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THE TERROR GOVERNMENT: RECONCILING NATIONAL SECURITY IMPERATIVES AND THE RULE OF LAW

**Reviewing NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO
GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE
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LAWRENCE M. FRIEDMAN*

Abstract. In this Review Essay, I examine Professor Natsu Taylor Saito's prescription for reinvigorating the rule of law as a guiding principle in American domestic and foreign policy-making, as outlined in her book, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State*. Her response to the danger of the prerogative state is essentially democratic, and I suggest that any democratic effort must include a role for the judiciary. Indeed, those who support the rule of law may find some solace in U.S. Supreme Court cases concerning various aspects of the war on terrorism; those cases offer a means by which we may begin the process of reconciling the imperatives of national security with the importance of adherence to binding legal rules.

* Professor of Law, New England School of Law. I presented an earlier version of this essay at the annual meeting of the Law & Society Association in Montreal, Canada, in May 2008. I thank Jeremy Telman for inviting me to join a panel discussion of Natsu Taylor Saito's book, and I thank my fellow panelists—Jeremy, Taunya Banks and Fiona de Londras—for an engaging discussion of the book and issues of plenary power. Thanks also to my colleague Victor Hansen for his comments and suggestions, and to Tim Donahue for his able research assistance.

INTRODUCTION

When we reached *Korematsu v. United States*¹ in my constitutional law course a few semesters back, I asked my students whether they thought similar restrictions, against Americans of Middle-Eastern descent, could have been enforced after September 11. Some students suggested that, regardless whether *Korematsu* is considered to be good law, the development of equal protection jurisprudence in the years since the U.S. Supreme Court decided that case would lead to a genuinely searching inquiry into a classification that on its face appeared overbroad. The sense among these students seemed to be that the restrictions would not pass constitutional muster today—that the Court has grown sufficiently skeptical of classifications based upon race or ethnicity to reject such measures as internment absent a demonstration of a particularly compelling interest.

On the other hand, a surprisingly large number of students felt that the Court correctly deferred to the government's arguments in *Korematsu*,² and should do so again in our hypothetical case, essentially for two reasons: first, because the President (they believed) has superior information about potential national security threats, information that could not be shared, even with the Supreme Court; and, second, because the government (they believed) should not be stopped from acting on any information that could prevent another terrorist attack, such as detaining individuals whom the government regards as potentially dangerous. A number of students raised this point again later in the course when we turned our attention to *Hamdi*³ and *Hamdan*,⁴ the cases in which the Court struck down elements of President Bush's war on terrorism. After that class, one student sent me an e-mail that I suspect reflected the views of many about the Court's efforts to curb assertions of executive power. She wrote:

[H]aving experienced September 11th in my own backyard, and having Americans in general share the feeling of having been violated by such a brute force it seems that there need be a point where America stops giving so much leeway to democracy for the benefit of others and starts to protect its own citizens and its own system by giving more deference to the [President] to lead our own Nation.

Statements like this put me at a loss. As Professor Natsu Taylor Saito⁵ shows in *From Chinese Exclusion to Guantánamo Bay: Plenary Power and*

1. 323 U.S. 214 (1944).

2. *Id.* at 218-19.

3. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

4. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

5. Professor of Law, Georgia State University College of Law.

the Prerogative State,⁶ her indictment of the kind of assertions of plenary power that President George W. Bush made commonplace during his administration, the federal government historically has been inclined to claim that its actions fall within the realm of national security, safe from scrutiny by the public or the courts. Though it did not formally create internment camps, as it did for Japanese Americans during World War II, the government since September 11 has held hundreds of so-called “enemy combatants” at Guantánamo Naval Base in Cuba and at other locations abroad;⁷ detained thousands of non-citizens, many of them permanent residents, here in the United States; and on an individualized basis detained several American citizens because of their alleged connection to terrorist activities.⁸ Professor Saito convincingly demonstrates that the treatment of all these people—citizen and non-citizen alike—has not been at all times consonant with constitutional standards or international human-rights law.⁹ These actions nonetheless have been viewed by many as within the federal government’s plenary authority—often located specifically within the executive branch—in respect to national security and immigration, the exercise of which has for the most part been accepted by the American people.

One of the reasons the American people have tolerated governmental practices such as Professor Saito describes is the widespread belief that such action is required in our present circumstances—that it is necessary to counter the extraordinary threat that terrorism poses.¹⁰ As Professor Saito shows, however, the exercise of the plenary power has for more than 150 years undercut individual rights for certain populations, including Native Americans,¹¹ Japanese Americans,¹² and Japanese-Latin Americans;¹³ in this light, its use represents an ordinary and not extraordinary phenomenon. Now is the time, she contends, to consider “what the rule of law entails in

6. NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE* (2007).

7. See generally Daniel R. Williams, *Who Got Game? Boumediene v. Bush and the Judicial Gamesmanship of Enemy-Combatant Detention*, 43 *NEW ENG. L. REV.* 1 (2008); Geoffrey S. Corn, *The Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 *NEW ENG. L. REV.* 17 (2008); Douglass Cassel, *Liberty, Judicial Review, and the Rule of Law at Guantánamo: A Battle Half Won*, 43 *NEW ENG. L. REV.* 37 (2008).

8. See SAITO, *supra* note 6, at 1-4.

9. *Id.* at 4.

10. *Id.*

11. See *id.* at 28-31.

12. See *id.* at 53-57.

13. See *id.* at 93-110.

times of perceived national emergency,”¹⁴ because it seems the national emergency triggered by terrorism will be never-ending.

In this Review Essay, I look at Professor Saito’s prescription for reinvigorating the rule of law as a guiding principle in American domestic and foreign policy-making. Her response to the danger of the prerogative state is essentially democratic, and I suggest that any democratic effort must include a role for the judiciary. Indeed, those who support the rule of law may find some solace in U.S. Supreme Court cases concerning various aspects of the war on terrorism; those cases offer a means by which we may begin the process of reconciling the imperatives of national security with the importance of adherence to binding legal rules.

I. THE DEMOCRATIC RESPONSE

So: what is to be done about unchecked federal governmental power in respect to national security and immigration? First, as Professor Saito advises, we must endeavor to distinguish between real and perceived threats.¹⁵ Second, we must insist “that all branches of the U.S. government comply with the rule of law.”¹⁶ As she puts it, “if this is to be a country that in fact comports with the rule of law, we must confront the exercise of plenary power by the executive and legislative branches of government and its sanctioning by the judiciary.”¹⁷ The Supreme Court must play a part in this effort; though judicial determinations alone will not ensure compliance with the rule of law, they would “clarify what the law requires and the choices American citizens face.”¹⁸ Recalling Frederick Douglass’s belief that “[p]ower concedes nothing without a demand,”¹⁹ Professor Saito asks whether we—the American citizenry—will demand of our leaders adherence to the rule of law.²⁰

This does not seem too much to ask, given the stakes: respect for the rule of law has both instrumental and intrinsic value. The instrumental value derives, at least partially, from the importance the world community attaches to principles that provide for the regular and predictable ordering of relations between states and between states and citizens; such ordering enables states to hold their fellow states accountable, and it provides a standard by which citizens may assess the actions of their governments.

14. SAITO, *supra* note 6, at 200.

15. *See id.* at 224.

16. *Id.* at 225.

17. *Id.* at 226.

18. *Id.* at 227.

19. Frederick Douglass, Speech to the West Indian Emancipation Society, New York (Aug. 3, 1857), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 358, 367 (Philip S. Foner ed., 1999) (1950).

20. SAITO, *supra* note 6, at 227.

The intrinsic value of the rule of law, at least in the United States, derives from the understanding the U.S. Constitution establishes about the relationship between the people and their leaders—the sense that the government must depend for its moral and legal authority upon the consent of the governed. Unchecked and, in many instances, unauthorized government action expresses disregard for that relationship by undermining the proper esteem the government should accord the constitutional principles pursuant to which the citizens have agreed to be governed. Respect for the binding quality of those principles should be the default position—else the rule of law becomes merely the rule the situation demands, nothing more.²¹

Professor Saito proposes an essentially democratic response to the problem of government action that contravenes the rule of law—to the problem created by the federal government’s frequent assertions of plenary power and the accompanying judicial deference to the coordinate branches, which permit the government to expand specific allocations of constitutional authority to encompass situations in which that authority would otherwise be limited. In her view, that democratic response requires a greater effort at self-education—the better to question whether any particular action will actually advance the claims of security that are asserted to justify government action, whether it be torturing enemy combatants or establishing a comprehensive domestic electronic surveillance program.²²

But there *is* information out there, and lots of it—the *New York Times*, for instance, suffered the wrath of the Bush administration and its supporters for revealing the existence of a domestic electronic surveillance program,²³ and the digital age allows for the dissemination of all manner of information (and of course innuendo) about what the government is up to. We may rightly question whether the organized news media are actually capable of keeping track of all that the government is, in fact, up to, and reporting their findings to us in a comprehensive and comprehensible way. Still, as the saying goes, information wants to be free, and the real question is whether enough of the citizenry is paying attention to hold their government appropriately accountable for its actions.

21. There are exceptional circumstances in which the government may act to protect the nation—circumstances in which a true exigency justifies a deviation from the rule of law; the quick restoration of the default constitutional order—and the accountability it ensures—defines the exceptional nature of such circumstances. *See infra* text accompanying notes 45-48. The problem of course—as Professor Saito understands—is when the government declares every circumstance to be exceptional.

22. *See* SAITO, *supra* note 6, at 195-200, 203-07, 224-27.

23. *See, e.g.*, John C. Eastman, *Listening to the Enemy: The President’s Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT’L & COMP. L. 49, 57-58 (2006).

As well, the democratic response requires the judiciary to act—it requires an end to the near-complete deference the courts have often shown the government, as exemplified by the Supreme Court’s decision in *Korematsu*. Here, I think, there is some reason for hope, for the Supreme Court actually handed President Bush some notable defeats: in *Hamdi v. Rumsfeld*,²⁴ the Court held that the government could not indefinitely detain individuals without some kind of process;²⁵ in *Hamdan v. Rumsfeld*,²⁶ the Court concluded that the President could not as a unilateral matter establish a system of military tribunals to try enemy combatants—that authority must come from the Congress;²⁷ and in *Boumediene v. Bush*, the Court held that alien enemy combatants at Guantánamo were entitled to the privilege of habeas corpus review of their detentions.²⁸ At least in the context of those cases, the Court did clarify the law and chasten the executive. And, importantly, the decisions in *Hamdi* and *Hamdan* were not ignored.²⁹ But we may be able to extract even more from these decisions—enough, perhaps, for lawyers in future cases to argue that the courts need not defer blindly to governmental claims of plenary power, even in matters involving national security.

II. THE RULE OF LAW IN THE COURTS: *HAMDI*, *HAMDAN*, AND *BOUMEDIENE*

To understand how the courts could be persuaded to support the rule of law, we must look at the context in which judges operate (and here I’m talking primarily about the Supreme Court). What factors move the Court to defer to governmental assertions of power in respect to national security, as in *Korematsu*? There is first and foremost the potential harm that the government claims can be avoided only through an expansive construction of the government’s plenary authority. Absent such expansive construction of its constitutional authority, the argument goes, the government would not be able to act as it must to prevent the loss of American lives.

This position has a great deal of emotional appeal. But it does not mean the Court actually lacks the jurisdiction to determine whether the Constitution precludes certain government actions—these cases generally are not about such legal limitations on the Court’s authority as the case or controversy requirement (though jurisdictional issues did allow the Court to

24. 542 U.S. 507 (2004).

25. *Id.* at 533 (“[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

26. 548 U.S. 557 (2006).

27. *Id.* at 567.

28. 128 S. Ct. 2229 (2008).

29. *Id.* at 2240-42.

duck a ruling in the *Padilla* case).³⁰ Neither does it mean that the Court lacks the authority to say whether a particular governmental action is unconstitutional—this is the enduring legacy of *Marbury v. Madison*,³¹ more recent cases, like *Bush v. Gore*,³² confirm that the Court not only has the authority to finally interpret the Constitution, but that its decisions in that regard generally will command respect even when a relatively large number of citizens disagree with them. Finally, the problem is not one of judicial competence; as Professor Fiona de Londras has observed, “[j]udges constantly make decisions on law based to some degree on matters on which they do not have expertise,” and “[t]here is no reason why the judiciary would be incapable of doing the same when security is the area of expertise involved.”³³

The judicial tendency toward deference in respect to questions of plenary authority is, in short, a matter of discretion and not compulsion. If the judiciary holds illegal governmental policies that happen to be particularly popular and—let’s take Presidents at their word here—might even save lives, the Justices may feel themselves constrained by the responsibility they—and the institution of the Court—will bear for the harm that might result. This anguish is understandable: the Justices are not directly accountable in the way that legislators and Presidents are, and that accountability puts elected officials in a better position to assume responsibility for making wide-scale determinations about public safety. To be sure, the Court’s lack of direct accountability is, in the mine run of cases, an asset when it comes to serving as a check and balance on the other branches of government. Nonetheless, with lives potentially hanging in the balance, as the government routinely claims in matters of national security, judges may reasonably be persuaded to choose deference—not, in the end, because the government is acting within legal bounds, but because of the potential consequences of denying the government the power to act. This is at heart a prudential choice, and a human one.

But this is not the only way in which a court might approach governmental decision-making, even in times of crisis. The decisions in *Hamdi* and *Hamdan* in particular show us a way to address the pressure upon a court to defer reflexively to the judgments of political leaders in these situations. *Hamdi* and *Hamdan* provide the means by which lawyers

30. See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

31. 5 U.S. (1 Cranch) 137, 166 (1803) (“But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”).

32. 531 U.S. 98 (2000).

33. Fiona de Londras, *Guantánamo Bay: Towards Legality?*, 71 MOD. L. REV. 36, 50-51 (2008).

could make some progress, at least in ensuring that there is some serious consideration of the tactics and strategies that the government will use in the war on terrorism—a discourse in the public square that could lead to the very demand for change that Professor Saito urges. Each decision relies upon essentially structural arguments to map ways in which the government could, consistent with the Constitution’s allocations of authority, detain and try individuals believed to be enemy combatants. Rather than precluding the government from acting, the Court required the government to achieve its ends pursuant to established procedures, the observance of which would serve to deter arbitrary and unlawful action—by compelling the government to create points in the detention process in which arguments about the validity of the detentions could be made,³⁴ and by compelling recourse to the democratic process to authorize a tribunal system for detainees.³⁵ The Court thus created opportunities for public discussion about just what powers the Congress should grant the President in the circumstances.

Importantly, in neither case did the Court give the federal government *carte blanche* to pursue its aims under a plenary power—which would have legitimized the government’s actions and possibly ended debate about their efficacy. And in neither case did the Court deny the government *all* authority in respect to enemy combatants—such a denial likely would have been met with profound resistance, and in that event we could imagine that the Congress and the President soon would have set to the task of devising ways to influence the Court’s future rulings, perhaps through alterations to the Justices’ terms of service or new jurisdictional limits on the Court. (As it happened, of course, the Congress tried to limit the Court’s habeas jurisdiction, but that effort, at least in respect to Hamdan’s case, came to naught.)³⁶ The Court instead allowed the government to proceed, conditionally, and in so doing it expressed respect for the basic expectations about the rule of law that the Constitution creates, and instructed the other departments of the federal government how to do the same.

34. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“[H]old[ing] that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the [charges against him] before a neutral decisionmaker.”).

35. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (“Congress ha[d] denied the President the legislative authority to create military commissions of the kind at issue here[,] [n]othing prevent[ed] the President from returning to Congress to seek the authority he believe[d] necessary.”).

36. *See id.* at 579-80 (plurality section) (concluding that Congress did not intend changes to habeas jurisdiction contained in the Detainee Treatment Act to apply retroactively to eliminate habeas jurisdiction in pending cases).

These victories may not seem like much, but they at least provide a base upon which lawyers may build to challenge other aspects of the war on terrorism. And so a President's penchant for acting unilaterally might be tested under *Hamdan* and that decision's constitutional limits on the scope of the executive's commander-in-chief power. And under *Hamdi*, even congressional approval would not permit the President to deny individuals within reach of the Court's jurisdiction any due process, no matter what they are alleged to have done. Together, then, *Hamdi* and *Hamdan* stand for the proposition that some level of accountability must be maintained (even when it is inconvenient) via the democratic process through which the President receives authority from Congress, and via the competing arguments about national security that will be revealed in the course of that process and in proceedings about specific individuals.

Boumediene is of a piece with *Hamdi* and *Hamdan* in the Court's reinforcement of separation of powers principles—in this case, through habeas corpus review. The *Boumediene* Court understood habeas review to be animated by an essential distrust of unchecked governmental power and the necessity, in a governmental system of shared power, “to call the jailer to account.”³⁷ Thus, allowing individuals deemed enemy combatants access to the privilege of habeas corpus review served to create opportunities to confirm that they were not arbitrarily detained—that the government had a basis for detaining these men.³⁸

Now, the kind of structural approach exemplified by *Hamdi*, *Hamdan*, and *Boumediene* is not the only way in which to address the problem of unchecked governmental action, and Professor Saito devotes some attention to alternative proposals.³⁹ For example, she criticizes the contention that greater congressional involvement would be sufficient to keep the executive in check. The structural argument I have set out here is subject to this legitimate criticism: there is no guarantee that legislative involvement will make a difference substantively; the members of Congress can be moved by the same passions that influence Presidents and judges, as the example of the Military Commissions Act, enacted in the wake of *Hamdan*, demonstrates.⁴⁰ Yet congressional involvement at least promises the possibility that, through engagement in the legislative process, with its investigations and hearings and debates, the results will be preferable to allowing the President sole control over national security

37. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008); *see also id.* at 2259 (referring to habeas review as “an indispensable mechanism for monitoring the separation of powers”).

38. *See id.* at 2266 (Habeas review entitles detainees “to a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of law.” (quotation omitted)).

39. *See SAITO, supra* note 6, at 198.

40. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(c)(2), 120 Stat. 2600, 2635.

decision-making—that the results will be more consistent with the demands of the individual rights’ protections guaranteed under both the Constitution and human rights law.

Other proposals suggest we acknowledge the inevitability of extraconstitutional practices and either formally or informally amend our understanding of the Constitution’s limits to account for those practices.⁴¹ I share Professor Saito’s belief that these proposals are flawed. Among the problems, as she explains, are that acceptance of such proposals would legitimize in some circumstances measures that have been consistently viewed as illegal, like torture, and would require superior confidence that the executive branch will otherwise respect the rule of law. “The heart of such proposals,” Professor Saito writes, “is that they are advocating changing the Constitution to adapt to governmental action rather than requiring the government to comply with the Constitution and international law.”⁴² She makes an important point here, and the approach I have sketched above—relying upon the structural arguments the Supreme Court endorsed in *Hamdi*, *Hamdan*, and *Boumediene* to challenge national security policy decisions and the way such decisions are made, to the end of ensuring some governmental accountability—is premised upon the presumption that the Constitution itself provides the means by which we may press the government to respect the rule of law.⁴³

To illustrate further, consider another example involving the scope of the executive’s emergency power. As Professor Saito quite correctly states, the government’s resort to the plenary authority argument in matters of national security is not aberrational—it is the norm. One problem is that the government has long controlled the debate about what, exactly, constitutes an emergency—a problem complicated by the fact that there are bound to be instances, however rare, in which the use of extraordinary measures is necessary and constitutional. There is precedent in state constitutional law to suggest that judges, at least, have long been aware of this possibility. For instance, the Massachusetts Supreme Judicial Court acknowledged the potential for exigent circumstances to disrupt ordinary constitutional processes in an 1833 opinion addressing whether specific amendments could be made to the state constitution by a process other than that specified in the document itself.⁴⁴ Writing for the court, Chief Justice Lemuel Shaw stated that, in the absence of a “great emergency,” the state constitution provided for no method of amendment other than that spelled out in its provisions.⁴⁵ Shaw understood a “great emergency” to involve

41. See SAITO, *supra* note 6, at 198-99.

42. *Id.* at 199.

43. See *id.* at 199-200; see also *supra* text accompanying notes 35-39.

44. Opinion of the Justices of the Supreme Judicial Court, 60 Mass. 573, 573 (1883).

45. *Id.* at 574.

circumstances so extraordinary as to require consideration of “the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded”⁴⁶

Given the possibility of genuine emergencies, what we must do is to carefully define those circumstances so that the government may not circumvent constitutional constraints whenever it claims an emergency is upon us. Victor Hansen and I have proposed using the understanding of exigent circumstances developed by the courts in the Fourth Amendment context to provide an appropriate limitation on governmental power.⁴⁷ We begin by acknowledging that there may be exceptional situations in which the federal government, acting through the office of the President, must act to protect the nation and its citizens, and that such action when necessary should be considered constitutional. The rule of law, however, does not tolerate an expansive understanding of this emergency authority and by using an exigent circumstances framework to test the validity of government action, the courts—and, more importantly, Congress and the citizenry—will have an objective standard against which to assess governmental claims of emergency and thereby ensure some accountability.

One factor in an exigent circumstances analysis is whether a delay would compromise national security or risk civilian lives. For instance, it is possible that, in the initial days and weeks after September 11, while the government was trying to determine the precise nature and scope of the terrorist threat, a delay created by engaging the democratic process could have been costly and various unilateral actions by the President could have been warranted. But other factors feature in the exigent circumstances analysis, including some inquiry into whether less intrusive means might accomplish the same goals, and whether the scope and duration of the governmental action relate to the exigency that called it forth. By these measures, actions like the indefinite detention of enemy combatants plainly exceeded the limits of any reasonable conception of the President’s legitimate emergency authority, as there was no threat of immediate harm from individuals who had been incapacitated at Guantánamo. There were no exigent circumstances sufficient to require the executive to act unilaterally to deny these individuals due process or a hearing of some kind, much less to detain them indefinitely.

Because every case will not be litigated, this approach, too, depends to a large extent upon Congress to assess the propriety of executive action and, in the event a court has concluded that the President overstepped his limits, to authorize or condemn future executive action. As Professor Saito

46. *Id.*

47. What follows is drawn from VICTOR HANSEN & LAWRENCE FRIEDMAN, *THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR* 21-46 (2009).

correctly notes, Congress has not proved a stalwart defender of individual and human rights. But, by forcing a President to justify his actions and if necessary seek congressional authorization, we have slowed the executive's ability to employ the plenary power at will, as well as called attention to the possibility that the President acted so as to undermine or violate settled constitutional and human rights, for which he should be held to account.⁴⁸

Again, this approach may not satisfy Professor Saito, but it is certainly better—for the individuals who may be subject to the governmental action, and for the proper functioning of our constitutional democracy—than alternatives like simplistic deference to executive claims of emergency, as in *Korematsu*. In that case, after all, no true exigent circumstances existed to justify the detention of American citizens: the government had no evidence of actual or potential wrongdoing on the part of the citizens it moved into internment camps.⁴⁹ An exigent circumstances analysis would require at a minimum that, when the government in fact cries emergency, it be put to its proof in some public forum, to demonstrate a basis for its action that may be objectively evaluated. Surely this is not too much to expect of a governmental system premised upon the rule of law.

CONCLUSION

In *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State*, Professor Saito has written a comprehensive brief on the dangers posed by unchecked governmental power. The American people will eventually have to reckon with the federal government's callous use of the plenary power, its past and current sins. When that reckoning will come is difficult to say. If the student in my constitutional law course who wrote me arguing for more, not less, judicial and public deference to the President is any guide, the time will not be soon. She and her like-minded classmates are still gripped by fear, and there is no doubting that, at this writing—almost eight years after September 11—they are not the only ones. The unfortunate fact is that fear leads people to neglect the values that respect for the rule of law supports, even when history shows they should know better.

48. It is also worth noting that the Bush administration fought legislative involvement at every turn. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 124-25 (2007). This suggests that, even in the midst of the war on terrorism, Congress should not be counted on to give the President the authority he desires.

49. See SAITO, *supra* note 6, at 70-71.