



Hiding the gulag:

Things have gotten so bad, the Bush administration is lying even to its own lawyers

BY HARVEY A. SILVERGLATE AND CARL TAKEI

May 28, 2004

Thus, when Deputy Solicitor General Paul Clement went before the court on April 28 and denied that torture was an issue, he likely did so with a clear (if ill-informed) conscience. Justice Ruth Bader Ginsburg asked him a prescient question: "But if the law is what the executive says it is, whatever is 'necessary and appropriate' in the executive's judgment ... what is it that would be a check against torture?" Clement replied that "our executive doesn't" conduct torture. He continued: "You have to recognize that in situations where there is a war — where the government is on a war footing — that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that."

Yet that very evening, CBS's *60 Minutes II* broadcast images of the Abu Ghraib prisoner humiliation and torture — images the Defense Department, but probably not the solicitor general, had known about at least since January. Every week has brought more images to light, and indications are that still-undisclosed materials document torture even more violent than what has been revealed thus far.

All this, of course, signals to the courts exactly what Donald Rumsfeld didn't want them to see: that the courts can no longer trust what government lawyers tell them. In a government where plausible deniability has become routine, the notion that courts can rely on lawyers' assurances becomes a quaint fiction.

GEORGE W. BUSH's administration, however, is hardly the innovator of this deceitful tactic. Sixty years ago, in a decision that, until now, marked the nadir of post-Civil War American civil liberties, similar deception of government lawyers by the military succeeded in gaining judicial approval of a similarly infamous program: the internment of Japanese-Americans during World War II.

In the spring of 1943, the Supreme Court was preparing to hear two cases — *Yasui v. United States* and *Hirabayashi v. United States* — challenging a wartime curfew for people of Japanese ancestry. A third case, *Korematsu v. United States*, which challenged the internment of this group, was coming down the pike as well.

The War Department knew it would have to provide military justification for these racially discriminatory measures. However, a month before oral arguments in *Yasui* and *Hirabayashi*, it encountered a problem. General John L. DeWitt, who directed the internment of Japanese-Americans, submitted a report to justify the program. In it, he wrote: "It was impossible to establish the identity of loyal and disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the 'sheep from the goats' was unfeasible." He grounded this assertion on the notion that the Japanese race was "a potentially dangerous element" with peculiar traits that made their loyalties and intentions inscrutable. This rationale, War Department officials realized, was legally indefensible.

Assistant Secretary of War John McCloy and several Army officials asked DeWitt to rewrite the report so as not to jeopardize the Supreme Court cases. DeWitt complied; he removed the racist language and replaced it with the assertion that wartime circumstances demanded immediate action, that there was no time to investigate the loyalty of each Japanese-American. McCloy then forwarded the doctored report to the Justice Department for use in the upcoming *Korematsu* case. The War Department destroyed all copies of the original, racist report, except for one that was accidentally misplaced and which eventually made its way to the National Archives, only to be rediscovered nearly a half-century later.

The Supreme Court issued opinions in the *Yasui* and *Hirabayashi* cases on June 21, 1943, and in *Korematsu* on December 18, 1944. In all three, the court ruled for the government, relying heavily on the Justice Department's assertion (which the lawyers derived primarily from the doctored report) that the exigencies of war demanded immediate action, and that there had been insufficient time to separate loyal from disloyal Japanese-Americans.

In his dissent in *Korematsu*, Justice Robert Jackson expressed concern that the court, "having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination." This result is precisely what the Bush administration wants — and has sought through similarly deceitful means.

THE BUSH administration has consistently argued that the national fight against terrorism belongs not in the world of laws and courts, but in a closed realm of executive and military decision-making. Concealing torture and abuse from the solicitor general — who, in turn, unwittingly misled the Supreme Court — was an effort to protect that closed realm.

Had the Abu Ghraib photos not come to light, Bush and Rumsfeld might well have been able to seal the doors of their own nascent gulag in Guantánamo. And the single-island gulag could have then spread to the entire "archipelago" (to use Aleksandr Solzhenitsyn's metaphor) of American military detention centers scattered throughout the world.

Now, that effort faces an obstacle. Earlier, the Supreme Court might have been inclined to give the administration carte blanche to run Guantánamo with no judicial scrutiny. But the ugly facts

from Abu Ghraib make that less likely. Immediately following oral arguments in all three "enemy combatant" cases, legal commentators (ourselves included — see "[Could the Gulag's Future Hang on a Real-Estate Deal?](#)", This Just In, April 30) predicted that the court would be closely divided, with the administration winning or losing by one vote. Recent developments might just shift the outcome in liberty's favor.

Harvey A. Silverglate can be reached at has@harveysilverglate.com. Carl Takei can be reached at carlweb@carltakei.com