



FDR's Solicitor General Withheld Evidence in Japanese Internment Cases

Thus, nearly 70 years after the fact, the federal government is still coming clean about its deceptions during World War II. The latest admission involves the withholding of evidence from the Supreme Court in order to preserve the Roosevelt administration's blatantly unconstitutional policy of interning thousands of U.S. residents of Japanese descent.

On February 19, 1942, President Franklin D. Roosevelt issued [Executive Order 9066](#), which authorized military commanders to designate "military areas ... from which any or all persons may be excluded." The result: More than 110,000 Japanese-Americans, plus several thousand German- and Italian-Americans, were forcibly removed from their homes and relocated to remote internment camps — "concentration camps," Roosevelt and other officials called them until such forthright terminology acquired particularly grisly connotations — where they remained until 1945.

The Roosevelt administration argued that the internment of Japanese-Americans, most of whom lived on the West Coast, was a matter of military necessity. Persons of Japanese ancestry living in the United States were, the administration said, suspected of disloyalty, espionage, and otherwise aiding their fatherland, with which the United States was at war. Moreover, [wrote Lt. Gen. John L. DeWitt](#), head of the Western Command, "it was impossible to establish the identity of the loyal and the disloyal with any degree of safety." Therefore, the administration maintained, the government had little choice but to relocate and incarcerate them all.

Some of the wronged parties fought back through the courts. In 1943, Gordon Hirabayashi challenged a curfew the government had imposed on Japanese-Americans, while the next year Fred Korematsu took on the internment policy. Both clearly had the Constitution on their side. Roosevelt had unilaterally suspended *habeas corpus* for Japanese-Americans, though the Constitution — Lincoln's precedent notwithstanding — only permits Congress to undertake such a drastic action, and then only "in cases of rebellion or invasion." The Fifth Amendment prohibits both the curfew and the relocation because both deprived individuals of their liberty (and, in the case of relocation, their property) without due process of law. The 14th Amendment mandates that all persons be afforded "the equal protection of the laws," yet Americans of certain ethnicities were being singled out for unequal treatment.





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The Roosevelt administration, never much concerned with the document FDR swore four times to “preserve, protect, and defend,” was determined to defend its policies toward Americans of Japanese descent at all costs, even to the point of lying to the highest court in the land. Solicitor General Charles Fahy defended the administration’s policies before the Supreme Court in the cases brought by Hirabayashi and Korematsu. Fahy argued that the curfew and relocation were matters of “military necessity” and “military urgency.” The court bought Fahy’s arguments and upheld Hirabayashi’s and Korematsu’s convictions, thereby declaring the administration’s policies constitutional.

Fast-forward to 2010. In the course of doing research on some immigration cases, Acting Solicitor General Neal Katyal began looking into the World War II internment cases. On May 24, 2011, at a Justice Department event honoring Asian Americans and Pacific Islanders, Katyal [revealed](#) the following:

By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court “might approximate the suppression of evidence.” Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC. And to make matters worse, he relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by “racial solidarity.”

“It seemed obvious to me that we had made a mistake,” Katyal added. “The duty of candor wasn’t met.”

The Roosevelt Justice Department had done far more than simply make a “mistake.”

“This was a deliberate, knowing lie by Fahy to the Supreme Court,” University of California at San Diego Professor Peter Irons [told the Los Angeles Times](#). In the 1980s, wrote the paper, Irons “had found reports in old government files that showed the U.S. military did not see Japanese Americans as a threat in 1942. His research led to federal court hearings that set aside the convictions of Korematsu and Hirabayashi. Congress later voted to have the nation apologize and pay reparations to those who were wrongly held.”

According to the *Times*, Katyal said Fahy’s suppression of evidence “harmed the court, and it harmed 120,000 Japanese Americans. It harmed our reputation as lawyers and as human beings, and it harmed our commitment to those words on the court’s building: Equal Justice Under Law.”

Irons praised Katyal’s admission, saying, “I thought it was very good and very long overdue.... For the government’s highest counsel to make that statement now is quite noteworthy and admirable.”

Korematsu died in 2005, but upon hearing Katyal’s remarks, Korematsu’s daughter Karen said, “It was a remarkable statement he made. It proves what my father believed all along — that removing the Japanese Americans was wrong and incarcerating them was unconstitutional.”

Likewise, the 93-year-old Hirabayashi’s nephew, Lane Hirabayashi, said of his uncle, “I know Gordon would be very pleased by this. He didn’t know at the time that government prosecutors had distorted evidence. However, he knew in his heart that mass incarceration was unconstitutional.”



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Indeed it was and is. Yet just after the attacks of September 11, 2001, our government arrested dozens of Muslim U.S. residents (most were released with no charges filed), and it continues to hold scores of prisoners from around the world and [refuses to release them](#) even when it cannot (or chooses not to) prove that they deserve to remain behind bars.

The government's fondness for illegally incarcerating people may even have cost Katyal the opportunity to be confirmed by the Senate as Solicitor General. Republicans were none too happy with then-Georgetown University Law Professor Katyal's victory over the Bush administration in [Hamdan v. Rumsfeld](#) (2006), in which the Supreme Court held that the administration's system of military commissions for trying Guantanamo Bay detainees was illegal. The decision quite probably also cost Lt. Cmdr. Charles Swift, another of Hamdan's defenders, his naval career.

Katyal's statement on the internment of Japanese-Americans serves as a reminder that governments' underhanded tactics do not change much. We may be well into the 22nd century before all the lies about the "War on Terror" come to light, but skepticism is in order today.

Photo of Gordon Hirabayashi: AP Images



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