KOREMATSU: A MÉLANGE OF MILITARY IMPERATIVES

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A well-known professorial critic of the United States Supreme Court, Professor Bernard Schwartz, has labeled *Korematsu v. United States*[1] as sixth among the ten "worst" decisions of the Supreme Court.[2] At the same time, this critic has listed the author of the Court's majority opinion in *Korematsu*—Justice Hugo L. Black—as eighth among the ten "greatest" Supreme Court Justices of all time.[3]

But how could such a "great[]" Justice, writing on behalf of a majority of six Justices of the Supreme Court, produce such a "worst" opinion? Professor Schwartz' explanation of what went wrong was that Justice Black's opinion rested on a racist notion that, following the Pearl Harbor attack, "citizens of Japanese ancestry could rationally be set apart from those who had no particular associations with Japan"[4] since "in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those

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

2. BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW WITH 100 COURT AND JUDGE TRIVIA QUESTIONS 69 (1997). The late Professor Bernard Schwartz, a distinguished author of books about the Supreme Court as well as a judicial biography of Chief Justice Earl Warren, listed what he considered to be the ten worst Supreme Court opinions of all time: (1) Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); (2) Plessy v. Ferguson, 163 U.S. 537 (1896); (3) Lochner v. New York, 198 U.S. 45 (1905); (4) Hammer v. Dagenhart, 247 U.S. 251 (1918); (5) Adkins v. Children's Hospital, 261 U.S. 525 (1923); (6) Korematsu v. United States, 323 U.S. 214 (1944); (7) Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); (8) Buck v. Bell, 274 U.S. 200 (1927); (9) Carter v. Carter Coal Co., 298 U.S. 238 (1936); (10) Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869). SCHWARTZ, *supra*, at 69.

3. SCHWARTZ, *supra* note 2, at 4. Professor Schwartz' list of the ten greatest and most influential Supreme Court Justices (each followed by his years on the Court) is as follows: (1) Chief Justice John Marshall (1801–1835); (2) Justice Oliver Wendell Holmes (1902–1932); (3) Chief Justice Earl Warren (1953–1969); (4) Justice Joseph Story (1811–1845); (5) Justice William J. Brennan, Jr. (1956–1990); (6) Justice Louis D. Brandeis, (1916–1939); (7) Chief Justice Charles Evans Hughes (1910–1916, 1930–1941); (8) Justice Hugo Lafayette Black (1937–1971); (9) Justice Stephen J. Field (1863–1897); (10) Chief Justice Roger Brooke Taney (1836–1864). *Id.* According to Professor Schwartz, Justice Black's high rank is based on his forceful advocacy of "the absolutist view of the First Amendment; and the incorporation of the Bill of Rights in the due process clause of the Fourteenth Amendment," advocacy that has resulted in "today's judicial awareness of the Bill of Rights and the law's new-found sensitivity to liberty and equality." *Id.* at 17-19. *See also* Henry J. Abraham, *Hugo L. Black as a Great Justice*, *in* GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 249 (William D. Pederson & Norman W. Provizer eds., 1993).

4. SCHWARTZ, *supra* note 2, at 77.

of different ancestry."[5] While one need not disagree with that explanation, there are some other reasons for giving *Korematsu* such a "worst" rating, reasons that are obvious from the face of the majority opinion. And there are other matters that should have been but were not dealt with in Justice Black's opinion.

Three Justices dissented from this "worst" opinion: Justice Roberts, Justice Murphy, and Justice Jackson.[6] Each wrote a separate opinion. To evaluate the written opinion of any Justice, be it a majority, a concurring, or a dissenting opinion, the opinion itself is the best evidence of what went right or wrong. The only concern here is what, if anything, went wrong in Justice Black's majority opinion in the *Korematsu* case.

I

THE BIRTH OF NEW EQUAL PROTECTION STANDARDS

The second paragraph of Justice Black's opinion, without reference to the wartime exclusion from the West Coast of all citizens of Japanese ancestry at issue in this case, creates new standards of judicial review of governmental restrictions that limit or curtail the civil rights of a single racial group:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[7]

The first and perhaps the most potent point made in that passage is that the courts "must" subject such "immediately suspect" governmental restrictions to the "most rigid scrutiny." This equal protection standard of review has been followed in subsequent cases involving racially-based restrictions, though not in the context of military orders or imperatives in wartime.[8]

Justice Black then states that this "most rigid scrutiny" test may be satisfied only if there is a "[p]ressing public necessity," more frequently termed a "com-

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5. *Id.* Professor Schwartz' complete explanation of what went wrong in the *Korematsu* opinion appears in SCHWARTZ, *supra* note 2, at 76-78.

6. Justice Felix Frankfurter, while joining the opinion of the Court in *Korematsu*, also wrote a separate concurring opinion in that case. 323 U.S. at 224-25. That separate opinion is not of concern here. Nor does this article attempt to critique or evaluate the three dissenting opinions rendered in this case. None of the three dissents questioned Justice Black's use of "military imperative[s]" to describe wartime military orders, actions, or inactions. Nor did they comment on the new equal protection standards of judicial review contained in the second paragraph of Justice Black's opinion.

7. *Id.* at 216.

8. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 392 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967). *See also* Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause [outlawing the 'separate but equal' doctrine] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime [citing *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu*]) has proven automatically fatal.").

pelling governmental interest."[9] Yet even if this "[p]ressing public necessity" test or the "compelling governmental interest" test be satisfied, writes Justice Black, "racial antagonism *never* can"[10] justify curtailing "the civil rights of a single racial group." Such use of the word "never" must mean that no "[p]ressing public necessity" can ever justify imposing a curtailment of the civil rights of a single racial group if the real reason is "racial antagonism."

Moreover, in this critical passage, Justice Black does not say or suggest that wartime military orders, including those cast into statutory form, are immune from this "never can [justify]" proposition. While military orders dealing with strictly military matters are virtually immune from judicial review, a military order that affects or destroys the constitutional rights of American citizens has historically been judicially reviewed to determine if the military has overstepped the bounds of military necessity.[11]

Moreover, Justice Black surely must have known of the Court's decision long ago in *Ex parte Milligan*.[12] There the writ of habeas corpus had been suspended throughout the United States by the President despite the fact that federal courts remained open for such actions. In language highly adaptable to the curfew and exclusion orders that the military had ordered in the *Hirabayashi v. United States*[13] and *Korematsu* cases, the *Milligan* majority opinion held if the country is at war and "is subdivided into military departments for mere convenience,"[14] and the military commander of one of those departments has the authority, "if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, [to] substitute military force for and to the exclusion of the laws [and the Constitution] and [to] punish [or to exclude] all persons, as he thinks right and proper, without fixed or certain rules,"[15] then that constitutes a failure of republican government, and "there is an end of liberty regulated by law."[16] Thus, if the military overstepped its authority in the Japanese relocation cases, then the military orders became reviewable using such civilian standards as those set forth by Justice Black in the second paragraph of his *Korematsu* opinion.

These *Korematsu* standards are certainly more relevant and harder to satisfy than the more relaxed "rational basis" standard used by Chief Justice Stone in writing for the Court in the earlier *Hirabayashi* case.[17] But Justice Black never

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9. *E.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (principal opinion of Powell, J.).

10. *Korematsu*, 323 U.S. at 216 (emphasis added).

11. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

12. 71 U.S. (4 Wall.) 2 (1866).

13. 320 U.S. 81 (1943).

14. 71 U.S. (4 Wall.) at 124.

15. *Id.*

16. *Id. See also* Sterling v. Constantin, 287 U.S. 378, 401-03 (1932).

17. In *Hirabayashi*, 320 U.S. at 81, a seemingly unanimous Court held constitutional a wartime military order subjecting all persons of Japanese ancestry, living within the large military zones on the West Coast, to a curfew requirement. No such persons could leave their homes between the hours of 8:00 p.m. and 6:00 a.m. *Id.* at 83. The curfew, instituted during the war between the United States and

says a word about the rational basis test used in *Hirabayashi* in assessing the constitutionality of the racially-based military curfew order there at issue.

In *Korematsu*, Justice Black remains strangely enigmatic about the governing standard of review of military orders that impact the civil and constitutional rights of American citizens. He never says which standard of review a court should use in assessing the constitutionality of the military order removing all permanent residents and all American citizens of Japanese ancestry from the West Coast military zone. Should a court use the "most rigid scrutiny," or the "rational basis," or the verboten "never can" standard? Justice Black never says which standard should be used here. Or did he mean to imply that such wartime military orders must always be respected by the courts, even though the orders might directly impact only a racial portion of the general public and might reflect either public or governmental "racial antagonism"?

Or perhaps Justice Black only meant to establish peacetime standards of review respecting the newly emerging concepts of equal protection for use in the post-*Lochner*[18] period. Or perhaps he was trying to emulate the famous footnote four of *United States v. Carolene Products,*[19] in which Chief Justice Stone speculated about the narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution.[20] But if that were Justice Black's intent in the *Korematsu* opinion, he certainly failed to convey the thought that the newly stated standards of equal protection review were nothing more than possible standards to be litigated or used in future equal protection cases.[21]

Justice Black here appears to be saying that a court, in reviewing the constitutionality of a military order that directly impacts the constitutional rights of a given racial group of citizens, is limited to a determination of whether the "proper military authorities"[22] or Congress were sufficiently apprehensive that this racial group of citizens and immigrants posed "the gravest imminent danger

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Japan and under an Executive Order that authorized the taking of military measures to prevent espionage and sabotage, was held to be within the constitutional wartime powers of the United States. *See id.* at 104. It was enough, said Chief Justice Stone for the Court, that "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant." *Id.* at 102. In so applying the rational basis test, Chief Justice Stone stated that, while "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection [citing three cases, including *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)]," *id.* at 100, those considerations were not controlling here because of a wartime danger of "espionage and sabotage," *id.*, and because Congress and the President should not be "precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others," *id.* But the *Hirabayashi* Court never had before it any conclusive military or civilian evidence that American citizens of Japanese ancestry had engaged in nighttime espionage, sabotage, or other war-like activities.

18. Lochner v. New York, 198 U.S. 45 (1905).

19. 304 U.S. 144 (1938).

20. *Id.* at 153.

21. *But see supra* text accompanying note 7.

22. *Korematsu*, 323 U.S. at 218.

to the public safety."[23] Any court would consider it foolhardy to review such military judgments; military apprehensiveness is not ordinarily subject to judicial review.

II

THE CREATION OF "MILITARY IMPERATIVES"

When it comes to testing the constitutionality of the *Korematsu* exclusion order, Justice Black makes no effort to apply any of the standards of review that he had set forth in the opening passages of his *Korematsu* opinion. He does not say that the exclusion order must be subjected to "the most rigid scrutiny,"[24] or that the order itself was "immediately suspect"[25] because it curtailed "the civil rights of a single racial group."[26] Nor does he bother to check whether the military order was so filled with "racial antagonism"[27] that even pressing public or military necessity could not justify its validity.

Justice O'Connor, in writing for a later Court in *Adarand Constructors, Inc. v. Pena*,[28] examined Justice Black's *Korematsu* opinion:

> [I]n spite of the "most rigid scrutiny" standard [he] had just set forth, [Black's opinion] then inexplicably relied on "the principles we announced in the *Hirabayashi* case" to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," the racially discriminatory order [of exclusion] was nonetheless within the Federal Government's power.[29]

Korematsu himself had been convicted of violating an Act of March 21, 1942,[30] which provided criminal sanctions for failing to remain in or leave any military area as prescribed by the Secretary of War or any military commander.[31] In this case, Lieutenant General John L. DeWitt, the Commanding General of the Western Defense Command, on May 3, 1942, had ordered that all residents of Japanese ancestry leave Military Area No. 1 and report to an "assembly center."[32] Mr. Korematsu was never charged with any act of sabotage or espionage. His "crime" was a simple refusal to leave his home and report to a nearby assembly center.[33] Had he done so, he would then have been

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23. *Id.*
24. *Id.* at 216.
25. *Id.*
26. *Id.*
27. *Id.*
28. 515 U.S. 200 (1995).
29. *Id.* at 215 (citations omitted). Indeed, Justice Black's *Korematsu* opinion expressly states that Mr. Hirabayashi's curfew conviction and Mr. Korematsu's exclusion conviction "rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage." 323 U.S. at 217.
30. Ch. 191, 56 Stat. 173 (1942).
31. *Korematsu*, 323 U.S. at 216.
32. *Id.* at 220-21; *see id.* at 229 (Roberts, J., dissenting).
33. *Id.* at 230 (Roberts, J., dissenting).

deported to a "relocation center"[34] in an interior state or area, taking with him only a few personal items and leaving behind his home and his job and any other business or economic interests.[35] And such relocation was to occur without any opportunity to prove his loyalty to the United States.[36] As Justice Murphy said in his *Hirabayashi* concurrence, all this "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."[37]

Justice Black then rests the constitutionality of the exclusion order, as well as the curfew order in the earlier *Hirabayashi* case, on "military imperative[s]"[38] a term never before used by the Supreme Court in assessing the validity of a military order. Even the *Hirabayashi* opinion, so much relied upon by Justice Black, consistently referred to the curfew order there at issue as simply a "curfew order"[39] rather than a "military imperative." Nor has the Supreme Court subsequently ever used that imperative language. Perhaps Justice Black thought the term more impressive, more likely to inspire a judicial refusal to overturn an "imperative" rather than a simple "order."

But whatever the reason for this one-time adventure with imperativeness, Justice Black found that the imperatives in the *Korematsu* case were composed of at least three parts:

(1) Exclusion of all those of Japanese origin was deemed necessary by military authorities "because of the presence of an unascertained number of disloyal members of the group, most of whom we [the Court] have no doubt were loyal to this country."[40]

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34. *Id.* at 221.

35. Coauthors Jacobus tenBroek, Edward Barnhart, and Floyd Matson noted the following:

> The evacuees were allowed to take only a few specified personal belongings. For each member of the family, "bedding and linens (no mattresses) . . . toilet articles . . . extra clothing . . . sufficient knifes, forks, spoons, plates, bowls and cups . . . essential personal effects" were to be taken. Everything else had to be left behind. "No pets of any kind will be permitted. No personal items and no household goods will be shipped to the Assembly Center." Most evacuees had five days after official notice of their removal to sell, rent, loan, store, or give away their real property and possessions; many, of course, acted before the notice for their area was posted. Household goods and cars could be stored with the government, but only at the owner's risk and without insurance. . . .
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> [T]he evacuees suffered heavy financial losses. One analyst . . . estimated that "if one includes both income and property losses . . . the total would exceed $350,000,000."

JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 124-25 (4th prtg. 1970).

36. *See id.* at 216, 223.

37. 320 U.S. at 111.

38. *Korematsu*, 323 U.S. at 219.

39. *E.g.*, *Hirabayashi*, 320 U.S. at 85.

40. *Korematsu*, 323 U.S. at 218-19. The only "justification" for the Court's assumption that there were some possible disloyal members among those of Japanese ancestry was that, according to "investigations made subsequent to exclusion," *id.* at 219, "[a]pproximately five thousand American citizens of Japanese ancestry [out of a total 112,000 such citizens] refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan," *id.* But none of these so-called "disloyal members of the group," *id.* at 218, were ever found to have committed, nor were likely to commit, any act of espionage or sabotage.

(2) "It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained [in *Hirabayashi*] the validity of the curfew order as applying to the whole group."[41]

(3) "In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. . . . [E]xclusion of the whole group was for the same reason a military imperative."[42]

And so the critical "military imperative" in Justice Black's view was "the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal."[43] But where was there any military imperative or provision in the exclusion order that only the disloyal were targeted to be removed from the West Coast military area? If the objects of the exclusion order were all those of Japanese ancestry, there would be no need to distinguish between the loyal and the disloyal. Yet Justice Black accepted as the critical and decisive "military imperative" this rather irrelevant and lame excuse that the military had no time to determine who were the loyal and who were the disloyal American citizens of Japanese ancestry.[44] So the entire group of 112,000 citizens and residents of Japanese ancestry,[45] loyal or not, must be and were physically removed from the West Coast military areas. The military did find time, however, to determine the loyalty of some such citizens once they had all been removed to relocation centers.[46]

Justice Black then stated that this "military imperative" of no time to make immediate determinations of loyalty "answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin."[47] But how does that statement square with Justice Black's earlier statement that racial antagonism "never can"[48] justify any kind of curtailment of "the civil rights of a single racial group"?[49] Justice Black never examined the military order evicting Mr. Korematsu from his home, nor had Chief Justice

41. *Id.*

42. *Id.*

43. *Id.* In contrast, Justice Murphy's dissenting opinion in *Korematsu* noted that during World War II it took only six months for British "alien tribunals" to examine 74,000 German and Austrian resident aliens and to determine if they were "real enem[ies]" of the Allies or only "friendly enem[ies]." *Id.* at 242 n.16. Of those 74,000 aliens only 2,000 were interned. *Id.*

44. Justice Douglas authored the Court's opinion in *Ex parte Endo*, 323 U.S. 283 (1944), and Justice Roberts and Justice Murphy wrote concurring opinions. Justice Roberts pointed out that Miss Endo, now an admittedly loyal citizen, had been deprived of her due process liberty for a period of years by virtue of the original exclusion order. 323 U.S. at 310. "Under the Constitution," he wrote, "she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned" by the exclusion order that was approved in *Korematsu*. *Id.*

45. *See Korematsu*, 323 U.S. at 242.

46. *See Endo*, 323 U.S. at 283 (decided on the same day that the *Korematsu* decision was rendered).

47. *Korematsu*, 323 U.S. at 219.

48. *Id.* at 216.

49. *Id.*

Stone in writing the earlier *Hirabayashi* case ever examined the curfew order, to see if either or both of these orders were so filled with "racial antagonism" that even "[p]ressing public necessity"[50] could not save the orders. If "racial antagonism" did indeed permeate both orders, without any chance to prove the loyalty of those of Japanese ancestry, then those citizens and residents were truly denied their constitutional rights to live, work, and move about as they saw fit.

As if to make matters worse, Justice Black writes that the Court was "not unmindful of the hardships"[51] imposed by these "military imperative[s]"

> upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. . . . Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[52]

When there is no substantial proof or military fear of imminent danger of hostile invasion, or when only a racial portion of citizens are required to move out of harm's way, that power to protect should be commensurate with the constitutional rights of that racial portion.

So at last Justice Black gives us sort of a standard of review of wartime military orders that exclude "large groups of citizens from their homes."[53] If "our shores are threatened by hostile forces"[54] it becomes a "military imperative" to remove all American citizens and residents who are related by blood or ancestry to the invading forces because those American citizens and residents might engage in espionage and sabotage to help their ancestral invading forces. If the American military forces find it "impossible to bring about an immediate segregation of the disloyal from the loyal"[55] of these ancestrally ill-starred citizens, then "exclusion of the whole group was for the same reason a military imperative"[56] that the Court must respect.[57]

So much for judicial review of "military imperative[s]" that deprive American citizens of their constitutional right to live and move about as they see fit. Is such an imperative to be respected simply because the military has no time to determine the "loyal[ty]" or "disloyal[ty]" of a given racial ancestry group of citizens, thereby sending both the "loyal" and the "disloyal" to concentration camps?

And by what standards did the military intend to use to determine "loyal[ty]" and "disloyal[ty]"? Should substantial proof be required that either

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50. *Id.*
51. *Id.* at 219.
52. *Id.* at 219-20.
53. *Id.* at 220.
54. *Id.*
55. *Id.* at 219.
56. *Id.*
57. *See id.* at 223-24.

the "loyal" or the "disloyal" had committed, or were racially prone to commit, acts of sabotage or espionage?

Does all this mean, then, that a military inability or refusal to take the time to distinguish between the loyal and the disloyal of a group of citizens will always trump the claim that the exclusion was, in Justice Black's words, "in the nature of group punishment based on antagonism to those of Japanese origin"?[58] Not necessarily. If the Court were to find another "military imperative" acknowledging that "racial antagonism" permeated the military exclusion order in question, then perhaps Justice Black would agree that the exclusion order was unconstitutional. Indeed, there was just such a military imperative in this case, a military order through which its author openly proclaimed and indeed boasted that the exclusion of all citizens, the Nisei, and resident aliens, the Issei, of Japanese ancestry was designed not to promote any established military purpose but mainly to get rid of "those Japs." They had long been the recipients of racial hatred, both personally and as business competitors, in California and other west coast states. The exclusion orders were vigorously supported by those local "Jap haters."

That cruel phenomenon of racial antagonism that permeated the exclusion and curfew orders was plainly acknowledged in the final report[59] ("Final Report") produced by the military author and promoter of those orders—Lieutenant General John L. DeWitt, the Commanding General of the Western Defense Command. This Final Report, which had been reviewed and approved by General DeWitt's military superiors, and perhaps even by the President, was part of the record before the Court in the *Korematsu* case. It was cited and quoted extensively in Justice Murphy's dissenting opinion in *Korematsu*.[60] In addition, this Final Report enabled Justice Roberts to note in his *Korematsu* dissent that "[t]he obvious purpose of the [exclusion] orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution."[61]

General DeWitt's Final Report boastfully but honestly revealed the "racial antagonism" that had inspired and permeated the issuance and administration of the curfew and the exclusion orders.[62] The Report presented no evidence, other than rumors, why removal of these citizens of Japanese ancestry would help promote the military defense of the West Coast, while leaving all other citizens in an "exposed" position should the Japanese military seek to invade the West Coast. This Report, moreover, certainly qualifies as a "military imperative," one that the Court should have recognized and considered in this

58. *Id.*

59. U.S. WAR OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943). The Final Report was released publicly in 1944.

60. 323 U.S. at 233-42.

61. *Id.* at 229.

62. *See Korematsu*, 323 U.S. at 235-42 (Murphy, J., dissenting) (construing U.S. WAR OFFICE, FINAL REPORT, *supra* note 59).

case. It was this Report of the Commanding General that revealed the "racial antagonism" that thoroughly permeated the exclusion and eviction of those citizens and residents of Japanese ancestry.[63] To repeat, this detailed account in the Final Report of this long-standing "racial antagonism" toward American citizens of Japanese ancestry and toward resident Japanese who had never sought American citizenship formed the basis of Justice Murphy's dissent in the *Korematsu* case.[64] From that Report, Justice Murphy was able to detail the personal and economic hatred and racial antagonism that West Coast citizens had long shown toward Japanese ancestral residents, the same racial hatred and antagonism that somehow had inspired if not justified the military curfew and exclusion orders.[65]

Why Justice Black refused even to mention, let alone analyze, General DeWitt's Final Report, remains a mystery. That report was certainly a military report, even with its highly partisan and sometimes bizarre statements.[66] And it was also one of those "military imperative[s]" that Justice Black said should be considered and possibly respected, particularly in wartime. Had it been fairly analyzed, it would have forced the conclusion that "racial antagonism" so permeated the whole ejection and removal of citizens and residents of Japanese ancestry as to warrant imposing what Justice Black early in his opinion said: "[R]acial antagonism never can" justify curtailing "the civil rights of a single racial group." There never has been such a military admission of constitutional error.

Why Justice Black reduced the whole issue of racial antagonism to a mere claim, a claim made in the briefs and oral arguments before the Court, while failing to acknowledge even the existence of the Final Report of General DeWitt, will forever remain unknown. That failure will always serve to help render Black's *Korematsu* opinion one of the "worst" in history.[67]

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63. *Id.*

64. *Id.*

65. *Id.*

66. Professor Laurence H. Tribe has taken note of General DeWitt's "remarkable" argument in his Final Report "that the subversive threat posed by Americans of Japanese descent on the West Coast was confirmed by the sinister absence of any overtly subversive activities in that area after Pearl Harbor." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1466 n.7 (2d ed. 1988).

67. Of note are the observations of biographer Roger Newman:

> [T]he commander [DeWitt] was an old friend. Josephine [Black's first wife] renewed her Birmingham friendship with DeWitt's wife Martha in Hugo's first term in the Senate. The two couples saw each other socially on occasion. And not only had Hugo stayed at the Army War College, headed by DeWitt, before and after his nomination to the Court, but Hugo's messenger, Spencer Campbell, was now working with the DeWitts in California. Black's faith in DeWitt added to his belief that the commander in the field had the right and the power to make the decision who should remain in an area.

ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 314 (1994). *See also* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 175-76 (1996) ("The person in charge of West Coast military defense was General J. L. DeWitt, a friend of the Blacks for over a decade. . . . Black's opinion validated the actions of his friend, General DeWitt; Hugo evidently did not see the need to recuse himself from the case because of this friendship. None of the brethren knew about the relationship, except Douglas,

Justice Black never regretted his decision in *Korematsu*. He believed he did the right thing under the circumstances.[68]

III

THE BITTER AND APOLOGETIC AFTERMATH

Since Justice Black died in 1971, he never witnessed Congress' apology to the Japanese American community for these wartime decisions, including Supreme Court's *Korematsu* decision. In 1988, after prolonged investigation by a special congressional commission, Congress enacted into law the following Statement:

> The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.[69]

Provision was then made to pay each eligible citizen of Japanese ancestry the sum of $20,000.[70]

This was an historic instance which Congress used its legislative powers to "overrule" a judicial decision. It did so by expressing public displeasure with a specific ruling of the Supreme Court. It is the only known instance where Congress has apologized "on behalf of the Nation" for such a hurtful and ugly instance of "racial antagonism."[71] In addition, the Executive Department made a similar confession of error when, in 1998, President Clinton honored Mr. Korematsu with the Presidential Medal of Freedom, the country's highest civilian award.[72]

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who, with his wife, had visited the DeWitts, staying at their West Coast residence shortly before the war began.")

68. *See* NEWMAN, *supra* note 67, at 318-19. *See also* MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 71-72 (1986) ("He stoutly maintained that if the circumstances were the same now as they were then, he would do it the same way. . . . '[W]e were in a state of war with Japan . . . . There were fears that California would be infiltrated and taken over by the Japanese. Hysteria was everywhere. Some Japanese people had been attacked on the streets by fearful citizens. The Japanese were distinguishable by their features and were also in danger. Reports were coming in through the press and radio that Japanese planes had been sighted close to New York. Yes, given the circumstances, I would still write *Korematsu* the same way.' ")

69. 50 App. U.S.C. § 1989a (2000). It has never been repealed.

70. 50 App. U.S.C. § 1989b-4 (2000).

71. *Korematsu*, 323 U.S. at 216.

72. Statement by Press Secretary on Medal of Freedom Recipients (Jan. 15, 1998), *available at* http://www.clintonfoundation.org/legacy/011598-statement-by-press-secretary-on-medal-of-freedom-recipients.htm (last visited Mar. 30, 2005) (on file with Law & Contemporary Problems).

Further disrespect for Justice Black's *Korematsu* ruling came about in 1984 and 1987. In those years, lower federal courts, in *coram nobis* proceedings, vacated the convictions of both Mr. Korematsu[73] and Mr. Hirabayashi.[74] They did so on the grounds that the Government, knowing full well that there was no evidence that citizens of Japanese ancestry had committed any acts of espionage or sabotage, deliberately failed to bring such total lack of evidence to the attention of the Supreme Court.[75] Had the Court known of such lack of critical evidence, Justice Black's opinion in *Korematsu* might have been different.[76]

Moreover, many state officials, as well as individuals, who had helped sponsor or give support to the relocation program of citizens of Japanese ancestry, have come to admit their error in doing so. Prominent among those who confessed error was Earl Warren, then the attorney general of California and later Chief Justice of the United States.[77] In his memoirs, published in 1977, the Chief Justice admitted:

> 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. . . . I was conscience-stricken. 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. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security . . . .
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> . . . Our entire treatment of Japanese-American citizens during the war was regrettable . . . .[78]

One can only conclude, as did Professor Schwartz, that Justice Black's opinion in *Korematsu* still ranks as one of the "worst" opinions in the Court's history, despite the "great[ness]" of its author.[79] That "worst[ness]" is traceable in large part to the Court's studied refusal to address the constitutional implications of what one contemporary critic described as "[o]ur war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast," at treatment that "has been hasty, unnecessary and mistaken."[80] The course of action which America undertook was in no way required or justified by the circum-

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73. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

74. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). For the full story, see PETER IRONS, JUSTICE AT WAR (1993). *See also* Neil Gotanda, *The Story of* Korematsu*: The Japanese-American Cases*, *in* CONSTITUTIONAL LAW STORIES 249 (Michael C. Dorf ed., 2004).

75. *See* 828 F.2d at 604-08; 584 F. Supp. at 1419.

76. Procedural experts have found at least seven procedural and substance mistakes made by the Court in the *Hirabayashi* and *Korematsu* cases. *See* TENBROEK ET AL., *supra* note 35, at 333–34.

77. THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 144-50 (1977) (published three years after his death in 1974).

78. *Id.* at 149.

79. *See* SCHWARTZ, *supra* note 2, at 4, 69.

80. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). *See also* Eugene V. Rostow, *Our Worst Wartime Mistake*, 191 HARPER'S MAG. 193 (1945); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945). Nanette Dembitz was a niece of Justice Louis Dembitz Brandeis.

stances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.