



Americans, citizens and aliens alike, to restrictions that began with a curfew, and ultimately resulted in the detention of over 110,000 persons of Japanese American ancestry. On the basis of an alleged "military necessity", Japanese Americans, more than 70,000 of whom were American citizens, were deprived of their freedom and placed in detention camps surrounded by barbed wire and machine gun towers, and located in remote and desolate areas of the country. They received this treatment without charge or trial, or any evidence of wrongdoing. Solely on the basis of their racial ancestry, individuals lost their homes, businesses and personal property, endured the harsh life in the camps and suffered the shame and anguish of accusations of disloyalty to the United States. Property losses alone have been calculated to be between \$1 billion and \$2 billion dollars. Less tangibly, evacuation and incarceration brought psychological pain, degradation, and the weakening of a traditionally strong family structure under the pressure of separation and camp conditions.

The Commission on Wartime Relocation and Internment of Civilians was established in 1980 by an act of Congress. It was directed to review the facts and circumstances surrounding Executive Order 9066 and its impact on American citizens and permanent resident aliens, to review the directives of the United States military under Lt. General John L. DeWitt which issued the relocation and detention orders, and to recommend appropriate remedies. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, Section 2, 94 Stat. 964 (1980).

The Commission was mandated to submit a written report of its findings and recommendations to Congress. It was given authority to conduct hearings, and to compel attendance of witnesses and production of documents, including documents in the possession of governmental agencies and departments.

The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. It held approximately twenty days of hearings in cities across the United States, taking the testimony of over 720 witnesses, including key government personnel responsible for decisions involved in the issuance of Executive Order 9066 and the military orders implementing it. The Commission reviewed substantial numbers of government documents, including documents not previously available to the public.

The findings and conclusions of the Commission were unanimous. In general, the Commission concluded that at the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting

the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry. The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that as a result,

"A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II."

Personal Justice Denied, at 18.

On June 16, 1983, the Commission issued recommendations to the Administration and the Congress that monetary compensation in the amount of \$20,000 should be provided to each of those persons who are still surviving and who were subject to exclusion orders as a form of national apology and acknowledgment of the violation of our laws and constitutional and moral principles. As the Commission explained in its recommendations:

No amount of money can fully compensate the excluded people for their losses and sufferings. Two and one-half years behind the barbed wire of a relocation camp, branded potentially disloyal because of one's ethnicity alone -- these injustices cannot neatly be translated into dollars and cents ... History cannot be undone; anything we do now must inevitably be an expression of regret and an affirmation of our better values as a nation, not an accounting which balances or erases the events of the war. That is now beyond anyone's power.

(Commission recommendations, at p. 6)

In a separate legal development technically unrelated to the Commission report, petitioner Fred Korematsu filed a writ of error coram nobis on January 19, 1983 to reopen the landmark Supreme Court case of Korematsu v. the United States, 323 U.S. 214 (1944), which upheld the constitutionality of the evacuation. In 1942, Korematsu was arrested, tried and convicted for refusing to obey a military order to report to an assembly center for evacuation. He appealed his conviction, challenging the constitutionality of the evacuation and detention. In 1944, the United States Supreme Court affirmed the conviction and upheld the constitutionality of the evacuation based upon "military necessity". The Court reached this finding on the representations submitted to the Court in the form of the Final Report of General John DeWitt, the official explanation and justification for the internment. In

addition to the racial arguments that Japanese Americans, by virtue of their bloodline, were prone to disloyalty, the report charged that Japanese Americans were engaging in espionage and sabotage in the form of signaling enemy ships from shore.

Over forty years later, Korematsu filed his petition on the ground that government officials and Justice Department lawyers intentionally suppressed, altered, and/or destroyed key evidence in order to manipulate the outcome of this landmark case by presenting an incomplete or distorted record. Using the Freedom of Information Act, Korematsu's attorneys discovered reports from the F.B.I. and the Federal Communications Commission which were in the possession of the Justice Department before the case was argued, which stated that every allegation of illicit radio signaling had been investigated, and that such allegations were found to be baseless. An Office of Naval Intelligence report, the security agency with jurisdiction over the issue of Japanese Americans and security, stated that the overwhelming majority of Japanese Americans are loyal, and that the situation was blown completely out of proportion, "largely due to the racial characteristics" of the people. The report concluded that evacuation and detention were unnecessary. That report was also in the hands of Justice Department lawyers.

Presented to the Court in the coram nobis petition were government documents from the Department of Justice in which Justice Department lawyers presented to their superiors arguments that they had an ethical obligation to disclose the government report to the Court. Edward Ennis, supervising the drafting of the Korematsu brief, wrote to Asst. Attorney General Herbert Wechsler, as follows:

"(The DeWitt Report) asserts that the Japanese American were engaged in extensive radio signaling and in shore-to-ship signaling. The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so, it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this department has to correct them."

In another instance, Justice Department attorney John Burling, responsible for drafting the Korematsu brief, wrote to the Asst. Attorney General, "There is no doubt that these statements (referring to military claims of espionage) are intentional falsehoods." Burling attempted to alert the Supreme Court to the inaccuracy of the military claims and the fact that they were contradicted by authoritative reports, by

inserting a footnote in the Korematsu brief. The brief went to press, but when War Department officials found out about the footnote, the presses were ordered stopped, and the footnote was removed.

On April 19, 1984, Federal District Court Judge Marilyn Hall Patel issued her written opinion which is to be published in Korematsu v. the United States of America, No. CR-27635 W. She states in her opinion:

"The record is replete with protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions. Petitioner's Exhibit A-FF. In fact, several Department of Justice officials pointed out to their superiors and others the "wilful historical inaccuracies and intentional falsehoods" contained in the DeWitt Report. E.g., Exhibit B and Exhibit AA, Appendices A and B hereto." P. 22.

Judge Patel called these omissions "critical". P. 22. She wrote:

"In Hirabayashi and Korematsu, the courts at each level engaged in an extensive examination of the facts known to the Executive and Legislative Branches. The facts which the government represented it relied upon and provided to the courts were those contained in a report entitled "Final Report, Japanese Evacuation from the West Coast" (1942), prepared by General DeWitt. His evaluation and version of the facts informed the courts' opinions. Yet, omitted from the government's representations was any reference to contrary reports which were considered reliable by the Justice Department and military officials other than General DeWitt . . . Omitted from the reports presented to the courts was information possessed by the Federal Communications Commission, the Department of the Navy, and the Justice Department which directly contradicted General DeWitt's statements. Thus, the Court had before it a selective record." P. 23-24.

Noting that coram nobis relief is available for a claim of prosecutorial impropriety, and the government itself had "acknowledged the exceptional circumstances involved and the injustice suffered by the petitioner and other Japanese Americans", (p. 26), the Court found that "There is substantial support in the record that the government deliberately omitted relevant information and provided misleading information and

papers before the Court. The information was critical to the Court's determination, although it cannot now be said what result would have obtained had the information been disclosed. Because the information was of the kind peculiarly within the government's knowledge, the Court was dependent upon the government to provide a full and accurate accounting . . . The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the Court." (P. 27).

Judge Patel concluded her opinion by stating:

"Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." P. 28.

Although the vacation of the Korematsu conviction does not carry with it any damages or monetary reparations, the fact that the government engaged in prosecutorial misconduct and intentionally suppressed key evidence makes the argument for reparations even more compelling. The misconduct compounds the injustice.

The leading case upholding the legality of the evacuation has now been factually discredited on the ground that the landmark precedent that was issued in 1944 was based upon an incomplete and a distorted legal record. As attorneys and officers of the court, we bear a special duty to insure the integrity and strength of our basic freedoms. This obligation is even stronger when a Congressional commission has found a grave injustice was committed, and a federal court has found that the government intentionally manipulated the evidence to facilitate that injustice. By its passage of this resolution, the American Bar Association will demonstrate its support and commitment to due process and civil liberties under law.

Accordingly, the American Bar Association should urge the Congress of the United States to provide appropriate monetary compensation to those denied equal justice under law pursuant

to Executive Order 9066 and subsequent laws subjecting Japanese Americans to detention during World War II.

Respectfully submitted,

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Chairperson

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