Arguing Both Sides of the Excesses of Government Power

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Two of the darkest chapters in 20th-century American justice were Korematsu v. United States, 323 U.S. 214 (1944), upholding the forced assembly of Japanese Americans, and Barenblatt v. United States, 360 U.S. 109 (1959), upholding a contempt citation by the House Un-American Activities Committee (HUAC). Both cases stand as examples of the Supreme Court failing to stand up to excessive exercises of power by other branches of government.

They also share another interesting similarity: The same lawyers led the arguments in both cases. But while they supported the government’s authority in one case, they vigorously opposed it in the other.

In the infamous Korematsu case, the petitioner, an American citizen of Japanese descent, was branded a criminal simply for being in California after an executive order required him to “assemble” and be removed. The Supreme Court affirmed his conviction, 6–3, based on war exigencies. Justice Black, famously an absolutist on the First Amendment, authored the majority’s decision.

In 1984, Korematsu’s conviction was vacated (584 F. Supp. 1406 (N.D. Cal. 1984)), because the actual government assessment of the lack of risk from Japanese American citizens was not presented to the Court by U.S. Solicitor General Charles Fahy. But the Supreme Court holding remained in place until it was recently reversed in the travel ban case, Trump v. Hawaii, 138 S. Ct. 2392 (2018), even though reversal was not necessary to achieve the result in that case. Chief Justice John Roberts concluded that “Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” 323 U. S., at 248, 65 S. Ct. 193 (Jackson, J., dissenting).

In the 1959 decision in Barenblatt, the
Supreme Court upheld a contempt citation against a university professor who refused on numerous grounds, including the First Amendment, to answer HUAC’s questions as to whether he had ever been a member of the Communist Party. It was a 5–4 decision, with Justice Black and three others dissenting. The results in cases like this swung the other way after the Warren Court’s ascension during the 1960s. HUAC itself was disbanded in 1975.

Lawyers represent clients. They do not necessarily agree with the legal or political position they advocate in a particular case. And it is often true that lawyers representing the government take different positions on legal issues after their government service. These cases are a great example.

Appearing on the government brief in Korematsu, in addition to Fahy, were Herbert Wechsler, assistant attorney general; Edward J. Ennis, director, Alien Enemy Control Unit; and Ralph Fuchs of the Solicitor General’s Office. Wechsler and Fuchs were prominent academics in the early 1940s when they joined the government because of the war.

Wechsler famously went on to argue New York Times v. Sullivan on behalf of the Times and to a distinguished teaching career. Less well known are Ennis and Fuchs, who appeared for the United States in Korematsu and against the United States in Barenblatt.

Edward Ennis worked for the Justice Department from 1932 until 1946. After Pearl Harbor, he opposed the army’s request for the mass removal of American citizens of Japanese ancestry. But President Roosevelt approved it. At that point, Ennis considered resignation but was fearful his position would be taken by lawyers “gung-ho for the Army’s position.” He strenuously, and unsuccessfully, urged Fahy to make a full disclosure to the Supreme Court regarding the lack of risk presented by Japanese American citizens (see Korematsu, 584 F. Supp. at 1421–24), but eventually signed off on the brief for the sake of “institutional loyalty.” In 1946, Ennis joined the American Civil Liberties Union (ACLU). He became its general counsel in 1955 and its president in 1967.

Ralph Fuchs started teaching at Washington University Law School in St. Louis in 1926. In 1941, while still teaching, he appeared on behalf of the ACLU in a classic First Amendment case in which a St. Louis paper did an amusing parody of judicial proceedings that took place in open court. The judge, lacking a sense of humor, was offended and held the paper in contempt. Pulitzer Co. v. Coleman, 152 S.W.2d 640 (Mo. 1941) (vacating the contempt citation). During World War II, he served as a special assistant to the U.S. solicitor general, arguing 14 cases before the Supreme Court. After the war, he began a long teaching career at Indiana University School of Law; he was a recognized expert in administrative law and a leading advocate on behalf of academic freedom. He became general secretary of the American Association of University Professors (AAUP) in 1955. AAUP was at a low ebb then, having failed to vigorously investigate or contest the actions of many universities in dismissing professors during the McCarthy era.

Revitalizing the organization, Fuchs initiated the practice of submitting amicus briefs on behalf of the AAUP in First Amendment cases, starting with the AAUP’s Barenblatt brief. Barenblatt was personally represented by the ACLU, and Ennis argued on his behalf in the Supreme Court.

The issue in that case was whether Barenblatt could be asked if he was a member of the Communist Party; there was no issue about what he had said in a classroom or written in an article. Justice Harlan, writing for the majority, concluded that it was appropriate for HUAC to investigate and legislate regarding the Communist Party. Justice Black’s dissent argued that mere membership in the Communist Party was a protected free speech right. Black’s concluding paragraph was an eloquent showstopper: “Ultimately all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our tradition and our Constitution we will have the confidence and courage to be free.” Barenblatt, 360 U.S. at 162

Most lawyers never have the opportunity to litigate a single high-profile civil rights case. Ennis and Fuchs were involved on both sides of two of the most divisive cases of the 20th century.