THE WEINTRAUB LECTURE: JUDICIAL DECISION MAKING AND THE EXTERNAL ENVIRONMENT

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Thank you all for your support today as I deliver the sixteenth annual Weintraub Lecture. As most of you know, Chief Justice Weintraub served this state as Chief Justice of the New Jersey Supreme Court from 1957 through 1973. He rendered a great service to our state with his diligence, intellect, and ardor for the law. I attempted to learn some measure of the man in my research for this lecture. An editorial in the New Jersey Law Journal following his retirement from the bench perhaps puts it best. In describing Chief Justice Weintraub, it stated:

> Much, much more can be said about our Chief Justice and the tremendous impact he has had on our society and ourselves. Perhaps, however, it can all be summed up by saying that he served as great men have served throughout history, as the standard, as the model lawyer, jurist, and human being, to which we could all aspire.[1]

It is indeed an honor to deliver the lecture that bears his name.

My topic for this evening's lecture is "Judicial Decision Making and the External Environment." As a federal district court judge, the cases and disputes that come before my colleagues and I, generally speaking, focus almost exclusively on the litigants before us. Rarely do we have the opportunity to opine and rule on matters of far-reaching effect. The Supreme Court of the United States, on the other hand, has the opportunity to consider and address matters that potentially affect our entire society. While rulings in various substantive areas may interest us as attorneys or observers of the development of law, it is the Court's rulings regarding social policy that society, as a whole, takes notice of.

In an article that I am in the process of writing, I address three substantive areas: the Japanese internment cases,[2] the *Brown* case,[3]

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1. *Joseph Weintraub, C.J.*, N.J.L.J., Oct. 11, 1973, at 4.

2. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States; 320 U.S. 81 (1943).

3. Brown v. Board of Educ., 349 U.S. 294 (1955).

and several gender/equal protection cases.[4] This evening, my focus is on the Japanese internment.

For me, the external environment consists of the political, social, intellectual, and other forces that influence and affect our judiciary and its decision making. Although the public may believe that judges make their rulings in a vacuum, we clearly do not. Not only does each member of the judiciary come to the bench with a different set of experiences, but our environment affects each judge differently as well. Chief Justice Rehnquist opined on this subject during a recent speech:

> The judges of any court of last resort, such as the Supreme Court of the United States, work in an insulated atmosphere in their courthouse where they sit on the bench hearing oral arguments or sit in their chambers writing opinions. But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. Somewhere "out there"—beyond the walls of the courthouse—run currents and tides of public opinion which lap at the courthouse door. . . . This is not a case of judges "knuckling under" to public opinion, and cravenly abandoning their oaths of office. Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.[5]

Of course, public opinion, as such, is too narrow a term to be applicable to Chief Justice Rehnquist's statement. I believe he intended, as do I, a definition encompassing those external matters that overtly as well as subliminally affect our decision making.

The Japanese internment cases present a prime example of how the external environment can affect decision making. Almost everyone in this room is familiar with the Japanese internment either in a historical or a legal context. Historically, the Japanese internment—which began within months after Pearl Harbor—is a blemish on the bright canvas of freedom that is the United States. Legally, the Supreme Court ruled on the internment cases in 1943 and 1944. While *Korematsu* is the most famous of these cases, in my view *Hirabayashi* is of major importance as well.

Most commentators focus their ire at the racism inherent at the core of these decisions. The blatant racial classifications utilized by

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4. *See* Craig v. Boren, 429 U.S. 190 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Roe v. Wade, 410 U.S. 113 (1973); Reed v. Reed, 404 U.S. 71 (1971).

5. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

these cases seem antithetical to our constitution and its basic tenets. To dismiss these opinions as merely racist, however, is too simplistic an analysis. Although there is much in each of these opinions to support that charge, the overt rationale that the Court professed was the exercise of the war powers.[6] Generally speaking, the internment cases noted with the imprimatur of the President and Congress that the military's power to address the exigencies of war should be unfettered. The Court therefore concluded that it should neither second guess nor review the military's conclusions.

Before honing in on why this approach fails, let me first set the stage with some key facts to place these cases in their proper historical context. The primary fact in this analysis is that the internment apparatus was set in place less than ninety days after the attack on Pearl Harbor. Within two weeks after Pearl Harbor, President Roosevelt appointed Associate Justice Owen Roberts of the Supreme Court as chairman of a five person panel to investigate the bombing of United States forces at Pearl Harbor. Roberts took a leave of absence from the Supreme Court to perform this task.

On January 23, 1942, the committee issued its report after more than twenty days of hearings in Hawaii and Washington.[7] The committee concluded that the two commanding officers of the Navy and Army at Pearl Harbor were guilty of dereliction of duty.[8] Before the attack there had been warnings from Washington, as well as other intelligence gathered, that advised the military to be prepared for exactly such an attack. Even worse, a new tracking system used by the military had picked up the incoming Japanese planes before the attack but nothing had been done despite the detection.

The report also claimed that Japanese spies, many of whom were consular agents, had provided intelligence about America's naval strength at Pearl Harbor.[9] The report went on to conclude that other Japanese persons, having no open relations with the Japanese foreign service, assisted in this effort. In other words, civilians were supposedly involved in the espionage effort. This allegation—which had neither prior nor subsequent substantiation—fueled the fire of race hate beyond repair. Politicians and militarists on the West coast had already begun to advocate the idea of the internment of Japanese Americans.

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6. *See Korematsu*, 323 U.S. at 217-18; *see also* U.S. CONST. art. II, § 2 (reflecting the President's war powers); U.S. CONST. art. I, § 8 (reflecting Congress' war powers).

7. *See* S. REP. NO. 77-159, at 1 (1942).

8. *See id.* at 20.

9. *See id.* at 12.

Several facts that were part of the public record preceding the internment should be mentioned. The governors of California, Oregon, and Washington state each supported the evacuation of all Japanese Americans.[10] The rationale given was fear of imminent attack, sabotage, and espionage. Earl Warren, future governor and Supreme Court Chief Justice, and then attorney general of California, testified in Washington and lobbied hard for internment.[11] In his testimony he noted: "We don't propose to have the Japs back in California during this war if there is any lawful means of preventing it."[12] Warren told a statewide meeting of all district attorneys in California, prior to the internment, that they should enforce the state's alien land law, a 1924 state law preventing resident aliens—Japanese in particular—from owning land, and adopt a resolution calling for evacuation of all Japanese Americans and alien Japanese.[13] To support the need for evacuation, Warren noted the predominant number and location of Japanese owned farms near government military bases outside of the normal farm areas in California. He concluded that this was clear proof of a covert Japanese operation to place sympathizers near government installations. Of course, it never occurred to anyone that a combination of bias, economics, and life's realities made this type of area the only one available to Japanese Americans at that time. Further, nationally syndicated columnists Walter Lippman and Damon Runyon stoked the fires of hate with columns that referred to the fifth column menace in Europe and reiterated the baseless allegations of civilian Japanese Americans' purported involvement in sabotage and espionage.[14] General John L. Dewitt,[15] who played the most prominent role of any military officer in the process of evacuation, relocation and internment, said to a congressional committee that "a Jap's a Jap; it makes no difference whether he's an American citizen or not. There is no way to determine his loyalty."[16] DeWitt played a prominent role in the military's representations to the government and the Court regarding the necessity for evacuation and internment. Against this backdrop, President

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10. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 112-23 (1997).

11. *See* ROGER NEWMAN, HUGO BLACK: A BIOGRAPHY 315 (1994).

12. CRAY, *supra* note 10, at 119.

13. *See* CRAY, *supra* note 10, at 119.

14. *See* Walter Lippman, *Today and Tomorrow-The Fifth Column on the Coast*, WASH. POST, Feb. 12, 1942; *see also* CRAY, *supra* note 10, at 117; PETER IRONS, JUSTICE AT WAR 60 (1983).

15. General DeWitt was the military area commander of the Western Defense Command.

16. NEWMAN, *supra* note 11, at 313.

Roosevelt jumped into action and signed two of what would become many critical executive orders in February 1942 and continuing into the summer of 1942.

The two critical executive orders were 9066 and 9102. First, 9066 empowered the military to designate certain areas as military areas which required protection, and to exclude people who might do harm to those designated areas.[17] The second executive order, 9102, established the War Relocation Authority, which empowered the military commander to evacuate and relocate persons—and dispose of their property—as he determined.[18] Within three and one half months of Pearl Harbor, Japanese Americans went from citizens of a great land to enemies of the state. The executive orders resulted in Japanese American citizens and alien Japanese being subject at first to curfews, and then to relocation to assembly centers, and finally internment camps. The loss of property, business, and way of life were the tangible effects of this policy. The injustice was made even more manifest by President Roosevelt's admission that the camps were essentially concentration camps.

The first case related to the internment that the Supreme Court addressed was *Hirabayashi*. The appellant, Gordon Kiyashi Hirabayashi, was in his senior year at the University of Washington. He was a nisei, i.e., an American citizen of Japanese ancestry. Hirabayashi was a pacifist and a Quaker. He felt the evacuation order violated his rights and he essentially volunteered to be a test case when he and his lawyer went to the local FBI office to surrender. At that time he delivered a four page letter of protest that stated in part: "Hope for the future is exterminated. Human personalities are poisoned."[19] He also had in his possession a diary which reflected his repeated curfew violations. The government used the diary to indict Hirabayashi for curfew violations as well as not reporting to the evacuation center. This fortuitous event would have a profound effect on the Supreme Court's ultimate analysis.

The federal government tried Hirabayashi for his refusal to comply with the evacuation order requiring him to report to an assembly center—a precursor to relocation and internment—and for his curfew violations. After a federal trial and conviction he received two concurrent three month terms on each offense. On appeal, Hirabayashi claimed that the military had exceeded its constitutional authority and deprived him of his rights as a citizen.

Chief Justice Stone took the opinion in the case. Stone intended

17. *See* Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).
18. *See* Exec. Order No. 9102, 3 C.F.R. 1123 (1938-1943).
19. *See* IRONS, *supra* note 14, at 88.

from the beginning to rule on the narrowest ground possible—the curfew. The opinion itself reviewed the executive orders that President Roosevelt had issued empowering the military to declare military zones and establish the structure for curfew, evacuation, relocation, and internment. Congress, in its act of March 21, 1942, codified and approved these executive orders. The curfew order issued by General DeWitt applied to all alien Japanese, alien Germans, alien Italians, and all persons of Japanese ancestry (including over 70,000 Japanese American citizens). The order established a curfew up and down the West coast from 8:00 PM to 6:00 AM.

Hirabayashi argued that Congress unconstitutionally delegated its legislative power to the military commander resulting in the curfew, and that the regulation violated the Fifth Amendment ban on discriminating between persons of Japanese ancestry and those of other racial or ethnic groups. Stone quickly concluded that since the power to wage war is constitutionally based, the actions of the President and Congress were within constitutional bounds. Thus, the military could exercise its power to protect vital national defense interests from sabotage and espionage.[20]

Stone specifically refused to "sit in review of the wisdom of [the military's] action or substitute [the Court's] judgment for theirs."[21] Although Stone professed to look at all the facts and circumstances and determine whether there was a substantial basis for the conclusion that the curfew was a protective measure necessary to meet the threat of sabotage and espionage he never sought to probe or test the veracity of General DeWitt's conclusions. Instead, Stone concluded that espionage by persons supporting the Japanese government helped in the attack on Pearl Harbor and that large numbers of Japanese were psychologically attached to the enemy. Stone played right into the racial stereotypes of the time, noting in the opinion:

> There is support for the view that social, economic, and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan.[22]

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20. *See Hirabayashi*, 320 U.S. at 93.
21. *Id.*
22. *Id.* at 96-97.

Chief Justice Stone also noted that federal legislation had denied Japanese citizenship by naturalization; the Immigration Act of '24 precluded Japanese from immigrating, and California's state laws prevented alien Japanese from owning land.[23] All of these laws supposedly contributed to this alleged solidarity.

Perhaps the most difficult reasoning to adopt was Stone's notion that because prejudice, through law and social custom, ostracized Japanese Americans, this source of isolation and unification could serve as a rationale for loyalty to Japan and disloyalty to the United States. It was these unsubstantiated conclusions which gave effect to the notion that judging loyalty was impossible.

Justice Douglas initially balked at Stone's draft opinion. Having grown up in the Pacific Northwest, he knew Stone's stereotype of Japanese Americans bore no resemblance to reality. Additionally, the inability of those interned to prove their loyalty and escape internment disturbed him. Nevertheless, Douglas ultimately joined in the opinion.

The criticism of *Hirabayashi* is several fold. First, Stone noted that the facts presented allowed reasonable inferences to be drawn that the curfew was necessary to avert the danger of espionage and sabotage. Stone merely accepted the military's conclusions. Although the military foresaw myriad instances of sabotage and espionage, none had occurred by May 1943 when the cases were argued despite the fact that interment had not been fully achieved until the middle of 1942. If Japanese Americans had been inclined to participate in such acts of espionage or sabotage, it would have occurred by then.

Second, although focusing the Court's ruling on the narrowest questions follows the strictures of judicial restraint, given the extraordinary circumstances—a constitutional question of first impression—skirting the evacuation issue seems unconscionable. Third, Stone accepted the race stereotypes about Japanese Americans at face value and, as such, accepted the notion that determining loyalty was not only impracticable but a foregone conclusion given the race prejudice of the majority of Americans. He propounded this notion despite the fact that a large number of the 112,000 Japanese Americans ultimately interned were either children or the elderly.

The irony of *Hirabayashi* is that Black, Douglas and Frankfurter—each staunch advocates of individual rights and civil liberties—threw their support behind Stone. *Hirabayashi* enjoyed a unanimous Court's ruling based in no small measure on Stone's persua-

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23. *See id.* at 97 n.4.

siveness and the narrow focus on the curfew. In *Korematsu*, however, Stone would barely hold together a majority.

Fred Korematsu, the appellant in *Korematsu*, presented a much more complicated story than Hirabayashi and he challenged the evacuation orders directly. An American citizen who worked as a welder from San Leandro, California, Korematsu refused to evacuate and report to an assembly center. Korematsu's plight was particularly poignant since he underwent plastic surgery to mask his identity so that he and his Italian fiance could travel back East without detection. The plan did not work and the FBI picked him up. He too was convicted of violating the evacuation order because of his refusal to report to an assembly center as a precursor to internment.

Ironically, Justice Black—the staunch supporter of civil liberties—took the opinion. He viewed the case as requiring the Court's imprimatur on the military's judgment because of the exigencies of war. Black's entire analysis reflected a deference to the military that belied the legal standard he had set out. Although he claimed that all legal restrictions that would curtail the civil rights of a single racial group are immediately suspect and, as such, require the most rigid scrutiny, he subjected the military's decision to no such scrutiny.

Generally speaking, Black's reasoning for endorsing the military's judgment and the exercise of the war powers focused on four points. First, the U.S. was at war with Japan. Second, the military feared invasion off the West coast and felt security measures—curfew and then internment—were justified. Third, the military had decided that the urgency of the situation demanded segregation of all Japanese Americans and Japanese aliens off the West coast. Fourth, Congress had determined that the military be so empowered.[24] There was no analysis of the veracity of the military necessity asserted. Although Black was emphatic that the scope of the opinion was limited to the military exclusion order and not relocation or detention, the criticism is no less compelling.

First, by December 18, 1944—the date of the decision—there still had not been any reported acts of sabotage or espionage by any Japanese Americans or Japanese aliens. Even the government in its brief could not provide any evidence of acts of sabotage or espionage after Pearl Harbor. This is particularly important because not all Japanese Americans were interned.[25] Second, the allegations of espionage and sabotage at Pearl Harbor reported in Justice Robert's re-

24. *See Korematsu*, 323 U.S. at 216-20.

25. Several thousand Japanese Americans and Japanese aliens who lived outside the military areas were never interned.

port had never been substantiated. The fear of invasion and attack on the West coast had never materialized nor was there ever any intelligence that any attack or invasion was ever afoot or planned. Third, the notion that the possible disloyalty of some Japanese Americans required the wholesale evacuation of all because of the military's inability to test loyalty proved to be an assertion without a basis. This is particularly true because many of those interned were either children or elderly citizens. The speciousness of this argument is even more evident based on the British government's loyalty tribunal which examined 74,000 German and Austrian aliens within six months after the outbreak of war. As a result, only 2,000 people whose loyalty to England remained in question were interned.[26]

Additionally, the military did hold loyalty investigations in much smaller numbers for alien Italians and alien Germans. Of course, the most persuasive Equal Protection argument that reliance on the war powers can not address is why Italian and German Americans were treated differently than Japanese Americans; especially after the formation of the Axis[27] powers against the Allies.[28]

Black's decision making in *Korematsu* was undoubtedly influenced by several factors outside the record. Black had served in the military and both of his sons were serving in World War II. Black served as President Roosevelt's emissary in win-the-war rallies and in 1942 went to Birmingham, Alabama—at Roosevelt's direction—to investigate production slow-downs that affected the war effort. Most important, General DeWitt was a family friend of Black's. Black's faith in DeWitt added to his belief that it should be the commander in the field that makes such decisions. More important, this relationship allowed Black, wrongly in my view, to rely on DeWitt's representations rather than critically analyze them.

The final report "Japanese Evacuation from the West Coast" was DeWitt's military basis for the curfew, exclusion, detention, and internment orders. Although completed and submitted to Congress in June of 1943, DeWitt had used much of the information for the initial support of the internment process. The report is filled with unsupported allegations, innuendo, and racial invectives. DeWitt referred to Japanese Americans as "subversive," as an "enemy race" whose "racial strains are undiluted," he further stated that every one of the 112,000 interned was potentially an enemy.[29] In Congressional testimony just prior to the submission of the report DeWitt stat-

26. *See Korematsu*, 323 U.S. at 242 n.16 (Murphy, J., dissenting).
27. Germany, Italy, and Japan.
28. The United States, Great Britain, France, and others.
29. *Korematsu*, 323 U.S at 236 (Murphy, J., dissenting).

ed: "I don't want any of them here. They are a dangerous element."[30]

Justice Murphy's dissent in *Korematsu* shook the very foundation of Black's decision and its blind allegiance to DeWitt's conclusions. Even Justice Roberts, the chair of the President's commission on Pearl Harbor, dissented in *Korematsu*. He objected to the wholesale imprisonment of citizens based solely on race without proof of disloyalty. He noted that no pronouncement of the commanding officer could, in his view, preclude judicial inquiry.

The ultimate sin of the decision is that Chief Justice Stone, because of his relationship with the administration, manipulated the release of the opinion until the day after it had been announced that total exclusion of Japanese Americans from the West coast would end on January 2, 1945. The inherent injustice of the Japanese internment is evident particularly by examining three sets of circumstances following the war. First, in 1948, Congress passed a law aimed at providing reparation to those interned after military evacuation.[31] The act authorized the attorney general to pay claims up to $2,500 upon a showing that the interned person suffered a loss of property that was the reasonable and natural consequence of evacuation. Second, Congress passed a law in 1988 entitled "Restitution for World War II Internment of Japanese Americans."[32] The purpose of the law was to acknowledge the injustice of the evacuation, relocation, and internment; apologize; finance an education fund to teach the public about the internment; and provide restitution in the amount of $20,000 to each internee or their descendant.[33] In my opinion, the real and unstated purpose was to assuage America's collective guilt about the internment. Indeed, Congress specifically acknowledged this fact within the bill itself with the following statement about the internment: "These actions were carried out without adequate security reasons and without any acts of espionage and sabotage documented by the Commission and were motivated largely by racial prejudice, war-time hysteria, and a failure of political leadership."[34]

Lastly, many people who participated in the internment process one way or another subsequently regretted their role and the havoc it wrought. For instance, Justice Douglas admitted in his memoirs that he, like others, had been too easily swayed by the military. Perhaps

30. *Id.* at 236 n.2 (Murphy, J., dissenting).
31. *See* H.R. Rep. No. 732 (1947), *reprinted in* 1948 U.S.C.C.S. 2297.
32. 50 U.S.C. app. § 1989 (1994).
33. *See id.*
34. § 1989a(a).

no one put their regret more eloquently than Earl Warren, the then-Attorney General of California and later Supreme Court Chief Justice and stalwart supporter of the rights of the individual and minorities. He said:

> I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had good motive in the security of our state. 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.[35]

Our constitution, if it is to have any meaning or effect, must function at its best in times of crisis. In those times, each branch of government must question, not defer; probe, not acquiesce; and proceed with caution, not alacrity. After Pearl Harbor, the confidence of the American people, and the military in particular, was severely shaken. The criticism of the Court's internment opinions is in its willingness to accept blindly the military's representations and conclusions without subjecting them to close scrutiny. Essentially, the Supreme Court abrogated its responsibility by condoning suspect racial classifications that resulted in the suspension of the constitution based on prejudice and hatred.

35. EARL WARREN, THE MEMOIRS OF EARL WARREN 149 (1977).