2002 Carnegie Challenge

Homeland Defense and Democratic Liberties: An American Balance in Danger?

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The Romans had a phrase for it: ***Silent leges inter arma.*** *During warfare the laws are silent*. We have seen the truth of Cicero's maxim during America's past wars. It was painfully evident to both sides during the Civil War, and again when we were fighting enemies on foreign shores during the two world wars. Now, as we mobilize after September 11th to face the global threat of terrorism, the strength and resiliency of the U.S. Constitution will once again be put to the test in light of such questions as: How do we protect our society from suicidal terrorists without undermining the basic freedoms that this country stands for, and without taking actions that later we will regret? How do we meet the potential new threat of attackers penetrating our borders and inflicting even greater casualties if they turn to—and succeed in acquiring—weapons of mass destruction? And how do our intelligence services use new methods and technologies to keep terrorists from carrying out their plans in the future?

On the morning after the attacks on the World Trade Center and the Pentagon, President George W. Bush declared that the United States had endured an act of war and was now, itself, in a state of war against terrorism. Throughout the nation there was deeply felt and widespread support for the president and for the course of action he took in the days, weeks and months that followed, which ranged from sending troops to root out Al-Qaeda terrorists in Afghanistan to instituting stringent and unprecedented security measures throughout the American homeland. While much of that support remains strong, it is useful to note that in past wars, such presidents as Abraham Lincoln, Woodrow Wilson and Franklin Roosevelt—with equal conviction, if not always with equal public accord—used their powers to protect and defend the nation in ways that deeply troubled civil libertarians at the time and still do, now, across the years. Outside of legalized slavery, the mass internment of 120,000 Japanese immigrants and their families in 1942—most, American-born citizens—stands as one of the most egregious and reviled breaches of liberty in U.S. history. (For other examples of clashes between American liberties and national security concerns, see the Appendix, page 11.)

President Bush's remarks on September 12th included the important warning that, "The American people need to know that we're facing a different enemy than we have ever faced." He was referring, of course, to the terrorist network that had instigated and carried out the airplane attacks on the World Trade Center and the Pentagon. But his characterization of the new foes of democracy can easily be extended to cover more than foreign-born fanatics fueled by religious fervor. The danger is domestic too, and has already come in the form of a crew cut ex-GI, Timothy McVeigh, who perpetrated the worst previous terrorist attack on U.S. soil, the April 1995 bombing of the Murrah Federal Building in Oklahoma City that left 168 dead. Terror has also made itself known by the hand of Theodore Kaczynski, the Harvard-educated Unabomber, who waged an 18-year tantrum

against modernity before his brother turned him in. And it came in the mail, as deadly anthrax disease spores—though we have yet to determine if the perpetrator of that terrorist campaign was homegrown or not.

Clearly, terrorism in all its forms—those we have experienced and those we can yet hardly imagine—is a fact of 21st century life that we all must face. "Terrorists," said Robert F. Turner, professor of international law and foreign policy at the University of Virginia and associate director of the Center for National Security Law, addressing a recent meeting at Carnegie Corporation of New York held to explore issues relating to homeland security and liberty, "are developing all sorts of nasty things that can kill people by the hundreds of thousands and perhaps millions." An even more dire warning was issued three years ago by the U.S. Commission on National Security/21st Century, co-chaired by former U.S. Senator Gary Hart—also a participant in the Corporation meeting. The commission stated that: "America will become increasingly vulnerable to hostile attack on our homeland, and our military superiority will not entirely protect us... States, terrorists, and other disaffected groups will acquire weapons of mass destruction, and some will use them. Americans will likely die on American soil, possibly in large numbers."

Given these realities, Americans may have some tough choices to make about what rights and protections they are willing to give up—or at least compromise on—in order to allow for the implementation of security measures that may be not only inconvenient and intrusive, but possibly even threatening to the freedoms that we perceive as the very foundations of our democratic society. Is it absolutely necessary, though, to make these choices or are there ways in which we can find a balance between our need to ensure the safety of our nation and our desire to protect the liberties of its citizens? This paper will explore some of the tensions inherent in that dilemma.

Surveillance of Means, Not Persons

By the time the second hijacked jet slammed into the World Trade Center's South Tower on September 11th, many Americans had begun to experience the shared realization that terror had come to our doorstep. We could never again allow ourselves to be as open and unguarded as obviously we were that morning. Our intelligence apparatus, our immigration and border control, our airport security—none had presented a strong enough defense against a determined and committed enemy. The people involved in the attacks on the World Trade Center and the Pentagon—as well as those who commandeered the airplane that crashed in Pennsylvania—moved in and out of the country on student or tourist visas, obtained drivers' licenses and credit cards, used library computers hooked to the Internet to communicate with co-conspirators in the Middle East and Afghanistan and learned the rudiments of flying jet aircraft in U.S. flight schools. Once the methods they had employed to enter the U.S., exploit the country's resources and travel around became clear, so did the feeling of

most Americans that they had caught us with our guard down.

Americans are accustomed to making sacrifices in wartime, and it may be that we will have to sacrifice some privacy to ensure that we are not such ready targets for the next group bent on mass murder. Most understand the need for stringent security checks at airports and generally have tolerated with good humor the delays and minor indignities that entails. And they have overwhelmingly endorsed many of the practical measures taken to ensure the safety of travelers in the air, on mass transit and on the roads, including the effective—and perhaps also symbolic—strengthening of doors to airplane cockpits, making them harder to force open. That means the next team of suicide hijackers, if there is one, will not find it so easy to seize control of a jetliner's controls in flight. Terrorists no doubt will look for other targets of opportunity, but they also may have to find means other than crashing a jumbo jet into a building. (And perhaps they already have, judging by the "shoe bomber" incident involving suspected Al-Qaeda operative Richard Reid. "Few now think Reid was a bungling amateur," reported *Time* magazine in February 2002.)

For Ashton B. Carter, a professor at Harvard's Kennedy School of Government and former assistant secretary of defense for international security policy under Bill Clinton—and also a participant in the Carnegie Corporation forum on homeland defense—what terrorists may do next and how to deal with the possibilities leads to an important distinction in the security choices that are available. Carter, who, as the senior Pentagon official responsible for international security policy from 1993 to 1996, spent considerable time worrying about how to keep nuclear weapons and fissile materials from falling into the hands of terrorists or "rogue states," says that while detection and prevention of terrorism certainly requires surveillance as a major strategic component, the civil liberties implications of *surveillance of means* and *surveillance of persons* need to be considered and understood separately.

For law enforcement agencies, Carter argues, the most important and do-able task is to improve surveillance of the means that terrorists could use to wreak destruction, such as tracking purchases of chemicals, fertilizer and other raw components of bombs or biological warfare or watching who is trying to rent crop-dusting aircraft. Crop dusters belatedly received scrutiny from authorities after it was learned that one of the September 11th terrorists had made a preliminary inquiry about renting one. But the FBI actually had crop dusters on their watch list as early as the 1996 Olympics in Atlanta.

Police and the FBI are accustomed to searching for guns and bombs—but not for the ingredients of weapons of mass destruction. Carter stresses the importance of authorities having up-to-date lists of what to check for in an age of terrorism.

"We tend to think of surveillance as looking for the perpetrators themselves," he says. "That's

tough to do. It's much easier to do surveillance of means. And surveillance of means is something we have not really begun yet. I'm not prepared to surrender any of my liberties," he adds, "until we have done a whole host of other things that can contribute materially to the solution of this problem."

Instant Checks for Credit, but Not for Terrorists

One surveillance tool we are all accustomed to encountering is the ubiquitous video camera that watches us at travel checkpoints, ATMs, malls and the entrances to office buildings—but unless they are being monitored in real time by watching eyes, they are not particularly effective as a preventive measure. In most cases, cameras serve by compiling a record that is useful to authorities in identifying perpetrators after the deed is done—like the infamous shot of Mohammad Atta and Abdulaziz Alomari carrying their bags through security at the airport in Portland, Maine, early on September 11th to catch a flight to Boston.

That doesn't mean that video cameras aren't helpful—or that security systems and personnel should not be on the alert for suspected terrorists. Indeed, nine of the nineteen September 11th hijackers were singled out for extra security screenings at airports that morning, either by guards who saw something that aroused suspicion or by computer programs that waved a red flag. Some of the hijackers were even on a terrorist watch list and should not have been allowed into the country. But none of those systems prevented the terrorists from getting on the planes and going about their work.

John Shattuck, chief executive of the John F. Kennedy Library and Foundation and former ambassador to the Czech Republic, offers this scenario: "Imagine if Mohammad Atta had taken out a credit card to pay for his ticket—as he did—and he'd exceeded the card's limit. He would have been denied the ticket. And yet we know that he was already on the watch list developed by U.S. intelligence agencies. Had that information been available to the airlines, they could have denied him passage." The credit card companies can tell an airline ticket agent instantly if someone is a bad credit risk—but the government has no foolproof way of flagging travelers who pose a threat to U.S. security.

One way of improving the government's ability to keep track of individuals with deadly intent has been suggested by William A. Owens, former admiral and vice chairman of the U.S. Joint Chiefs of Staff who is now co-chief executive officer of Teledesic, a satellite communications company, and a trustee of Carnegie Corporation of New York. He would like to see a "system of systems," where sensors and software would be linked together to provide vital information across federal departments that could link in states and localities as well. In that way, he says, agencies such as the U.S. Customs Service and the Immigration and Naturalization Service "would have access to information about border crossings, flight manifests and lists of passengers traveling on airplanes." With that kind of information quickly and reliably avail-

able, much more could be done to deter potential terrorists.

Two U.S. agencies that also need to break down traditional barriers to cooperation—at least when it comes to tracking terrorists—are the CIA and the FBI. Traditionally, the FBI, with its domestic security mission, and the CIA, charged with protecting national security and gathering foreign intelligence, have not worked closely together, and that's how our society wanted it. But changing times and events have blurred the edges of their separate missions: the FBI, for example, recognizing the global nature of much crime and terrorism, has opened offices in dozens of foreign capitals over the past few years. And both FBI and CIA operatives had a hand in helping Pakistani police capture Abu Zubaida, the Al-Qaeda leader who had been functioning as Osama bin Laden's operations chief since the terrorist leader has been on the run.

That's not to say that cooperative efforts between law enforcement agencies has become the norm. Local law enforcement personnel often grouse about the feds' unwillingness to share information. And the seemingly constant round of high security alerts called by Homeland Security Director Tom Ridge and Attorney General John Ashcroft in the months after September 11th frustrated some governors and police chiefs, who remained in the dark about exactly what they were supposed to be on high alert for, since that information was not provided to them. "Livid" would probably be a better word for how New York City officials felt when they found out that this past October, the federal government had received a tip that terrorists were planning to detonate a small nuclear bomb in New York City but didn't notify the mayor, the governor of the state, or local law enforcement. Ridge later explained that if the information—which turned out to be false—had leaked, it would have caused widespread panic, but many officials and citizens alike felt that they should have been given the option of how to respond.

A Commonsense Approach to Terrorism

In his 1998 book, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (MIT Press, 1998), Philip B. Heymann, the James Barr Ames Professor of Law at the Harvard Law School and former deputy attorney general, succinctly conveyed his prescription for what democracies need most in dealing with terrorism: common sense. Looking at how Northern Ireland, Germany, France and other countries dealt with terrorists within their borders, Heymann writes: "For democratic nations, the primary concerns in dealing with terrorism are to maintain and protect life, the liberties necessary to a vibrant democracy, and the unity of the society, the loss of which can turn a healthy and diverse nation into a seriously divided and violent one."

According to Heymann, the greatest danger for a democracy is that it may take self-destructive actions in response to terrorism—precisely what the terrorists want. In a recent paper on "Civil Lib-

erties and Human Rights in the Aftermath of September 11th," Heymann reasons: "The safest and surest way of preventing a terrorist attack is to monitor effectively every individual or group who may possibly be planning such an attack. But the result...is to expose large numbers of individuals and groups who have no violent intentions to monitoring because of some small chance that the government may have overlooked the danger of the group or individual. How dangerous that is depends, in part, on how coercive or intrusive the monitoring is. But it will all be intrusive."

"Intrusive monitoring" includes the use of informants to spy on political, religious, and other activist groups, which "is always likely to create a substantial inhibition of democratic political activity," says Heymann. There are, in fact, notable recent examples of how these kinds of activities can diminish the causes they are set in motion to serve. FBI surveillance of civil rights and antiwar groups, for instance, caused bitter divisions in this country during the tumultuous 1960s and eventually led to restrictions on the agency's tactics in spying on U.S. citizens. Even after three decades, the Nixon White House's dispatching burglars to rifle the files of Daniel Ellsberg's psychiatrist in search of incriminating evidence against the leaker of the Pentagon Papers remains a painful memory for some. There were further contretemps during the 1980s over the government's infiltration of liberal and left-wing groups opposed, for example, to the Reagan administration's Latin American policies.

But what if law enforcement agencies have a reasonably good idea of who, or what groups—such as certain Muslim fundamentalist organizations—they should be keeping an eye on? Then it makes sense to concentrate investigative resources on that group "even if you know that…the number of innocent members subjected to investigation or denial of access...will vastly exceed the number of legitimate suspects," Heymann says. "But there is a frightening long-term cost. Every member of the class denied access or subjected to special investigation before being granted access will be made to feel less than a full citizen of the United States or less than a fully wanted visitor and that message will be conveyed to all of the other citizens of that country."

An alternative is improving the capacity of U.S. intelligence agencies to identify dangerous people and to check expanded databases whenever someone seeks access to targets or resources that could be used for a terrorist attack. But that means the government would be creating more dossiers and checking them more often, which also has serious civil liberties consequences, Heymann suggests. He therefore concludes: "[T]he gravest danger to civil liberties and human rights…in the aftermath of September 11th is that our leaders will think we are without courage; without concern for non-citizens within the United States, and indifferent to the welfare of citizens repressed by despotic governments; prepared to accept without question unequal treatment based on ethnicity, and unable or unwilling to see that there will and must be

trade-offs among even our own freedoms and to share in considering them carefully."

Red Teaming

There are other methods that can be used to try to predict and intercept terrorist activities. One missed opportunity that should serve as an important lesson learned is that aviation security experts might have foreseen the possibility of a September 11th hijack scenario if they had practiced the type of war gaming that the military regularly engages in to try to prepare for surprise attacks. Military war gamers teach the importance of trying to stay a jump ahead of the enemy through what is known as red team/blue team exercises. In classrooms at military colleges and in the field during exercises, the red team plays the enemy and plots novel ways to circumvent the blue team's defenses. It was Red Teaming that spurred the development of Stealth fighter technology and other military advances.

Counter-surveillance is also imperative. As Carter stresses, "You look out and see who's looking at you." American embassies in sensitive locations routinely do that, but in this electronic age, that kind of proactive monitoring can also be carried out via the Internet by noting who comes to particular web sites looking for information that might be useful to someone trying to target a U.S. facility or build a weapon. One way of doing this is by setting up what's called a "honey pot"—a web site or network armed with software designed to record and track visitors sniffing around for sensitive information. This approach is promising enough, the *Irish Times* recently reported, that the U.S. government has consulted with the Honeynet Project, a prominent nonprofit group of security professionals dedicated to information security research.

But Who Will Guard the Guardians?

No matter how successful government or law enforcement agencies may be in setting up more effective surveillance of means, it is likely that American citizens are going to experience infringements on the privacies and liberties they are used to. In fact, Hart predicts that if there is another attack, the security precautions and inconveniences that Americans now experience when they're flying will spill over into their daily lives. "It'll be airport security every day, going in and out of shopping areas, supermarkets and so on. And people will get very irritated with it," he says. This is a cause for concern to Christopher F. Edley, Jr., a member of the U.S. Commission on Civil Rights, who also addressed the Carnegie Corporation meeting. He wonders, for example, what the commission could have done, had it existed in 1942, to prevent the internment of Japanese Americans on, in Edley's characterization, "the flimsiest of national security precautions." The Civil Rights Commission has sought to uncover post-September 11th incidents of bias against Americans of Arab descent and to discourage racial profiling by law enforcement. Edley points out that even before the September attacks, the country was struggling to agree on whether any kind of racial profiling, in any circumstances, was acceptable. Now the question

becomes even more pointed. As Edley asks: "What strategies will become acceptable in an anti-terrorism context? Will the methods used include intensive surveillance of devout Muslims or of graduate students who speak Arabic? What about sweeping hundreds of individuals from 'suspect' countries into detention centers—as happened after September 11th—and then throwing up barriers to their families, their attorneys and journalists clamoring to know who was being held and why, or even where? There is a crisis in legitimacy when we don't know the answers to those questions and may be denied a voice in resolving them."

Edley goes on to echo a question the Romans first pondered: "Who will guard the guardians? The courts? Perhaps, but don't count on it. *Korematsu v. The United States**, surely one of the most shameful decisions in the history of the Supreme Court, has never been overruled. That fact alone should deflate our confidence that the courts will stand as a bulwark against war-stoked passions that bend liberties and reshape rights."

Support for Edley's viewpoint comes from William H. Rehnquist, the chief justice of the U.S. Supreme Court. In his absorbing and prescient 1998 book *All the Laws But One: Civil Liberties in Wartime* (McKay, David, 1998) Rehnquist recounts the history of the major legal battles fought over the years in regard to civil liberties in wartime. He quotes Francis Biddle, FDR's Attorney General who opposed the Japanese internment, saying: "The Constitution has not greatly bothered any wartime president." Rehnquist says that apart from the added authority that the law gives the chief executive in time of war, presidents tend to "push their legal authority to its outer limits, if not beyond." As for the courts, the chief justice adds: "If the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue."

Edley's proposal for creating a balance between the potential pressure on civil liberties that might be exerted by a wartime president and the maintenance of an open democracy is to create a civic oversight group to serve as a watchdog agency that can bridge the divide between those who are deeply involved in the fight against terrorism and those who are equally concerned about oppression and the violations of civil and human rights. "We need to create a mechanism so that people with different points of view can sit together, look at the problems day by day and, on behalf of the rest of us, monitor what is going on behind closed doors," Edley says.

Preserving the Right to Debate

Finally, in the debate about security vs. the rights of citizens in a democratic society, it is important to note that the right to debate has, itself, recently been called into question. When some Administration critics raised concerns about the speed with which Congress rushed through the USA Patriot Act (signed into law by President Bush on October

** The decision that allowed for the internment of Japanese Americans; see page 12.*

26th, 2001) which, among other provisions, expanded the FBI's powers to conduct certain kinds of surveillance without court orders, and others objected to government suggestions that captured Al-Qaeda fights might be brought before military tribunals, Attorney General John Ashcroft admonished them by calling their patriotism into question. Those who raised doubts about aspects of the government's war on terrorism were, Ashcroft asserted, engaging in "fear mongering," and scaring people with "phantoms of lost liberty." Ashcroft said that such tactics "only aid terrorists, for they erode our national unity and diminish our resolve." He added that, "They give ammunition to America's enemies, and pause to America's friends. They encourage people of goodwill to remain silent in the face of evil."

"Actually, the reverse is true," maintained John Farmer, national political correspondent for *The Star-Ledger* of Newark, New Jersey. "The people of 'goodwill' most likely to be silenced," he stated, "are those who believe Bush and Ashcroft have overreached in their anti-terrorism crusade…[Ashcroft's] comments seemed designed to instill fear in critics and shut down real debate."

The editorial pages of newspapers across the nation echoed similar statements; the lead op-ed piece in the *New York Times* the following weekend even made it clear that some took Ashcroft's comments as indicating that he considered opposing points of view to be tantamount to treason. Ashcroft soon issued statements indicating that his remarks had been misrepresented, and that he *did* want public debate about security measures. "What he does not think is helpful to the country," his spokesperson said, were "misstatements and the spread of misinformation about the actions of the Justice Department," giving examples that included using the word "eavesdropping" to describe the monitoring of some attorney-client conversations (involving those interred after September 11th because of concerns that they might have had some connection to the terrorists), and those who have alleged that interviews with more than 5,000 foreign visitors, most of them from the Middle East, amount to racial profiling.

However one interprets the attorney general's remarks, it is useful to remember that he is not the first to have suggested that, in some circumstances, there may be limits on Americans' rights, including the right of free speech. As Supreme Court Justice Robert Jackson famously remarked in 1949, in an opinion dissenting to a decision in a free speech case, "The Bill of Rights is not a suicide pact." Richard A. Posner, a U.S. Court of Appeals judge and noted author, seems to agree: in December 2001 he wrote in the *Atlantic Monthly* that civil libertarians "treat our existing civil liberties—freedom of the press, protections of privacy and of the rights of criminal suspects and the rest—as sacrosanct…[but] this is a profoundly mistaken approach to the question of balancing liberty and security. The basic mistake is the prioritizing of liberty." Others, however, passionately defend not only the right of citizens to speak out against

encroachments on American freedoms but say there is also a need to do so, and that our democracy is strong enough to withstand not only terrorist attacks but also vigorous public disagreement about the ways in which the war on terror should be conducted.

Debate about these issues—the balance between security and civil rights; the need to improve our ability to prevent terrorists from acquiring the tools and materials with which to cause widespread destruction; the kind of oversight that may be necessitated by new national security proposals, along with many other questions—will continue for as long as the war on terrorism goes on and will have implications for the shape of American democracy for decades ahead. Therefore, the voices that must be raised, the opinions that must be heard, should come from all of us: from our president and elected representatives, surely, but also from citizens, foundations, universities, organizations and institutions of every political persuasion and representing the great diversity of this nation which is, ultimately, its greatest strength.

APPENDIX

Liberty, Security and U.S. History

Tension between liberty and security goes back to the early days of the Republic:

• The Alien and Sedition Acts, passed by the Federalist Congress in 1798 during a time of fractured relations with revolutionary France, allowed President John Adams to deport aliens and ban newspapers that wrote "false, scandalous and malicious" articles about the government. After Thomas Jefferson led the Republicans to victory in 1800, the unpopular statutes were repealed or allowed to sunset.

• President Abraham Lincoln suspended *habeas corpus* in the first tense weeks of the Civil War in April 1861. When the Army jailed a Maryland militia leader and suspected saboteur named John Merryman, Chief Justice Roger Taney promptly ordered Merryman released, but the president ignored the order. In a message to Congress, Lincoln asked: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"

• In 1864 a military tribunal tried several Indiana "copperheads"—Southern sympathizers—suspected of plotting to raid federal arsenals and free Confederate prisoners. Three were condemned to death, although the sentences later were commuted. In December 1866 the U.S. Supreme Court threw out the conviction of one of the individuals, Lambdin Milligan, ruling that he should have been tried in a civilian court. Justice David Davis wrote in *Ex Parte Milligan*: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

• Eight alleged accomplices of John Wilkes Booth were tried in a military court after the April 1865 assassination of Lincoln and attempt on the life of Secretary of State William Seward. Four were found guilty and hanged, including Mary Surratt, who operated the boarding house where Booth and his cronies met. Her guilt or innocence remains a subject of historical debate. Mrs. Surratt's lawyers sought a writ of *habeas corpus* on the morning of her execution, July 7, 1865. A District of Columbia judge, Andrew Wylie, issued the writ, but backed off after prosecutors showed him an order from President Andrew Johnson suspending *habeas corpus.*

• The Espionage Act of 1917, passed during World War I, gave President Woodrow Wilson the power to censor books, newspapers or any publication "urging treason, insurrection, or forcible resistance to any law of the United States." Postmaster General Albert Burleson refused to deliver antiwar newspapers and magazines. Eugene V. Debs, five-time Socialist candidate for president, was sent to prison for a speech in support of draft resisters. A string of anarchist bombings in eight cities unnerved the nation in 1919. Attorney General A.

Mitchell Palmer —whose home was struck by one of the bombs—rounded up thousands of aliens suspected of having Communist or anarchist sympathies. Several hundred were deported to Russia. Prominent lawyers decried Palmer's tactics and Palmer eventually lost public support.

• Ten weeks after the Japanese attacked Pearl Harbor, President Franklin D. Roosevelt signed Executive Order 9066, allowing military commanders "to prescribe military areas ... from which any or all persons may be excluded." The order did not single out Japanese aliens, but it was the Issei (the generation of Japanese who left their country in the late 1800s to come to the U.S.) and their American-born offspring, the Nissei, who were forced from homes in California, Oregon and Washington and moved to internment camps in March 1942.

• The U.S. Supreme Court heard three challenges to internment during World War II. In June 1943 it unanimously upheld the conviction of American-born Gordon Kiyoshi Hirabayashi, 24, a senior at the University of Washington in Seattle, for a curfew violation. Noting that the Constitution gives the president and Congress the power to wage war, the justices said, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." Then in December 1944 it voted 6-3 to uphold the internment of Fred Korematsu, 22, a welder born in Oakland, California. In dissent, Justice Frank Murphy said the majority ruling was based on an "erroneous assumption of racial guilt rather than bona fide military necessity" and fell into "the abyss of racism." At the same time, the high court unanimously granted Mitsuye Endo, a motor vehicles clerk from Sacramento, release from a Utah internment camp. The high court held that the War Relocation Authority had no power to detain "citizens who are concededly loyal."

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