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Thinking Through Internment: 12/7 and 9/11

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WHAT 12/7 HAS TO TEACH ABOUT 9/11: RACE MATTERS

The terrorist attacks on 9-11 have frequently been analogized to Pearl Harbor. In many ways, the analogy is apt. Just as that attack launched us into World War II, the attacks on the World Trade Center and the Pentagon have launched us into a new kind of war against terrorism. But waging this sort of borderless war poses great risks, not only to the soldiers commanded to fight but also to core American values. In this way, Pearl Harbor raises other disturbing memories, those of the internment.

Like the recent explosions on the East Coast, the bombing of Pearl Harbor on 12-7 shattered our feeling of national security. How could this have happened? Ordinary individuals, prominent journalists, and government officials soon started pointing the finger at the Japanese in America. Viewing these "Orientals" as incurably foreign, speaking foreign languages, perpetuating foreign cultures, practicing foreign religions (Shinto, Buddhism), American society could not distinguish between the Empire of Japan and Americans of Japanese descent. As General DeWitt, in charge of the Western Defense Command, put it, "A Jap's a Jap." In his ominously titled "Final Recommendation," he explained: "[R]acial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship have become 'Americanized' the racial strains are undiluted."¹ As government reports rushed to the conclusion that Japanese Americans aided and abetted the attack, the wheels of the internment machinery began turning.

On February 19, 1942, President Franklin Roosevelt issued Executive Order 9066, which authorized military commanders in the Western U.S. to issue whatever orders were necessary for national security. Although prompted by DeWitt's plan for mass exclusion of Japanese Americans, the

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1. *Report of the Commission on Wartime Relocation and Internment of Civilians*, Personal Justice Denied 66 (CLPEF 1997) [hereinafter *Personal Justice Denied*] (quoting *DeWitt's Final Report*, 34).

Executive Order conveniently made no mention of race or ethnicity. In March, Congress criminalized disobedience of military regulations issued pursuant to the executive order. By December, an efficient, empowered military with the newly created War Relocation Authority had concentrated nearly all Japanese on the West Coast into ten desolate camps, surrounded by barbed wire and armed sentries. All this without the declaration of martial law. All this without individualized determinations of guilt or disloyalty.

The internment was challenged in courts of law, but the Supreme Court affirmed the constitutionality of the curfew and exclusion orders in the 1943 and 1944 cases of *Hirabayashi*,² *Yasui*,³ and *Korematsu*.⁴ While protesting loudly that racial prejudice should trigger the highest scrutiny, the Court nevertheless deferred to the government's vague claims of military necessity. Was the internment in fact justified as a matter of military necessity? A Congressionally appointed blue ribbon commission concluded in 1982 that the "broad historical causes which shaped these decisions were race prejudice, war hysteria, and a failure of political leadership,"⁵ not any genuine military necessity. In other words, it was a tragic wartime mistake. For that, all branches of the U.S. government have apologized.

What lessons then should we learn from this mistake? One lesson could be that this was just an accident, in a time of war, and that the Supreme Court erred because it was not given complete, accurate information. It turns out that the Executive Branch (Department of War and Department of Justice) suppressed key evidence from the Office of Naval Intelligence, Federal Bureau of Investigation, and Federal Communications Commission. This exculpatory evidence, in the form of smoking gun documents (burned reports, edited footnotes, and the like), was uncovered in the early 1980s⁶ and helped eventually reverse the criminal convictions of the World War II litigants.⁷ Applied to the present crisis, this lesson would counsel against law enforcement zeal that prevents a fair, balanced consideration of all the facts by our political leaders, the judiciary, and the American people.

But learning only this lesson would be to commit another error. We did not intern *en masse* German and Italian Americans, even though we were at war with those nations too. We did not intern *en masse* the huge numbers of Japanese in Hawaii (where Pearl Harbor is), for doing so would have meant shutting down that economy.⁸ We did not abstain from drafting Japanese Americans from the very internment camps that kept jailed their traumatized parents. The Supreme Court knew and understood

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

3. *Yasui v. United States*, 320 U.S. 115 (1943).

4. *Korematsu v. United States*, 323 U.S. 214 (1944).

5. See *Personal Justice Denied*, *supra* note 1, at 18.

6. See generally ERIC YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 286-318 (2001) (reproducing the original suppressed documents).

7. See, e.g., *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

8. We did, however, declare martial law in Hawaii.

this. Even without the suppressed evidence, Justice Murphy knew enough to dissent in *Korematsu* and lament that the majority had fallen into “the ugly abyss of racism.”⁹

The more important lesson, then, is not that wartime creates mistakes; instead, it is that wartime coupled with racism and intolerance creates particular types of mistakes. Specifically, we overestimate the threat posed by racial “others” (in WW II, Japanese Americans; today, Arab Americans, Muslims, Middle Easterners, immigrants, and anyone who looks like “them”). Simultaneously, we underestimate how our response to those threats burden those “others” (in WW II, shattering lives through the internment; today, intimidation and violence by individuals, and racial profiling by the state). Historian Roger Daniels put it more bluntly:

[T]he general tendency of educated Americans . . . to write the evacuation off as a “wartime mistake” is to obscure its true significance. Rather than a mistake . . . the legal atrocity which was committed against Japanese Americans was the logical outgrowth of over three centuries of American experience, an experience which taught Americans to regard the United States as a white man’s country. . . .¹⁰

THINKING THROUGH PROFILING

Most people believe that nothing like the internment could ever happen again. Surely, as yet, it seems politically implausible to intern tens of thousands of American citizens of Arab descent in desert camps, for years, without individual determinations of guilt. But what about less severe curtailments of civil liberties, both *de jure* and *de facto*? (Recall that the first step of the internment process was a curfew.) Specifically, consider the hard case of racial profiling. After 9-11 and our retaliation, should we authorize racial profiling of Arab Americans and those who look like them? More specifically, should we use race or ethnicity as a substantial factor to subject someone to a search or special surveillance? During World War II, Japanese Americans were subject to racial profiling that went way beyond search and surveillance, but the idea remains the same.

Utilitarian justifications are now given for what was once unsavory practice: the benefits (stopping another terrorist attack) are said to outweigh the costs (minor inconveniences for those profiled). If we suppose for the sake of argument that cost-benefit analysis is the right approach, how should Americans of good conscience who have learned the internment’s lessons think through the issue?

First, we should demand good data. For instance, what data might justify special searches of anyone who looks “Arab” at an airport? There are up to seven million Arab Americans in the United States, up to eight million Muslims, and if we add all those South Asians (1.6 million), Latinos, and African Americans who might “appear” Arab, and discount

9. *Korematsu*, 323 U.S. at 233.

10. ROGER DANIELS, *CONCENTRATION CAMPS, NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II* xvi (1981).

overlaps, we have a ball park figure of at least 10 million folks. How many of these are bona fide terrorists? Let's say a 100. That is a percentage of 0.001 percent. As rough comparison (admittedly, comparing apples to oranges), consider that in 1999 alone, roughly 350,000 men were arrested for violent crimes. There are about 135 million men alive in America. That is a percentage of 0.26 percent. Should we stop and search all men because they may act violently?

Obviously, these numbers are rough and speculative. Maybe there are 1,000, not 100, bona fide terrorists in our midst. Also, as we have painfully witnessed, one violent terrorist can do far more damage than one violent street criminal. Still, we should demand the best data available from our government. Even if the government can only provide guesses, forcing the government publicly to provide ball park figures is itself a check on reckless profiling.

Second, we should strive to parse the data correctly. Humans are notoriously bad with probabilities. For instance, the fact that 100 percent of the terrorists are Arab-looking men does not mean that 100 percent of Arab-looking men are terrorists. We also fixate on relative probabilities instead of absolute ones. So, even if the Arab-looking man seated to your left is 100 times more likely to be a terrorist than the Aryan-looking man seated to your right (relative), 100 times a number essentially zero is still near zero (absolute). This is an important reminder for our own conduct as private citizens; it is an even more important reminder for public policymakers.

Third, we should not overestimate the benefit. Is racial profiling really that effective? There will surely be "false negatives," those who turn out to be terrorists who do not fit the profile. Recall that many of the terrorists in the 9-11 attacks hardly behaved as fundamentalist Muslims: they drank alcohol and got lap dances. And shrewd terrorists will respond to Arab-based profiling by sending different types of bodies, which look Asian (consider Malaysia or the Philippines) or pass for White (consider Turkey). We may also waste valuable resources on "false positives," those who fit the profile but who are not terrorists. That is the lesson of scientist Wen Ho Lee, who was unfairly scape-goated as the "spy" who leaked nuclear secrets to China. That is also the lesson of the internment.

Moreover, if profiling is being justified in cold, logical cost-benefit terms, we should dispassionately consider how many statistical lives we will actually save. Could we save far more lives by mandating head-curtain airbags, reducing the national speed limit (thereby decreasing dependence on Middle Eastern oil), discouraging smoking, and encouraging exercise? To be sure, the possibility of death in a car accident feels different than death in a terrorist act. The fear of the former does not paralyze the nation; the fear of the latter does. But that difference does not automatically justify what might end up being a misallocation of life-saving resources.

Fourth, do not underestimate the harm. Just as it is easy to spend other people's money, it is easy to burden other people's liberties — especially racial and ethnic minorities. Just ask a young Black man

profiled as a rapist; a Black woman profiled as a drug mule; a Latino profiled as an illegal immigrant; a survivor of the Japanese American internment profiled as a traitor. The leap of empathy is difficult, so we must all try hard to imagine living the life of a “false positive,” stopped at airports, bus stops, stadiums, skyscrapers, and malls. Think about the time, the inconvenience, the insult to your dignity. Think about trying to calm your children bewildered by armed men pulling you aside. Now think about this happening every day of your life.

Fifth, understand context and consequence. If the profile is accurate, why is that so? Can we simply take the sociological facts “as they are” and ignore what context made them come to be, ignore how government action based on that profile might perpetuate an unjust past? Moreover, what are the long-term consequences of profiling? Will relegating Arab Americans into second-class status be strategically beneficial in our attempt to bolster human intelligence? Will it fuel propaganda that America represses Islam? Consider another lesson from the internment. In *Hirabayashi*, the Court noted that because American society had discriminated against the Japanese legally, politically, and economically, they had been kept from integrating into mainstream society:

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.¹¹

In a footnote, the Court continued by detailing federal law that denied Japanese naturalization and prevented their immigration; state law that prevented property ownership and intermarriage with Whites; and economic discrimination that limited professional and employment opportunities.¹²

But then, the Court went on to explain — in an entirely rational but still disturbing way — that therefore the Japanese posed a greater national security risk.¹³ This presents a horrible Catch-22. In essence, the Court said: because America has treated you badly, you have reason to be disloyal; therefore, America now has reason to treat you still more badly, by restricting your civil rights. The analogy post 9-11 is clear. If state actors racially profile and private actors racially harass, we might be

11. *Hirabayashi*, 320 U.S. at 96.

12. *Id.* at 97 n.4.

13. Specifically, the Court wrote:

The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack.

Id. at 98-99.

forcing another group of Americans into the same impossible situation. Tomorrow's burdens will be justified by the resentment caused by today's burdens—a vicious cycle.

Sixth and finally, we must consider morality. Only after taking these five steps can any profiling policy be justified “on the numbers.” But aren't moral principles embedded in our Constitution supposed to trump utilitarian calculations? Isn't this precisely what the Supreme Court claimed to be doing when it struck down useful affirmative action programs for violating the rights of innocent Whites? Is it now unfair or unpatriotic to hold the conservative Justice Antonin Scalia to his word: “In the eyes of government, we are just one race here. It is American.”¹⁴

Still, we should not be surprised if courts determine that national security in the face of terrorism is—in the lingo of constitutional law—a “compelling interest” and that crude forms of racial profiling, notwithstanding its over and under-inclusiveness, are “narrowly tailored” to furthering that interest. It would be foolish to think that the courts will necessarily save us from the excesses of the more political branches. That is another lesson of the internment. This is all the more reason to demand that our political leaders publicly make the cost-benefit and moral case in favor of racial profiling before they adopt any such practice.

* * *

We are living through times of terror. And liberty does not flourish in fear. Those tutored in realpolitik may dismiss this essay with shibboleths heard during all wars: we have a “fighting Constitution,” which is not a “suicide pact.” Indeed, in *Hirabayashi*, the Court exclaimed that “[t]he war power of the national government is ‘the power to wage war’ successfully.”¹⁵ A call to remember the lessons of the internment—that racism warps what we honestly believe to be rational calculations, especially in times of crisis—is not a call for weakness or suicide. True, heeding these lessons will not make us any more secure against terrorism. But we should remember, even in times of terror, that the Constitution in itself does not make our nation strong. It merely makes us worthy of our strength.

14. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

15. *Hirabayashi*, 320 U.S. at 93 (quoting Charles Evan Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238).