

The Rule of Fear

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Another Lesson From World War II Internments

By DAVID J. GARROW

IN 1942, Gordon Hirabayashi was imprisoned for violating a military curfew that applied only to Japanese-Americans, a preliminary step in the government's forcible relocation of "all persons of Japanese ancestry" from the West Coast to remote detention camps. When that began, Fred Korematsu, another Japanese-American, evaded detention, for which he was also convicted.

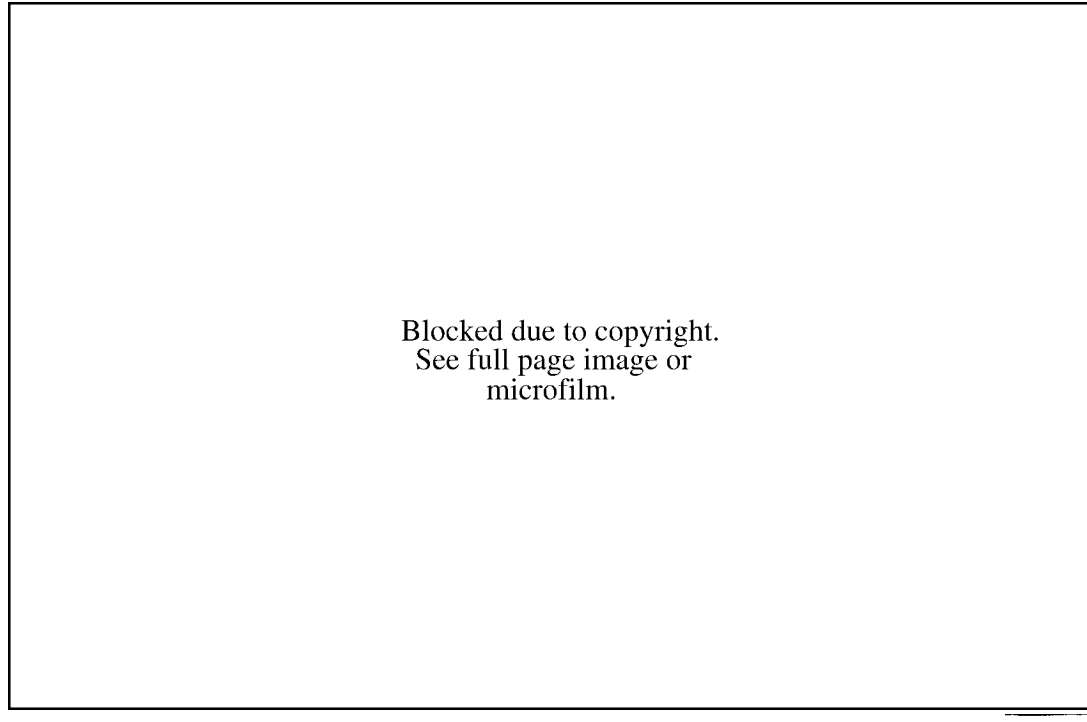
In the mid-1980's, amid a national wave of regret for the wartime discrimination, federal courts erased both men's convictions. Congress has apologized to Japanese-Americans, and reparations have been paid.

The historical lesson of these two cases appears simple: government crackdowns based solely upon race or ethnicity are wrong. But while the Korematsu and Hirabayashi decisions are often cited as infamous examples of the legal vulnerability of ethnic groups, their broader lesson is the judiciary's frailty in the face of pressing concerns about national security. That frailty may well resurface as, in the wake of the events of Sept. 11, America debates whether to significantly loosen rules for electronic surveillance and dramatically truncate judicial protections for resident aliens.

Some passages from the Supreme Court's two opinions read as if they could apply today. The Court unanimously affirmed Mr. Hirabayashi's conviction on the basis that "residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."

Even the Court's more liberal members agreed. Justice William O. Douglas said that "the wisdom or expediency of the decision which was made is not for us to review." Justice Frank Murphy merely registered reluctance: "Few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by reasonable men," he warned.

The Supreme Court likewise affirmed the conviction of Mr. Korematsu, but in his case the justices fractured six to three. Justice Hugo Black, celebrated as a liberal by many



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Rasmieh Abed, a Palestinian-American, at a candlelight vigil in Brooklyn last Sunday sponsored by Arab-Americans.

scholars, declared on behalf of the majority that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." Agreeing with Justice Black, Justice Felix Frankfurter emphasized that "action is not to be stigmatized as lawless because like action in times of peace would be lawless."

However, one of the three dissenters, Justice Robert H. Jackson, perhaps the best prose stylist ever to sit on the high court, argued persuasively that the harm done by the majority would reach far beyond race: "A military order, however unconstitutional, is not apt to last longer than the military

emergency," he wrote. "But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated" that rationalizing principle. And that "principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

And Hirabayashi and Korematsu both demonstrated, Jackson warned, that the federal judiciary is unlikely ever to constrain executive branch excess: "If the people ever let command of the war power fall into irresponsible and unscrupulous hands,

the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."

Three decades later, Jackson's argument was validated by the posthumous confession of the man who, as governor of California, had been, in the words of one sympathetic biographer, "the most visible and effective" force behind the internment: the legendary Chief Justice Earl Warren.

Celebrated like Douglas and Black as a liberal, Chief Justice Warren professed him-

self "conscience-stricken" over the role he had played in the 1940's.

"It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state," he wrote in his memoirs. "It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts."

BUT the decisions are far from universally regretted. Earl Warren's guilt was not shared by Hugo Black, who even in the late 1960's embraced his opinion in the Korematsu case, declaring "I would do precisely the same thing today." And even in the year 2001 as prominent a judicial voice as Richard A. Posner, the circuit court judge, confesses that "I actually think Korematsu was correctly decided."

Chief Justice William H. Rehnquist, writing three years ago in his book "All the Laws but One: Civil Liberties in Wartime," said that "in time of war the government's authority to restrict civil liberty is greater than in peacetime," and that "distinctions that might not be permissible between classes of citizens must be viewed otherwise when drawn between classes of aliens."

Indeed, Chief Justice Rehnquist volunteered that for cases like Korematsu "There is no reason to think that future Justices of the Supreme Court will decide questions differently from their predecessors."

However, writing in 1984 in the reopened case that erased Mr. Korematsu's conviction, District Judge Marilyn Hall Patel agreed with Justice Jackson and Chief Justice Warren that the legal legacy of the Japanese internment reached beyond racism and illuminated a greater danger:

"It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."

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