DODGING RESPONSIBILITY: THE STORY OF HIRABAYASHI V. UNITED STATES

Introduction

“Strict scrutiny” for race-based classifications is typically traced back to Korematsu v. United States,1 the Japanese-American internment case in which the Supreme Court trumpeted that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”2 But the link can be made one year earlier, to the first of the internment cases: Hirabayashi v. United States.3 Although less well-known, Hirabayashi is arguably the more important case because it created the procedural and precedential foundation upon which Korematsu was built.4

To complicate matters, we must take account of two Hirabayashi cases: one decided during World War II, and the other a part of the 1980s coram nobis cases. In these latter cases, the men whose convictions the Supreme Court affirmed in the 1940s marched back into federal district court, and on the basis of “smoking gun” evidence discovered in the National Archives, they achieved vindication four decades after their initial defeat. Although those cases are rightly cele-

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1 390 U.S. 214 (1943).
2 id. at 216.
3 320 U.S. 51 (1943).
er, is Hirabayashi's relationship to Korematsu and Endo, the two cases decided the following year.

Opening Korematsu's Door

In Korematsu, the Court, in an opinion by Justice Hugo Black, began by replicating the segmentation technique introduced in Hirabayashi. Ignoring the government's own concession to the contrary,71 the Court speculated that, had Korematsu obeyed the evacuation order, he might not have ended up in a relocation camp after all.72 Accordingly, the Court would focus exclusively on the legality of evacuation and ignore questions related to detention. Cloaking itself in the mantle of self-restraint, the Court exclaimed: "To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case."73

Through segmentation, then, the only question presented was whether the government could require Japanese Americans to evacuate their homes temporarily—as if a hurricane were coming—for personal safety and the good of the country. In answering this narrowly framed question, the Court announced that

All 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.74

This language marks Korematsu as the fount of strict scrutiny. In application, however, the flowery rhetoric wilted into limp acceptance of crude, time-worn racial stereotypes. In the Court's view, "pressing public necessity" included assumptions of disloyalty based on race; such generalizations were not seen as evidence of "racial antagonism."75

The payoff of the segmentation technique executed in Hirabayashi was substantial. Reneging on its promise not to use Hirabayashi as

71 See Brief for the United States at 28–29, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 197, 230–31 (Philip B. Kurland & Gerhard Casper eds., 1975) (hereinafter Landmark Briefs) ("[T]he [Korematsu] obeyed all of the provisions of the order and the accompanying instructions, [he] would have found himself for a period of time, the length of which was not then ascertainable, in a place of detention.").

72 See Korematsu, 323 U.S. at 221.

73 Id. at 222.

74 Id. at 216.

75 See id. at 219.