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# **Civil Rights and the Wartime Supreme Court**

## **By Dawinder Sidhu**

**SCOTUSblog (Supreme Court of the United States)**

**Posted Monday, February 22, 2010, 8:41 PM**

Posted by Erin Miller

*The following essay was written for our Race and the Supreme Court event by Dawinder S. Sidhu, a founding director of the Discrimination and National Security Initiative at Harvard University. Mr. Sidhu's work focuses on discrimination against Muslim-Americans and those perceived to be Muslim, and he is coauthor of a book published in 2009 titled Civil Rights in Wartime.*

At earlier, regrettable moments in this nation's past, Blacks as a race were thought to be property or inferior beings. The civil rights movement of the mid-twentieth century offered an alternative view of race in America — the simple, undeniable truth that all men are equal and should be judged on the basis of who they are, rather than the race to which they belong. In challenges to racial classifications involving African Americans, the Supreme Court made clear that the Constitution does not tolerate the wholesale stereotyping of individuals on account of their race.

While the Court has recognized the perniciousness of race serving as a proxy for blanket preconceptions of African Americans, in one context "" national security "" the Court has historically and presently considered racial proxies to be practically sensible and legally permissible instruments. And it has done so notwithstanding that, in times of war, Japanese , Muslim , Arab , South Asian , and Sikh Americans have been stereotyped as a class and suffered considerable mistreatment, including profiling, pretextual arrest, harassment, stabbing, assault, and murder. This anomaly in the Court's evaluation of race is not only troubling by itself, but should also alarm anyone who believes in the moral vision of the leaders we honor this month.

The Court has endorsed the use of proxies in the national security setting long before the civil rights movement, and it continues to condone such discrimination today. In *Hirabayashi v. United States* (1942), the Court upheld the conviction of an American citizen of Japanese ancestry who had been charged with violating the exclusion order and curfew requirements imposed after the attack on Pearl Harbor. The Court accepted the notion that the government could equate the ethnic Japanese with those posing "a greater source of danger." Similarly and infamously in *Korematsu v. United States* (1944), the Court approved the President's executive order in which 120,000 individuals were confined to internment camps based solely on their Japanese ancestry. Again, the Court did not find anything legally problematic with the government casting an entire lineage as presumptively disloyal.

Justice Robert H. Jackson dissented in *Korematsu*, forewarning that the Court's discriminatory reasoning "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need" "a cautionary, and arguably prescient, statement. Indeed, the same sort of Court-sanctioned proxies applied to the Japanese during World War II has been used today " also with the Court's blessing " against Muslims and those perceived to be Muslim in the wake of the attacks of September 11, 2001.

In *Ashcroft v. Iqbal* (2009), the Court reviewed allegations made by a Muslim arrested on charges of identity theft that he was detained and segregated with other "September 11 detainees" solely because of his race, religion, or national origin, and not because of any tie to terrorism. The Court, crediting these allegations as true, held that they were insufficiently indicative of any wrongdoing. "It should come as no surprise," the Court noted, that a policy seeking "individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." This Court arrived at this determination despite the plaintiff's argument that this "link" was predicated on his background alone.

*Iqbal's* logic has not been confined to the national security compartment, but has seeped into judicial thinking on domestic law enforcement matters completely unrelated to wartime exigencies, thereby validating Justice Jackson's concern in *Korematsu* that wartime discrimination sanitized by the Court would be expanded for "new purposes." Soon after *Iqbal* was decided, the Fourth Circuit in *Monroe v. City of Charlottesville* (2009) held that a district court properly dismissed an African-American plaintiff's equal protection claims stemming from a city police department's investigation in which DNA samples were sought from random African-American men. Citing *Iqbal*, the court concluded that the police department's investigative activities were not racial in nature and merely had an "incidental" impact on African-American men in the area: "Even though thousands of Arab-Muslim men were investigated in *Iqbal*, the Supreme Court deemed this insufficient to render a legitimate investigatory process unconstitutional."

These cases demonstrate the mutuality of legal interests between traditional race-based civil rights and wartime civil rights " specifically, the doctrinal relationship implicating these groups as well as the reciprocal benefits in eradicating the viability of classifications premised on race, religion, or national origin. Accordingly, those focused on the civil rights movement may give consideration to recent cases like *Iqbal*, while those working on behalf of minority groups targeted after 9/11 may look to past strategies and successes in the racial arena for guidance. In *Heart of Atlanta v. United States* (1964), for example, the Court found significant not only the acts of excluding African Americans from motels, but also the "qualitative" and "quantitative" experiences of African Americans in enduring such exclusion. The experiences of African Americans encountering discrimination were also important factors in other seminal cases from the civil rights era, including *Brown v. Board of Education* (1954).

In the years since 9/11, Muslims and others have been subject to discrimination, such as baseless ejections from airplanes, and have dealt with the attendant human consequences, such as deciding not to travel by air or removing religious attire that

may serve as markers for adverse treatment. Drawing on Heart of Atlanta and Brown, these real-life responses, not just the tangible acts of discrimination, should be considered ripe for the public's attention, remedial action by policymakers, and judicial notice. Further, in opposing the salience of racial proxies, post-9/11 activists may point to cases such as Shaw v. Reno (1993) and Grutter v. Bollinger (2003), in which the Court rejected the assumption that all members of a particular race think alike or possess certain characteristic minority viewpoints.

This symbiotic legal relationship between race and wartime civil rights should be reflected in how civil rights generally is framed in America today. Since 9/11, shared experiences with discrimination and with an unsympathetic judiciary have bound Muslims, Arabs, South Asians, and Sikhs in this nation with African Americans "" whether they are aware of it or not. African Americans have progressed socially and in the courts. But much like a family holding hands running towards a finish line, some may be ahead of others at any one point, stumbles or differing paces will affect the whole, and critically, victory is not achieved until all cross. Racial progress in America therefore must be thought of and measured in collective terms. As Justice Thurgood Marshall understood, no group will achieve racial justice solely by pulling itself up by its own bootstraps. The communities targeted in times of war must be included in any conversation on race. Nothing less than the true realization of the "dream" depends on it.

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