped from Los Angeles orphanages to the so-called “Children’s Village” at the Manzanar Relocation Center.\footnote{Renee Tawa, \textit{Childhood Lost: The Orphans of Manzanar}, L.A. TIMES (Mar. 11, 1997, 12:00 AM), http://articles.latimes.com/1997-03-11/news/mn-37002_1_manzanar-orphans [https://perma.cc/P2WM-EZBV].} In the jargon of strict scrutiny, the exclusion orders were outrageously overinclusive: they touched people they didn’t need to touch.

They were also outrageously underinclusive. If we are to stipulate that some Americans of Japanese ancestry posed a threat of espionage or sabotage, we must also stipulate that some American citizens of German or Italian ancestry posed a similar threat. Yet the Army never ordered the mass exclusion of American citizens of German or Italian ancestry from one square inch of U.S. territory.

If one were now to ask the same law student to read Chief Justice Roberts’s language overruling Korematsu in \textit{Trump v. Hawaii}, she would end up scratching her head. The problem in Korematsu was that “[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, [was] objectively unlawful and outside the scope of Presidential authority.”\footnote{Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (emphasis added).} This contrasted with President Trump’s action, which was “well within executive authority and could have been taken by any other President.”\footnote{Id.} The Chief Justice made no mention of strict scrutiny and no mention of fatal overinclusion or underinclusion. He transformed
Korematsu into a case—and a mistake—about the boundaries of the powers of the President. The Chief Justice did not explain why presidential power does not extend to relocating racial, ethnic, or religious groups of American citizens during wartime. He merely asserted it.

The trouble is not that that proposition is erroneous; in fact it seems quite salubrious. The trouble is that the proposition misses what decades of analysis suggested was the point. The Court’s crucial error in Korematsu was to tolerate racial line-drawing where it should have been—and pretended to be—demanding. The error was promising to test racial action in the name of national security with vigor and then doing it with indulgence. The reason to overrule Korematsu was to correct that mistake, to make clear that strict scrutiny means strict scrutiny even in a national-security context involving racial distinctions.92

IV. Enter the Second Monster

To the Ring-Danes, it mattered little exactly how Beowulf killed Grendel—with which blade, or with what sort of swing of the arm. What mattered was that Grendel was dead. In that spirit, this parsing of Chief Justice Roberts’s rationale for overruling Korematsu in Trump v. Hawaii might seem like pointless perseveration: Korematsu has been overruled, and that is all that really matters.

But it matters a great deal. There is a second monster out there, a Grendel’s mother, just as menacing as Korematsu, perhaps more. It has been in the shadows since World War II, but we have paid it no mind. If it should strike—and there is reason to fear it could—we will want to know that Korematsu was overruled for the right reasons. Those reasons might prove our only protection.

The new monster facing us is Hirabayashi v. United States. Hirabayashi was a constitutional challenge to another army order entered against Japanese-Americans pursuant to Executive Order 9066.93 It imposed a dusk-to-dawn curfew on all people of Japanese ancestry along the West Coast—citizens and noncitizens alike—and came a few weeks before the exclusion order that Fred Korematsu fought.94 It imposed no such curfew on American citizens of German or Italian ancestry.95 At the time the Army imposed the order, Gordon Hirabayashi was a twenty-four-year-old American citizen of

92. Jamal Greene’s thoughtful and detailed elaboration of this and related ideas about the ambiguities of what in Korematsu the Trump Court might have overruled is valuable. See generally Greene, supra note 72 (discussing how the Supreme Court’s claim that the infamous Korematsu decision was overruled is “both empty and grotesque”).
95. See id. (declaring and establishing that the order applies to “all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry”).
Japanese ancestry living in Seattle. He defied the curfew and refused to report for exclusion and was prosecuted in federal court for the two acts of defiance in separate counts, one for the curfew violation and one for the exclusion violation. He was tried and convicted in federal district court in Seattle in October 1942 and challenged his conviction up to the Supreme Court. Due to a quirk of appellate criminal procedure, the Court addressed only Hirabayashi’s challenge to the curfew, leaving the challenge to exclusion for another day.

The Supreme Court unanimously affirmed Hirabayashi’s conviction in June 1943. The Court began its analysis of his equal protection challenge with an even harsher indictment of racial discrimination than it would pen a year and a half later in Korematsu: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Such distinctions, said Chief Justice Stone, had “often been held to be a denial of equal protection”—and would be such a denial in Hirabayashi were it not for the fact that “the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”

The Court undertook a lengthy account of “the conditions with which the President and Congress were confronted in the early months of 1942, many of which . . . were then peculiarly within the knowledge of the military authorities.” Those conditions were both external—the threat facing the country from without—and internal—the threat facing the country from within. Relying on information fed to it by the Solicitor General, the Court reported that at the time the Army imposed the curfew, it was “fac[ing] the danger of invasion” of the West Coast by the Japanese military, an area

96. See IRONS, supra note 11, at 89–90 (stating that Hirabayashi, at the age of twenty-four, had just started his senior year at the University of Washington in Seattle when the curfew became effective).

97. See id. at 91–92 (“[T]he federal grand jury in Seattle returned an indictment that charged Hirabayashi with two violations of Public Law 503, the first for failure to report for evacuation and the second for curfew violation.”).

98. The quirk of criminal appellate procedure is called the “concurrent sentence doctrine.” It says that a federal court will decline to consider questions on counts of conviction if it finds at least one valid count of conviction resulting in a concurrent sentence. See Benton v. Maryland, 395 U.S. 784, 787–89 (1969) (discussing the history of the Court’s “concurrent sentence doctrine” jurisprudence); see also Kang, supra note 45, at 944–45 (indicating that Chief Justice Stone utilized the concurrent sentence doctrine to avoid the exclusion issue in Hirabayashi).

99. That day would turn out to be Korematsu v. United States in December 1944.

100. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

101. Id.

102. Id. at 93–94.

103. Id. at 94.
densely dotted with military bases and war manufacturing plants.\textsuperscript{104} Along the coast, Chief Justice Stone noted, were some 112,000 people of Japanese ancestry, two-thirds of them U.S. citizens, a group purportedly marked by their “solidarity” and their failure to assimilate.\textsuperscript{105} Noncitizen parents sent their citizen children to Japanese language after-school programs where, according to the Court, they imbibed “Japanese nationalistic propaganda” that “cultivat[ed] allegiance to Japan.”\textsuperscript{106} The noncitizens maintained contacts with Japanese consulates, which, the Court related, had “been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese government.”\textsuperscript{107} All of this left the Japanese—citizens and noncitizens alike—cut off from the white population, and probably “irritat[ed]” by the isolation they felt.\textsuperscript{108} This, in turn, “may well have tended to increase . . . their attachments to Japan and its institutions.”\textsuperscript{109}

Having drawn this bleak landscape of possibly imminent invasion and this cloak-and-dagger caricature of isolated and bitter Japanese-Americans, the Court made quick work of Hirabayashi’s equal protection claim. The government, “in the crisis of war and of threatened invasion,” had adopted public safety measures—including a curfew—“based upon the recognition of facts and circumstances which indicate[d] that a group of one national extraction may menace that safety more than others.”\textsuperscript{110} That curfew was “not wholly beyond the limits of the Constitution and [was] not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.”\textsuperscript{111}

The \textit{Hirabayashi} opinion had little chance to reverberate because \textit{Korematsu} came along promptly and, in a sense, supplanted it. There was little reason to pay attention to a case permitting the military to confine people to their homes once there was a case allowing it to drive people from their homes. There was irony in \textit{Hirabayashi}’s disappearance from the scene, because \textit{Korematsu} itself leaned all over it. It was “[i]n the light of the principles we announced in the \textit{Hirabayashi} case”\textsuperscript{112} that the \textit{Korematsu} Court validated mass exclusion. Fred Korematsu sought to contest the various factual assumptions that animated the Court’s opinion in

\begin{footnotes}
\item[104] Id. at 95.
\item[105] Id. at 96.
\item[106] Id. at 97.
\item[107] Id. at 98.
\item[108] Id.
\item[109] Id.
\item[110] Id. at 101.
\item[111] Id.
\end{footnotes}
Hirabayashi, but the Court simply repeated and readopted them. Justice Frankfurter, “unable to see how the legal considerations that led to the decision in Hirabayashi . . . fail[ed] to sustain the military order” commanding mass racial exclusion, confirmed Hirabayashi’s status as Korematsu’s progenitor.

As the decades passed and the criticisms of Korematsu piled up, Hirabayashi slipped by virtually unnoticed. Gordon Hirabayashi saw his conviction vacated on a coram nobis petition in 1986—much like Fred Korematsu had in 1984, and on much the same grounds—but that impugned only his criminal conviction. It did not—indeed, could not—invalidate the Supreme Court’s decision approving the curfew. Acting Solicitor General Neal Katyal included Hirabayashi alongside Korematsu in his “Confession of Error” in 2011, which made clear that the deceptions marring the litigation of Korematsu infected the Hirabayashi litigation too. But that has been the extent of the criticism.

It is actually more worrisome than that. Unlike Korematsu, which by the 1980s had become a case no judge would mention in polite company, Hirabayashi has retained a modicum of vitality as precedent. In 2004, Justice Thomas cited the case in his dissent in Hamdi v. Rumsfeld—and not for a salutary idea like the “odious[ness of racial classifications] to a free people,” but for the darker notion that courts owe extreme deference to executive factfinding. That such deference had run the Court aground in Hirabayashi itself seemed not to faze him. Other Justices cited the case

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113. Id. at 218.
114. Id. at 224 (Frankfurter, J., concurring).
116. Katyal, supra note 56. Katyal might have gone even further in condemning Hirabayashi, as then-recent research had established that the Solicitor General’s Office committed even more misconduct in that case than it later did in Korematsu. In Hirabayashi, the Solicitor General repeatedly insisted that in March 1942 the Army was preparing specifically for a “Japanese invasion” of the West Coast, but archival evidence demonstrates that the Army was in fact preparing for no such thing and Justice Department lawyers almost certainly knew it. Eric L. Muller, Hirabayashi and the Invasion Evasion, 88 N.C. L. REV. 1333, 1336–38 (2010).
117. Dennis Hutchinson’s careful excavation of Justice Jackson’s unpublished concurring opinion in the Hirabayashi case is illuminating, but it does not address the merits or demerits of the Court’s Hirabayashi opinion. Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455.
120. Hamdi, 542 U.S. at 584 (Thomas, J., dissenting).
without evident disdain in 1963, 121 1967, 122 1971, 123 and 1978. 124 The Solicitor General cited Hirabayashi approvingly in a merits brief defending preventive pretrial detention in the Supreme Court in 1986. 125 And as recently as June of 2018, the case materialized in a brief filed by Department of Defense lawyers in a case pending before a military commission at Guantanamo Bay. 126

Still alive and on the prowl, Hirabayashi can do real damage. Compared to wholesale ouster from an entire chunk of the continent, a curfew is a pretty modest imposition. Korematsu was about the trauma of departure: rapacious buyers pawing through their departing Japanese neighbors’ belongings at hastily arranged “evacuation sales,” panicked families trying to fit their lifetimes into a few pieces of luggage, farmers leaving their crops unattended to rot in the fields, anxious parents calming frightened children, tearful children saying goodbye to family pets. Hirabayashi, by contrast, was about making it home before dark and not leaving the house too early in the morning. The intrusion on people’s lives Korematsu ratified was among the greatest imaginable: a forced internal mass exile of a kind unseen in America since perhaps the Trail of Tears. Curfews, on the other hand, happen all the time, at least comparatively speaking; they’re enforced in the wake of natural disasters and civil unrest. Many local governments have juvenile curfew laws on the books. 127

This is not to say that the curfew on Japanese-Americans did not inflict indignities on all, or grave harms on some—for example, night shift workers, or people suffering nighttime health crises who had to defy the law to go to the hospital. It is simply to say that a huge gulf of suffering and trauma separates curfew from exclusion. The cases are, as we like to say, distinguishable. It is not difficult to mentally sketch out a brief that would argue the distinction, or a judicial opinion that would endorse it.

127. For just one example, see DALLAS, TEX., CODE § 31-33(b) (2019), http://library.amlegal.com/nxt/gateway.dll/Texas/dallas/cityofdallastexascodofordinances/volumel/chapter31/offenses-miscellaneous/articlebgcolor2/?=templates$fn=default.htm$3.0$vid=amlegal:dallas_tx$an=JD_31-33 [https://perma.cc/XS28-V8FA].
The consequences of that thought experiment are concerning. One can imagine an array of race- or religion-based government intrusions and impositions that are an order of magnitude milder than mass exclusion. Mass surveillance; mass registration; mandatory identity cards; mass federal job layoffs; mass loyalty inquests—the list can expand to the limits of a person’s ability to imagine the fear and anger of a nation reeling from a terror attack. All of these would have a potential constitutional pedigree in a world where Korematsu is dead but its mother, Hirabayashi, survives.

V. Slaying the Second Monster

When Grendel’s mother appeared at the mead hall to avenge her son’s death, the Ring-Danes were sleeping off the aftereffects of their banquet revelry. Assuming the mead hall safe, Beowulf had departed and was slumbering elsewhere. This gave Grendel’s mother the chance to wreak havoc, killing a Danish prince and making off safely to her underwater lair. Beowulf had no choice but to dive into the lake and challenge her on her turf, with a blade forged for a giant. Only after an epic struggle did Beowulf kill Grendel’s mother.

Hirabayashi is still on the prowl, and we have been sleeping. If the case is to be overruled, how might it be accomplished?

Speedily, one hopes. When the Supreme Court overruled Plessy v. Ferguson’s separate-but-equal doctrine in Brown v. Board of Education, the only thing that was clear was that the Equal Protection Clause would no longer tolerate racial segregation in public education. Segregation by law, though, was a pervasive practice across the American South. Uncertainty briefly reigned, as people puzzled over whether segregation at other public facilities might survive. The Court put the matter quickly to rest, condemning segregation at golf courses and beaches in per curiam opinions that did nothing more than cite Brown. The message was clear: Brown did not state a rule about public education only. It stated a broad legal principle about the categorical invalidity of state-sponsored racial segregation wherever it cropped up.

In the follow-through to overruling Korematsu, the Supreme Court would do well to follow the Plessy example by announcing that Hirabayashi is also dead. The Court should make clear that Korematsu wasn’t just wrong on its facts but embodied a broadly illegitimate rule.

And what is that rule? This is where the oddity of Chief Justice Roberts’s language in Trump v. Hawaii really matters. The Chief Justice said that

128. 163 U.S. 537 (1896).
Korematsu was wrong because the mass exclusion order was “outside the scope of Presidential authority.” But that is not why Korematsu was wrong, or at least it is not the most important reason. Korematsu was wrong because it upheld a government order that cavalierly and needlessly impacted Japanese-American orphans, tubercular patients in sanatoria, and soldiers in the U.S. Army, while leaving American citizens of German and Italian ancestry untouched. It was wrong because it made a mess of strict scrutiny, tolerating absurd over- and under-inclusion when it ought to have tolerated none, or almost none.

Hirabayashi is wrong for just the same reasons. The orphans and the hospital patients and the soldiers were just as needlessly placed under curfew as they were later excluded, while American citizens of German and Italian ancestry remained free to stroll the nighttime streets. The essential problem of Hirabayashi, just as with Korematsu, is not that the orders against Japanese-Americans fell outside the scope of presidential power. To frame the problem as a flaw of government structure, a president straying outside the boundaries of his authority, is to imply that the other branch—Congress—could do what the president could not. But that cannot be right; surely a statute directing racial curfew and exclusion would have had the same constitutional defects as an executive or military order. No, the problem in the cases is not one of transgressed powers in branches of government; it is one of individual rights.

There is reason to believe that the Court that decided the two Japanese-American constitutional cases of World War II would agree that overruling one entails overruling the other. Justice Black worked hard to tie Korematsu to the earlier Hirabayashi case, essentially adopting the Hirabayashi Court’s findings about the internal threats posed by Japanese-Americans and the external threats posed by the Japanese military. Justice Black thought he was doing no new doctrinal work in Korematsu; he was simply upholding exclusion “[i]n the light of the principles we announced in the Hirabayashi case.” One could therefore argue that the overruling of Korematsu in Trump v. Hawaii forcefully implied the overruling of Hirabayashi.

But we do not have a doctrine of silent overruling by inference. The Court has to come out and say it, and it should do so. Regrettably, the fate of Hirabayashi is uncertain in the wake of Trump v. Hawaii. We are living in a time when a domestic terror attack—another September 11—might at any moment be seconds away. That is an inauspicious moment for uncertainty about whether racial or religious discrimination short of internal exile violates equal protection. We recently learned that in the immediate wake of the September 11 attacks, high-ranking Justice Department lawyers debated

reviving *Korematsu* in service of racial profiling at airports.\textsuperscript{134} That frightening fact alone should prompt action on *Hirabayashi*.

The first monster is dead, but the second one lives. At any moment she might be upon us as we slumber. The time to strike is now.