

misuses of the exclusion power by immigration officials. Thus, as this century began, the Court viewed Congress's power to control immigration—nowhere specified in the Constitution—as complete, inherent and mandated by sovereignty and international law. That power overrode state law, prior treaties and fundamental constitutional protections, and it could be exercised virtually free from judicial scrutiny.

A doctrine so sweeping attracted criticism. The extension of the power to exclude, granted in *Chinese Exclusion*, to deportation and expulsion proved too much even for Justice Field, who not only dissented but also wrote a letter urging that additional members be added to the Court, reasoning that “where [a] decision goes to the very essentials of Constitutional Government, the question of an increase of the bench may properly be considered and acted upon.” But as Fiss reveals, the one consistent and enlightened critic of the Asian immigration decisions was Field's nephew, Justice David Brewer, who dissented in *Nishimura Ekiu*, *Fong Yue Ting* and *Lem Moon Sing*, showing the kind of clarity and independence of mind that marked him as the Blackmun of his day. The son of missionary parents in Asia Minor, Brewer was one of the few Justices who sought to understand the role of aliens in the constitutional community. In his *Fong Yue Ting* dissent, he highlighted the racist character of the law in question, asking, “In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?”

For all his enlightenment, even Brewer did not argue that the Constitution's protections applied outside the United States. To the contrary, his *Fong Yue Ting* dissent declared that “the Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions.” Years later the Court would exploit that loophole by creating a legal fiction—that even aliens who have physically entered the United States remain legally outside it, thereby intentionally denying even longtime residents of this country meaningful constitutional protection.

As the century turned, the question of whether aliens outside the United States have constitutional rights was absorbed by the larger issue of “whether the Constitution follows the flag”—that is, whether the Constitution extends to the furthest reaches of the emerging American empire. The characteristic executive-branch response to this question, ascribed by Fiss to Secretary of War Elihu Root, was, “As near as I can make out the Constitution follows the flag—but doesn't quite catch up with it.”

Only one decision ran against the anti-Asian tide: *United States v. Wong Kim Ark* (1898). That case asked whether children born in the United States of Chinese parents became American citizens by virtue of the 14th Amendment's birthright citizenship clause. Given the earlier Chinese decisions, the case seemed an uphill struggle. The Chinese Exclusion Act had denied Wong Kim Ark's parents the opportunity for citizenship through naturalization, and Chae Chan Ping and Fong Yue Ting had settled that those parents could have been deported, expelled or forbidden reentry upon leaving the country. Justice Gray began inauspiciously, asserting that “the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.” Yet surprisingly, he went on to hold that the 14th Amendment denied the federal government the power to withhold

citizenship from children born in the United States of alien parents.

The decision rested on the birthright citizenship clause, which confers citizenship on U.S.-born persons of parents “subject to [U.S.] jurisdiction.” The Court's holding that Chinese parents of American-born children were so subject reaffirmed the themes of sovereignty and absolute territorial jurisdiction that ran through the earlier Chinese cases. Ironically, the decision also seems to have been driven by the potential impact of a contrary holding on ethnic groups other than Asians. As Justice Gray noted, “To hold that the 14th Amendment . . . excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship of thousands of persons of English, Scotch, Irish, German, or other European parentage, who always have been considered a citizens of the United States.

All this might seem like ancient history, made irrelevant by the New Deal, the Warren court, the Bill of Rights revolution and the global era of international human rights. Nor does it seem plausible that blatantly racist laws could survive after *Brown v. Board of Education*, the end of official racial discrimination and the advent of strict judicial scrutiny. But our government's position in recent cases reveals that immigration is caught in a time warp.

Chinese refugees, arriving on Long Island's south shore aboard the Golden Venture, fall squarely within the Chinese Exclusion holding. Poor black Haitian boat people, fleeing persecution after a coup d'état overthrew their first democratically elected government, encounter as obstacles to their entry into the United States claims of inherent sovereignty and plenary congressional power, allegedly delegated to the President and the Coast Guard. Haitians who raise due process and equal protection claims are told that the Constitution does not protect them on the high seas. Their efforts to invoke multilateral and bilateral refugee treaties similarly founder on American claims of territoriality. When Haitians challenge their summary repatriation to Haiti, our government in its defense cites grounds of foreign policy, national security and non-reviewability. Refused admission as public charges and health risks, HIV-positive Haitian asylum seekers are detained for nearly two years in a U.S. government internment camp at Guantanamo Bay, Cuba, in an eerie parallel of the government's internment of Japanese-Americans during World War II. At this writing, thousands of Haitians are again detained at Guantanamo. Ironically, the question arises whether Haitian children born in the Guantanamo camp are Haitian, Cuban or perhaps even American citizens.

Other infamous decisions from the 19th century, such as *Dred Scott* and *Plessy v. Ferguson* (which legalized separate but equal), have been overruled, both at law and in the court of public opinion. But the Asian immigration cases of that era—no less shocking—still bear bitter fruit. Today, no public official would embrace the racism, hatred and nativism that drove those decisions. Yet the legal principles they enunciated still rule our borders. •

TRIBUTE TO GORO HOKAMA

• Mr. INOUE. Mr. President, I have known Goro Hokama, the outgoing chairman of the county council of the County of Maui, for over 40 years. In the spring of 1954, I recall meeting with him to discuss whether we should consider public service as our life's career.

For 40 years, Goro Hokama has served the people of Maui County as a member of the county council and also chairman of that same body.

I wish to share with you and my colleagues the following editorial from the Maui News, dated December 20, 1994, entitled “Goro Hokama: 40 Years of Service.”

I believe it expresses the sentiment of many of us who have had the privilege of calling him friend, and the many who have benefited from his leadership. I wish to join the people of Maui County and all of Hawaii in commending and thanking Goro Hokama for his 40 years of dedicated public service.

The editorial follows:

[From the Maui News, Dec. 20, 1994]

GORO HOKAMA: 40 YEARS OF SERVICE

1994's end will officially bring down the curtain on Goro Hokama's 40 continuous years of public service to Maui County. It's impossible to overstate the contributions he has made to this community, and in fact, to the entire state of Hawaii.

The departing Maui County Council chairman was first elected to office in 1954, the year of the great political revolution that saw the Democrats snatch the reins of power from the Republicans and by proxy from the big landowners. Hokama was Hawaii's lone remaining elected county official who had a hand in that historic housecleaning, a staying power made ever more remarkable by his having to face election every two years.

U.S. Sen. Daniel Inouye is the only person remaining from the 1954 sweep who has served in elected office as long as Hokama, but even he did not have to win 20 straight times to do so. Hokama did.

And Hokama won without ever sacrificing his principles, even when it meant risking the loss of longtime supporters. For all of his 40 years on the County Council, or its predecessor, the Board of Supervisors, Hokama held the Lanai residency seat. In more than one election he trailed his opponent when the ballots on Lanai were counted, but with countywide voting he would prevail anyway because of his broad appeal to residents throughout the county.

Seeing himself as more than just a Lanai councilman, Hokama clearly understood his role as a county councilman, and his actions reflected that understanding, even if not always to his benefit back home.

He learned early, however, not to be frightened off by the odds, working as a union organizer among the pineapple workers on Lanai in the 1940s when unions were a poison to the ruling political and financial powers. And neither was he frightened off nearly 50 years later when the ILWU shockingly refused to endorse him, one of its own, in the election of 1992 because of differences he had with the union leadership over the course of development on Lanai.

He won anyway.

That was an occasion when he opposed development, and he drew the wrath of labor. On other occasions he supported development, and he drew the wrath of environmentalists. On all of those occasions, however, Hokama acted upon what he believed was right, not on what may have been politically expedient.

Maui has repeatedly been cited by economists as the county with the firmest financial footing in the state, and that is due in no small part to Goro Hokama. Fiscally conservative by nature, he nonetheless was a leader in the bold gambles that paid off in the developments of Kaanapali, Wailea and

Kapalua, bringing the full fruits of tourism to bear on Maui's economy. That economic success story is certainly his chief legacy.

His first and only election loss came in November when his bid for mayor was turned back by Linda Crockett Lingle. Hokama again found himself bucking the odds by taking on the popular Republican incumbent, but as always he showed his resolve not to be cowed by the odds. He waged an aggressive and tireless campaign from day one, the only difference being that this time he lost.

That he didn't lose in any of the 20 elections before this one is both a tribute to the man Goro Hokama and a profit to the County of Maui. •

STAR WARS OR MAGINOT LINE? CONTRACT TO BANKRUPT AMERICA

• Mr. SIMON. Mr. President, the Republican contract calls for the old star wars program—the strategic defense initiative [SDI]—to be retooled, reinvigorated, and deployed “at the earliest possible date.” We have spent a fortune on this program since 1983, with next to nothing to show for it, except perhaps how wasteful and foolish our defense spending can sometimes be.

The following article, written by Robert Wright in the *New Republic* in December 1994, makes a clear case for discontinuing the high levels of treasure we spend on missile defense every year. President Clinton, who seems intent on spending far too much on defense over the next few years, must know that the new threats to our national security cannot be parried by building fanciful, expensive, uncertain missile defenses.

The President and Congress instead ought to acknowledge that SDI by any name remains nothing more than a 1990's version of the old French Maginot Line. The Maginot Line didn't work in World War I, and star wars can't work today, for reasons made clear over the past 10 years of congressional and public debate. Sadly, we are visiting an issue now that should have gone away in the late 1980's.

I commend the *New Republic* article to my colleagues, and I ask that it be printed in the *RECORD*.

The article follows:

CRAZY STATE

(By Robert Wright)

Gingrich argued that conservatives adopt space exploration and Reagan's Strategic Defense Initiative, the so-called Star Wars program, as causes for tactical political gain. “Young people like space,” he said.—The Washington Post, 1985)

The Strategic Defense Initiative is back. It's right there in the Republicans' Contract with America—or, at least, in the exegesis. The National Security Restoration Act, one of ten bills the contract would bring to a vote by spring, demands “deployment at the earliest possible date” of an anti-ballistic missile defense. The Republicans haven't said whether that means a space-based defense or a land-based defense. Either way it means trashing the 1972 Anti-Ballistic Missile Treaty, upping Pentagon spending by several billion a year for research and upping it by much more when deployment starts. Why aren't you excited?

A surprisingly large number of people are. The new SDI comes with a new post-cold war rationale that has attracted not just Republicans, but some centrist Democrats. Indeed, research for a land-based SDI has stayed alive—if barely, and under another name—during the Clinton administration. Accelerated research and early deployment are thus a real political possibility, even if space-based weapons are a long shot. But before we make that leap, could somebody explain why the post-cold war rationale deserves anything less than the derision that finally overwhelmed the cold war rationale?

The cold war derision had two pillars. First, there were firm doubts about technical feasibility. Nothing has since happened to undermine them. The Pentagon's initial claim of a 96 percent success rate for the Patriot Missile against Iraqi Scuds turned out to be fantasy.

Second, we realized that plain old deterrence worked just fine as a missile defense; so long as Leonid Brezhnev could count on tit for tat, he wouldn't attack. If anything, indeed, a missile defense could weaken the perverse logic behind deterrence by making mutually assured destruction less assured; the “protected” nation might feel too nervy and the unprotected nation too nervous.

Now, all of a sudden, we're told that deterrence won't work. Why? Because now we face not coolly rational, game-theoretical Soviets, but a different class of enemy: “rogue states”—Saddam Hussein's Iraq, Kim Jong Il's North Korea, Muammar Qaddafi's Libya. How does one qualify as a “rogue state”? So far as I can tell, it helps if your leader (a) doesn't have white skin, (b) dislikes the United States and (c) does not behave in genteel fashion (often failing, for example, to wear a necktie during affairs of state). The less polite term for “rogue state,” and its real meaning, is “crazy state.” But there is zero evidence that any of these leaders is “crazy” in the relevant sense: suicidal. Quite the contrary. Ronald Reagan gave Qaddafi the litmus test for sanity and he passed: we bombed his house, and he modified his behavior. Hussein has shown repeatedly that, once he knows where the brink is, he doesn't step over it.

Bear in mind that a nuclear attack on the United States would be more suicidal for these men than it would have been for the Soviets. Brezhnev might conceivably have weathered a firestorm and emerged from his bunker to inherit a world destroyed. If Saddam Hussein tried that, he would be squashed like a bug upon emerging. And he knows it.

Besides, if any “crazy” leader does want to blow up an American city, there are SDI-proof ways: drive a bomb across the Mexican border, sail it up the Potomac on a yacht or mail it. For a seventy-pound package, second-day UPS costs less than a ballistic missile.

Neo-SDI advocates also invoke fear of “accidental launch.” But, as John Pike of the Federation of American Scientists has written in this magazine, “Lots of things have to happen for a missile to fire. The chances of its leaping unbidden from its silo are about the same as the chances of a car starting itself up, opening the garage door and backing out into the driveway without human assistance.” Besides, how many missiles are aimed at America these days? Russia has agreed to point no missiles at us in exchange for our reciprocal pledge. And whether or not you trust the Russians, their own strategic logic argues increasingly for aiming elsewhere (e.g., at other former Soviet states). Similarly, North Korea's top two targets would be South Korea and Japan. That's the way tensions are in the post-cold war world: regionalized. The surest American defense

against “accidental launch” is to stay on good terms with Brazil.

Of course, however slight the chances of nuclear attack, and however real the chances that a missile defense would fail to repel it, a little insurance would be appealing if it were cheap enough. First of all, it isn't cheap (\$50 billion assuming meager cost overruns). Moreover, “insurance” conduces to solipsism; if we feel (however falsely) safe inside our little shell, waning support for internationalism will wane even faster.

I'm not saying the new SDI enthusiasm is driven by nascent Republican isolationism. But the enthusiasm accommodates and nourishes the party's isolationist strain. In the Republican summary of the Security Restoration Act, only one goal gets more prominent billing than SDI: “to ensure that U.S. troops are only deployed to support missions in the U.S.'s national security interests.”

We all care about “national security interests.” But some of us think that national security (in various senses) is increasingly tied to global stability. The Republicans' post-election rhetoric, in contrast, fixates on keeping U.S. troops out of peacekeeping roles, keeping U.S. dollars from supporting other peacekeepers and stifling the foreign aid that helps stabilize places like Russia and the Middle East.

Also, of course, the Republicans don't favor one-worldish projects like . . . well, like continued adherence to the 1972 ABM Treaty. And violating that treaty (which, alas, even the Clinton administration's battlefield missile-defense research program threatens to do) is itself a dangerous retreat from internationalism. What's scarier than an Indian-Pakistani border flanked by nuclear arsenals? An Indian-Pakistani border flanked by destabilizing ABMs as well. We might yet be able to head that prospect off, but not once we've built our own shell.

The United States is now uniquely positioned to lead the world in avoiding two bad things: a global race to build destabilizing missile defense systems, and a global race to carry destabilizing weapons into space—not just anti-missile weapons, but anti-satellite weapons. The Republicans are now on record as wanting to start the first of these races, and they are clearly inclined to start the second. It's time for President Clinton to crawl out of his bomb shelter, survey the wreckage and start fighting. •

PERES ON DESALINATION

• Mr. SIMON. Mr. President, I will be reintroducing the desalination research bill, which I have introduced in two previous Congresses. It has passed the Senate twice. Unfortunately, it got caught up in the last-minute, partisan wrangling that had nothing to do with the desalination bill, and it did not pass.

The need for it becomes more and more clear every day.

Recently, I had the chance to read responses of Israeli Foreign Minister Simon Peres to questions at the National Press Club Forum on October 4.

In response to a question by Jim Anderson of the German Press Agency, Foreign Minister Peres said: “If you want to save your children from poverty, pay attention to the water. The rivers do not follow the frontiers and the rain doesn't go through the customs.”

Then, in response to another question from a reporter, whose name I do