

## **President Trump, White Supremacy, and the Rule of Law (Draft)**

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After last year's presidential election, the podcast Amicus streamed a discussion about whether *Korematsu v. United States* was still good law. In *Korematsu*, the Supreme Court deemed constitutional the internment of people of Japanese descent during World War II, even if they were American citizens. The case has never been expressly overruled. This question arose because during the campaign, then-candidate Donald Trump intimated that, if elected, he would create some kind of Muslim registry. (Whether that registry would be for people immigrating to the U.S. or for any Muslim in the country was never made clear.)

Neal Katyal, a former Acting Solicitor General for the U.S. and law professor, concluded that it was no longer good law with these words:

If [Trump] brings this issue to the courts, he will lose and it's not going to take very much for him to lose. I mean, these are so fundamentally un-American proposals, they are so deeply in tension with the text and structure and the rights guaranteed by our Constitution, that even if President Trump is able to stack all nine seats on the Supreme Court with his appointees, which, obviously, it would be difficult to imagine, but even if were he able to do that, I cannot imagine any nine justices upholding the types of proposals that the Trump advisors were calling for last week.

I was alone in my home while listening to the podcast and I said, out loud, "Are you kidding me? Does this man really believe this?" As far as I was concerned, the mere fact that the country was having this conversation suggests that Katyal, and all those who say they believe in the rule of law, should think about what that means in this brave new world. The proposal that he deemed un-American was promulgated by the man who is now slated to be the American President.

Those of us who care deeply about the well-being and fair treatment of people of color in this country are right to be apprehensive about what the election of Donald Trump means for their – for our – fate. I believe that Donald Trump's presidency will reinforce white supremacy through its interpretation and enforcement of the law.

When I refer to white supremacy, I mean a system of cultural and legal norms that sustains and justifies the exploitation and oppression of people of color. In that context, the rule of American law's embrace of white supremacy is nothing new but it is not that old either. *Bush v. Gore* and *Shelby County v. Holder* might both be considered exercises in using law to help prop up white supremacy. One used the rule of law to discount the votes of people of color during an election and the other failed to use the rule of law to protect the processes that provide access to the ballot.

I foresee many more profound and explicit examples of the law being used to support white supremacy in the next years and, perhaps, decades, not only through judicial interpretation, but also through enforcement choices. The clearest example of

this is the nomination of Jeff Sessions to be the Attorney General of the United States. Sessions not only finds the pursuit of civil rights by lawyers un-American, but as U.S. Attorney sought not to protect the voting rights of people of color, but to prosecute those who wanted to register people to vote.

But perhaps most important, and most frightening, is Trump's casual disregard of legal norms and his promotion of illegality. He has breezily discounted concerns about his conflicts of interest and those of his cabinet nominees. While campaigning, he "joked" that his supporters would love him even if he committed murder. He has insinuated that violence against political dissidents and protesters is acceptable. And he has done these things while simultaneously inviting into his inner circle some people who are at best foes of racial diversity and at worst promoters of ideas of white racial superiority.

To the degree that America works, it works because of our national belief in the rule of law. People of color in the U.S. have, from the beginning, sought to use law to achieve civil, educational, and economic rights. If there is no shared national belief in the rule of law, it does not mean that attempts to achieve justice will end. It may just mean that many Americans, and particularly those on the margins, may seek their justice by any means necessary.