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Symposium

NATIONAL SECURITY, NATIONAL ORIGIN, AND THE CONSTITUTION: 75 YEARS AFTER EXECUTIVE ORDER 9066

INTRODUCTION

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On February 19, 1942, just over two months after the attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066.¹ That order provided the legal authority for the internment of Japanese American residents of the West Coast during World War II.² Four cases involving these events reached the Supreme Court: Hirabayashi v. United States,³ Yasui v. United States,⁴ Korematsu v. United States,⁵ and Ex parte Endo.⁶ The Court did not question the legality of the executive order in any of those cases.⁷

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3. 320 U.S. 81 (1943).
5. 323 U.S. 214 (1944).
7. The Endo Court held that Executive Order 9066 and its implementing orders and legislation did not authorize the detention of a “concededly loyal” citizen of Japanese descent. Id. at 297. The Court upheld the government’s position in the other three cases. Gordon Hirabayashi and Minoru Yasui had been arrested for violating a military curfew in
But the treatment of Japanese Americans was controversial even at the time. Justice Black’s law clerk began his bench memo in Korematsu as follows: “This is a damned Fascist outrage.” And Professor Eugene Rostow of the Yale Law School published a withering contemporaneous critique of these decisions. More recently, the cases arising from Executive Order 9066—especially Korematsu—have fallen into extraordinary judicial and scholarly disrepute.

The tension between national security and civil liberties was not confined to World War II. We have seen similar issues throughout American history. For example, President Lincoln suspended habeas corpus during the Civil War, and federal authorities imposed restrictions on the press and brought critics and Confederate sympathizers before military commissions.


12. Neely, supra note 11, at 14–18, 26–29, 65–68, 104; Stone, supra note 11, at 82, 124–28. After the Civil War, the Supreme Court held that civilians could not be tried before military tribunals if the civil courts remained available. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). But Milligan had only limited impact in later years. Neely, supra note 11, at 178–84.
The federal government likewise showed little sympathy for opponents of American involvement in World War I. Rejecting an effort to prevent the mailing of a left-wing magazine, Learned Hand warned against “the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies,”13 but he was promptly reversed by a higher court.14 And the Supreme Court upheld convictions of war critics whether prominent or obscure. In Schenck v. United States,15 Justice Holmes explained: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and . . . no Court could regard them as protected by any constitutional right.”16 A week later, in Debs v. United States,17 Holmes wrote an even briefer opinion that gave short shrift to the First Amendment.18 To be sure, Justice Holmes soon came to take a more speech-protective view, starting with his dissent in Abrams v. United States.19 And the Court eventually recognized, in Dennis v. United States,20 that this view had essentially prevailed.21

Nevertheless, Dennis rejected a First Amendment defense to conspiracy charges against a dozen leaders of the Communist Party.22 And during the first decade of the Cold War, the Court generally deferred to the government in cases challenging aggressive loyalty-security programs.23 But beginning in 1957, the Court narrowly construed the statute under which the government prosecuted members of the Communist Party to require a showing that members knew of

13. Masses Publ’g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).
14. Masses Publ’g Co. v. Patten, 246 F. 24 (2d Cir. 1917).
16. Id. at 52.
17. 249 U.S. 211 (1919).
18. For detailed discussion of this case, see Melvin I. Urofsky, The Trial of Eugene V. Debs, 1918, in JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 97 (Paul Finkelman & Roberta Sue Alexander eds., 2012).
21. Id. at 507 (observing that “there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale”).
22. Id. at 517.
23. See Stone, supra note 11, at 411–13; see also Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (rejecting a federal employee’s due process challenge to her dismissal under a loyalty-security program), aff’d by an equally divided Court, 341 U.S. 918 (1951).
an organization’s advocacy of violent revolution and had the specific intent to promote that goal.24

During the Vietnam War, the Supreme Court upheld a statute prohibiting the destruction of draft cards in a case involving a young man who burned his draft card to protest the war.25 But the Court also ruled that the federal government could not enjoin the publication of the Pentagon Papers, a classified Defense Department study of U.S. involvement in Southeast Asia;26 that public school students had a First Amendment right to protest the war so long as their actions did not substantially disrupt the educational process;27 and that an opponent of the war could not be prosecuted merely for bringing a jacket emblazoned with “Fuck the Draft” into a courtroom.28

The attacks on September 11, 2001, followed by U.S. military intervention in both Afghanistan and Iraq, have raised additional concerns about the relationship between national security and civil liberties.29 Those events have generated widespread litigation and numerous judicial rulings.30 More recently, President Trump’s proposed ban on travel to this country from several predominantly Muslim nations as part of a policy designed to protect against further acts of terrorism has generated widespread controversy and litigation.31

In the seventy-fifth anniversary year of Executive Order 9066, the editors of the Case Western Reserve Law Review organized a symposium to explore the perennial tensions between national security and civil liberties. The symposium took place on November 17, 2017, and brought together speakers from several disciplines and a wide

29. The first Persian Gulf War did not last long enough to generate as much in the way of case law, at least at the federal level. But see State v. Lessin, 620 N.E.2d 72 (Ohio 1993) (overturning the conviction of a demonstrator who burned an American flag to protest the war).
range of viewpoints. This issue contains papers that were presented on that occasion.\textsuperscript{32}

Geoffrey Stone, a leading scholar of the Constitution and author of a panoramic chronicle of civil liberties and national security,\textsuperscript{33} provides a broad overview to open this symposium issue.\textsuperscript{34} He examines the background that led to the promulgation of Executive Order 9066, including the debate within the Roosevelt Administration over the wisdom and propriety of moving against Japanese Americans, followed by an account of \textit{Hirabayashi} and \textit{Korematsu}, focusing particularly on what we know about the Supreme Court’s internal consideration of those cases. He goes on to address the aftermath of the internment, from the ending of that program to the long process that culminated in belated compensation to internees.\textsuperscript{35} Finally, he comes full circle by noting that the federal courts eventually vacated the convictions of Gordon Hirabayashi and Fred Korematsu.\textsuperscript{36} But the story does not end there—Professor Stone concludes with an account of how he came to submit an \textit{amicus curiae} brief on behalf of Korematsu to the Supreme Court in one of the post-September 11 cases.

Professor Stone’s personal conclusion sets the stage for the paper by documentary producer and film-maker Frank Abe, who was born in Cleveland because the government moved his parents here in the wake of \textit{Endo}.\textsuperscript{37} Eventually his family moved to California, where his parents had been born and raised. But only when he got to college did he come to understand that his parents had been interned during World War II. It turns out that his experience was typical: Nisei


\textsuperscript{33} \textit{See Stone, supra} note 11.


\textsuperscript{36} Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); see also Yasui v. United States, 772 F.2d 1496, 1498 (9th Cir. 1985) (noting that a district court had granted the government’s motion to vacate the conviction of Minoru Yasui).

parents generally did not tell their Sansei children much about what had happened to them in the camps. This belated discovery of his parents’ story and that of thousands of others motivated him to learn more about the internment and to document the experience of the people who went through it.

The next paper broadens the time frame by focusing on World War I. Specifically, David Forte examines the case of Eugene V. Debs, who was convicted of obstructing the military in connection with an antiwar speech that he gave in Canton, Ohio, in June 1918. Professor Forte focuses on the details of the case, but he also considers the strikingly different approaches taken by President Woodrow Wilson, whose administration vigorously prosecuted Debs, and President Warren G. Harding, who commuted Debs’ ten-year prison sentence.

Peter Margulies brings the focus to the present, addressing the relief available to victims of governmental overreach in national security cases. This issue arose only obliquely in the World War II internment cases; only many years later did the federal government compensate some of those whose rights had been violated. But it has taken on greater significance in the period after September 11, as the federal government has taken more aggressive actions to prevent further acts of domestic terrorism. Professor Margulies criticizes the Supreme Court’s recent decision in Ziglar v. Abbasi, which rejected a constitutional tort claim brought by immigration detainees who had been placed in high-security detention facilities despite any meaningful evidence that they had ties to terrorism. That decision strengthened the barriers to constitutional claims against high-level executive officials that were announced in Iqbal v. Ashcroft.

Karen Korematsu learned of her father’s experience only in her high school history class; her parents had never told her anything about what had happened. See Karen Korematsu’s Interview Answers, FRED T. KOREMATSU INST., http://www.korematsuinstitute.org/karen-korematsus-frequently-asked-questions/ [https://perma.cc/K7L6-BK59] (last visited Apr. 13, 2018).

See supra notes 17–18 and accompanying text.


See supra note 35 and accompanying text.

137 S. Ct. 1843 (2017).

556 U.S. 662 (2009). Iqbal in turn built on the plausibility standard of pleading that the Supreme Court previously established in Bell Atlantic
recognizes that the plaintiffs in Abbasi and Iqbal generally were not legally in the country and therefore were subject to immigration enforcement action, whereas the parties who challenged the World War II internment were either U.S. citizens or lawful residents, but he emphasizes that the Constitution applies to all persons physically present in the country regardless of their citizenship or immigration status. He argues that damages are an appropriate remedy for constitutional violations and that the Abbasi Court proceeded from an erroneous presumption against remedies in concluding that damage actions for constitutional violations were not available except in very limited circumstances.

In the final article in this symposium, Robert Chang offers the broadest historical sweep in the issue. He contends that the legal arguments supporting contemporary efforts to restrict entry of persons from certain countries into the United States can be traced to the Chinese Exclusion Case. This case provides an important foundation for the so-called plenary power doctrine, which requires the judiciary to defer to immigration and naturalization decisions made by the political branches. And Korematsu and the other World War II internment cases suggest that the federal government has authority to single out citizens of a particular nation for disfavored treatment in the interest of national security. Professor Chang traces the development and evolution of the plenary power doctrine, which he characterizes as immigration exceptionalism, as well as judicial deference to the political branches in national security cases, which he refers to as national security exceptionalism. Although the arguments for national security exceptionalism ultimately rest on precedents such as the Chinese Exclusion Case and Korematsu, the government and other advocates of judicial deference rarely acknowledge the jurisprudential roots of their position, even when citing other precedents that do rely on those cases.

There is one more symposium-related item in this issue, an amicus curiae brief that was submitted to the Supreme Court in Trump v. Hawaii, the latest round in the litigation over the president’s travel ban. Among the amici on whose behalf this brief was filed are Karen

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47. 138 S. Ct. 923 (2018) (No. 17–965), granting cert. to 878 F.3d 662 (9th Cir. 2017).

48. See supra note 31 and accompanying text.
Korematsu, Jay Hirabayashi, and Holly Yasui, children of litigants who unsuccessfully challenged the Japanese internment during World War II.\textsuperscript{49} The brief contends that the government’s arguments supporting the travel ban echo those that succeeded in the internment cases and urges the Court to avoid repeating the judicial errors that gave rise to those rulings.\textsuperscript{50}

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\textsuperscript{49} See supra note 7. This is not the first time that descendants of a litigant in leading civil rights cases have filed an amicus curiae brief. See Brief of the Family of Heman Sweatt as \textit{Amicus Curiae} in Support of Respondents, Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (No. 11–345) (filed on behalf of the daughter and nephews of Heman Marion Sweatt, the successful plaintiff in \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), which invalidated the whites-only admissions policy at the University of Texas Law School, in a case challenging the race-based affirmative action admissions policies of the University of Texas).