



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS GROUP • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT
OF
WILLIAM L. ROBINSON
on behalf of the
AMERICAN BAR ASSOCIATION
before the
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
of the
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
on
THE WARTIME INTERNMENT OF CIVILIANS

April 28, 1986

Mr. Chairman and Members of the Committee:

The American Bar Association is pleased to appear before you today to express our views on the wartime internment of civilians. My name is William L. Robinson. As an officer of the ABA Section of Individual Rights and Responsibilities, I have been designated by ABA President William W. Falsgraf to represent the more than 320,000 members of the Association.

Mr. Chairman, the ABA supports legislation before you which would provide appropriate redress, including appropriate monetary compensation, to Americans of Japanese Ancestry who, during World War II, lost their freedom and their property simply and only because of their racial background. In 1984, the House of Delegates of the American Bar Association passed the following resolution:

BE IT RESOLVED, that the American Bar Association hereby urges the Congress of the United States to provide appropriate legislative recognition to those denied equal justice under law pursuant to Executive Order 9066 and subsequent laws subjecting Japanese Americans to detention during World War II.

As you know, on the basis of an alleged "military necessity", over 110,000 persons of Japanese American ancestry, more than 70,000 of whom were American citizens, were herded into detention camps surrounded by barbed wire and machine gun towers and located in remote and desolate areas of the country. They received this unjust 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 and \$2 billion.

Three American citizens, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui challenged the constitutionality of the internment program, each believing that a grave injustice was being committed. In 1943 and in 1944, their cases came before the United States Supreme Court. In a series of landmark decisions, the United States Supreme Court upheld the legality of the internment, accepting the government representations that the internment camps were justified by "military necessity."

The Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were committing espionage and sabotage by signaling enemy ships from shore. The government also charged that it was impossible to separate the loyal from the disloyal due to the racial characteristics of Japanese Americans.¹

While this was certainly not the first or only time in American history that a minority group had lost its freedom simply by reason of race, these Supreme Court decisions are the only cases in this century upholding an instance of invidious racial discrimination. It has been said that the hallmark of a democracy is its ability to correct its

own mistakes. So it is appropriate that the Congressional Commission on Wartime Relocation and Internment of Civilians concluded that 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."

Further, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui filed petitions for writs of error coram nobis, a petition to correct "fundamental errors", alleging that a fraud had been committed upon the Court, and that high government officials and the Justice Department lawyers knew that there was no factual basis for the claim of "military necessity."

The claims of Korematsu, Hirabayashi and Yasui were based upon documents recently discovered under the Freedom of Information Act, revealing that government attorneys suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the F.B.I., the Federal Communications Commission, and Army Intelligence which flatly contradicted the government claim that Japanese Americans were a threat to security.

The Office of Naval Intelligence report issued in February of 1942, before the internment began, was the culmination of a two-year study of the West Coast Japanese American population. Authored by the ONI authority on Japanese Americans, Lieutenant Commander K. D. Ringle, the report concluded that only a small and readily

identifiable portion of the Japanese American people were even potentially disloyal. "The entire Japanese problem has been magnified out of its true proportion largely due to the physical characteristics of the people."²

Edward Ennis, Director of the Alien Enemy Control Division of the Justice Department and the attorney responsible for supervising the drafting of the Justice Department brief in Korematsu v. United States, advised Solicitor General Charles Fahy in April of 1943 that, "We must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence Agency regarded selective evacuation as not only sufficient but preferable (to mass evacuation). I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that it represents a view of the Office of Naval Intelligence.... Any other course of conduct might approximate the suppression of evidence."³

In response to a request by Attorney General Francis Biddle to verify the accuracy of military claims of shore-to-ship signaling, J. Edgar Hoover wrote in February of 1944 before the Korematsu case was argued, "Every complaint (of shore-to-ship signaling and radio transmissions) has been investigated, but in no case has any information been obtained which would substantiate the allegation that there has been illicit signaling from shore to ship..."⁴

In response to a similar request, James Fly, the Chairman of the Federal Communications Commission, wrote in February of 1944:

"There were no radio signals...which could not be identified or which were unlawful."5

In a February 1944 memo to Attorney General Francis Biddle, Ennis criticized the Final Report of General J. L. DeWitt as being highly inaccurate in stating that Japanese Americans were committing acts of espionage and sabotage and were prone to disloyalty. He wrote, "(The Final Report) stands as practically the only record of causes for the evacuation and unless corrected will continue to do so. Its practical importance is indicated by the fact that it is being cited in the briefs in the Korematsu case in the Supreme Court...." 6

Justice Department Attorney, John Burling, also responsible for drafting portions of the Korematsu brief, wrote in a memo to Assistant Attorney General Herbert Wechsler in September of 1944, "You will recall that General DeWitt's report makes statements concerning radio transmission and ship-to-shore signaling which were categorically denied by the F.B.I. and the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods...." 7

Burling attempted to alert the Supreme Court of the falsity of the military claims, particularly with respect to allegations of shore-to-ship radio transmissions, by inserting a footnote in the Korematsu brief stating that such allegations were in conflict with information in the possession of the Department of Justice. War

Department officials objected to Burling's footnote and the printing of the brief was stopped in midstream.⁸ Despite protestations by Edward Ennis that the footnote should remain, the Justice Department ultimately omitted the footnote from the government's Korematsu brief.⁹

On November 10, 1983, in Federal District Court, Judge Marilyn Hall Patel ruled that the government's failure to substantively respond to Korematsu's petition was "tantamount to a confession of error."¹⁰ Referring to the congressional report of the Commission on Wartime Relocation and Internment of Civilians and the documents attached to the Korematsu petition as exhibits, Judge Patel stated that the claim of military necessity justifying Executive Order 9066 was based upon unsubstantiated facts and distortions.¹¹

On April 19, 1984, Judge Patel issued her written opinion formally vacating Korematsu's conviction.¹² Referring to the newly discovered government documents attached as exhibits to the petition, Judge Patel wrote, "The substance of the statements contained in the documents and the fact the statements were made demonstrate that the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."¹³ Citing the instance of the original Burling footnote which revealed that the Justice Department attorneys possessed reports contradictory to the allegations of espionage and sabotage, Judge Patel noted, "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. In fact, several Department of Justice officials pointed out to their superiors and others the "willful historical inaccuracies and intentional falsehoods" contained in the DeWitt Report. Judge Patel stated, "These omissions are critical."¹⁴ Judge Patel continued, "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." ¹⁵

In concluding that coram nobis relief exists for a claim of prosecutorial impropriety,¹⁶ Judge Patel wrote, "There is substantial support in the record that the government deliberately omitted relevant information and provided misleading information and papers before the Court."¹⁷ "The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the Court."¹⁸

Judge Patel closed 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."

In a decision dated February 10, 1986, Judge Donald Voorhees, of the Western District of Washington similarly found that the government failed to disclose crucial evidence and that Hirabayashi was "in fact very seriously prejudiced by that non-disclosure."²⁰ In making this finding, Judge Voorhees vacated Gordon Hirabayashi's conviction for violation of exclusion orders.

In the latest judicial pronouncement from the United States Court of Appeals on January 21, 1986, District of Columbia Circuit Justice Skelly Wright wrote:

In the spring of 1942, the government of the United States forcibly removed 120,000 of its Japanese citizens from their homes and placed them in internment camps. There they remained for as long as four years. When the constitutionality of this action was challenged in the Supreme Court, the government justified its action on the ground of "military necessity." The Supreme Court deferred. Nearly 40 years later, a congressional commission concluded that the government's asserted

justification was without foundation. It is now alleged that this fact was concealed from the Supreme Court when it rendered its historic decision in Korematsu v. United States. Yet today, now that the truth can be known, the government says that the time for justice has passed. We cannot agree.²¹

The Circuit Court of Appeals reviewed the documentary evidence that the government had engaged in misconduct and had suppressed crucial evidence which undermined the government claim of "military necessity." The Court held that the statute of limitations is not a bar to the property damage claims raised by Japanese Americans if they can prove that the government fraudulently concealed material evidence. This ruling is now on appeal to the United States Supreme Court and it will be some time before a definitive determination is made with respect to claims for damages by Japanese Americans. It should be noted that while the decision, at least at this point, seems to allow property claims to go forward, Japanese Americans are precluded from suing the government for personal injury, loss of business opportunity, false imprisonment or other torts.

The courts seem to be reaching a consensus that our government committed grave acts of misconduct and suppression of evidence before the Supreme Court. However, the prospects for full relief through litigation are still speculative. Regardless of the ultimate availability of relief through the courts, it is singularly appropriate that Congress enact promptly the legislation before you providing for appropriate redress, including monetary compensation, so that Japanese Americans might receive some measure of justice from the U.S. Government for their suffering.

The leading cases upholding the legality of the internment have now been discredited on the ground that the landmark precedents that were issued in 1943 and 1944 were based upon an incomplete and distorted legal record. As attorneys and officers of the court, members of the American Bar Association feels a special duty to ensure 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 the Federal Judiciary has found that the government intentionally manipulated the evidence to facilitate that injustice. Accordingly, the American Bar Association urges the Congress of the United States to support legislation which would provide appropriate recognition for Japanese Americans.

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Subcommittee for inviting us to present these views. I would be pleased to answer any questions you or members of the Subcommittee may have.

FOOTNOTES

1. Lt. Gen. J. L. DeWitt, Final Report: Japanese Evacuation From the West Coast, 1942: "There were hundreds of reports nightly of signal lights visible from the Coast, and of intercepts of unidentified radio transmissions. Signaling was often observed at premises which could not be entered without a warrant because of mixed occupancy. The problem required immediate solution. It called for the applications of measures not then in being." Quote, at p.8. "Because of the ties of race, the intense feeling of filial piety and the strong bonds of common tradition, culture and customs, this population presented a tightly-knit racial group. It included in excess of 115,000 persons deployed along the Pacific Coast. Whether by design or accident, virtually always their communities were adjacent to very vital shore installations, war plants, etc. While it was believed that some were loyal, it was known that many were not. It was impossible to establish the identity of the loyal and the 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," at p. 10. See also Hirabayashi v. the United States, 320 U.S. 81 at p. 99, "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted and menace to the national defense and safety..."
2. "Report on the Japanese Question", by Lt. Commander Kenneth D. Ringle, U.S. Navy, Office of Naval Intelligence, January 26, 1942.
3. Memorandum from Edward Ennis (Director, Department of Justice Alien Enemy Control Unit) to Solicitor General Fahy, April 30, 1943.
4. Memorandum from J. Edgar Hoover, Director, Federal Bureau of Investigation, to Attorney General Frances Biddle, February 7, 1944.,
5. Letter from F.C.C. Chairman James L. Fly, to Attorney General Francis Biddle, April 4, 1947, at p. 3.
6. "Memorandum for the Attorney General Re: General DeWitt's Final Report on Japanese Evacuation", from Edward J. Ennis to Francis Biddle, February 26, 1944.

7. Memorandum from J. L. Burling to Asst. Attorney General Herbert Wechsler, September 11, 1944.
8. Memorandum from J. L. Burling to Asst. Attorney General Herbert Wechsler, September 11, 1944; memorandum from J. L. Burling to Edward Ennis, October 2, 1944.
9. See Korematsu v. the United States, 584 F. Supp. 1406 (1984) at 1417 and 1418. Judge Patel notes regarding the footnote revision: "The final version made no mention of the contradictory reports. 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 Exhibits A to FF. In fact, several Department of Justice officials pointed out to their superiors and others the 'willful historical inaccuracies and intentional falsehoods' contained in the DeWitt Report."
10. Transcript from proceedings of "Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu before the Honorable Marilyn Hall Patel", San Francisco, California, November 10, 1983, at p. 35.
11. Transcript from proceedings of "Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu Before the Honorable Marilyn Hall Patel", San Francisco, California, November 10, 1983, at p. 37.
12. Korematsu v. the United States, 584 F. Supp 1406 (N.D. Cal. 1984), at p. 1409
13. Ibid., p. 1417.
14. Ibid., p. 1418.
15. Ibid., p. 1419.
16. Ibid., p. 1420.
17. Ibid.
18. Ibid.
19. Ibid.
20. Hirabayashi v. the United States, February 10, 1986 No. C83-122V at page 33.
21. Hohri v. the United States 782 F.2nd. 227 (D.C. Cir. 1986) at 231