August 1987

National Council for Japanese American Redress

NEWSLETTER

VOLUME IX, NUMBER 7

Dear Friends,

The passage of our historic lawsuit through the courts coincides with an equally historic challenge to our judicial system by the Reagan administration. Two judges from the D.C. Appeals Court who reviewed our case have been nominated to the Supreme Court. Justice Antonin Scalia succeeded. Judge Robert Bork faces the hurdle of confirmation by the U.S. Senate. Our adversary in the Supreme Court was the U.S. Solicitor General, Charles Fried.

The New Yorker's "The Talk of the Town" (August 3, 1987) was devoted to an analysis of the judicial philosophy of Judge Bork. The magazine's next two issues (August 10 and 17) published Lincoln Caplan's essay, "The Tenth Justice," on the office of the U.S. Solicitor General. These essays provide background and insight into the judicial setting of our lawsuit. I strongly recommend them. (The two-part Caplan essay is available through NCJAR. Please check our literature listing on page 9.)

On January 21, 1986, a three-judge panel of the D.C. Appeals Court, after reviewing our appeal of the U.S. District Court's dismissal of our lawsuit, tolled the statute of limitations to July 1980 and remanded our lawsuit to trial. The government, you may recall, requested a hearing *en banc* by a full eleven-judge panel. In a six-five vote, its request was denied. Judge Bork wrote a strongly-worded dissent from this denial.

In my judgment, his arguments were intemperate and extreme. He struck me as being more of an adversary than a judge. He characterized the panel majority's reasoning as "contrived" and as creating "a rule of *absolute* and *permanent* judicial deference to any claim of 'military necessity.'" (Bork's emphasis.) He described this deference as "utter capitulation," and then argued,

> "So sweeping is the panel majority's new role, the executive branch may remove American citizens from their homes and impound them in camps, solely on the grounds of race, and the courts will not interfere, no matter what facts are shown."

Of course, Judge Ruth Ginsburg and Judge Skelley Wright, the panel majority, were far from pronouncing such a general rule. They rebutted,

> "We ruled narrowly, specifically, and only that when the Supreme Court has definitively held that deference to a military judgment is due in a particular case, litigants may not reasonably be required to re-litigate that issue in advance of a green light from the 'war-making branches.'"

Bork's performance in our case was only only the tip of the iceberg. His arrogance is so monumental that he takes issue with most of our constitutional-legal tradition. As "Talk of the Town" states:

> It is this Court, and its continuity with its predecessors in almost every major decision upholding an individual constitutional right against the powers of the State, over a period of more than thirty years—going back to *Brown v. Board of Education* and beyond—that Judge Bork has repeatedly and consistently been accused of deciding "lawlessly" and "without principle," and of "creating rights," and of imposing

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> "value choices" and "preferences," and of "lacking candor," and of being "unprincipled," and of producing a line of precedents "as improper" and "as intellectually empty" as *Griswold v. Connecticut*—a 1965 case in which the Court held a married couple's right to use contraceptives, a decision to which Bork has returned obsessively and scornfully again and again, and one that he would clearly vote to overrule. He has accused the Court, including on major occasions Justices Oliver Wendall Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart, and Lewis Powell, with whom he prefers on other occasions to be identified, of being, unaccountably but consistently, less principled, less competent intellectually, and less committed to the Constitution than Judge Bork believes himself to be.

I find particularly repugnant these lines by Bork on the Public Accomodations Act, Title II of the 1964 Civil Rights Act:

> The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Because of Bork's opinion in our case, I think any of us has sufficient reason to express our opposition to his appointment to the Supeme Court. With these revelations, our opposition should be rigorous and certain.

I found Lincoln Caplan's essay enlightening and distressing. I learned that the Solicitor General (or S.G., as the position is called) has a tradition of wearing striped pants and tails in the Court. In 1983, the odds on the Court's granting certiorari were but three per cent, not the five per cent I had used earlier. His success rate on cases he argues is around eighty per cent, which may provide some comfort—at least our loss was within the fat part of the normal curve.

The Department of Justice contains 5,107 attorneys, a real Goliath for our David of a law firm. (But remember who won.) The S.G. has permanent offices in both the Supreme Court and the Dept. of Justice. His principle role is "to represent the executive branch of government in the Supreme Court." The Justices expect "his remarks to be distinguished * * * They count on him to look beyond the government's narrow interests. They rely on him to help guide them to the right result in the case at hand, and to pay close attention to the impact of the case on the law itself."

In brief, the S.G. is the government's most expert legal mind. He (to date the position has been exclusively male) reviews every request from within the government for adjudication by the Supreme Court, and exercises his considerable power in deciding which to argue, rejecting about eighty per cent. He is independent and authoritive.

Caplan states his theme:

> At the center of many of the deep, almost seismic changes that Reagan's team has tried to bring about in the courts and the law is a little-known figure in the Justice Department called the Solicitor General. To lawyers in the highest reaches of the profession, he once represented better than any other individual this country's dedication to the rule of law. The Reagan Administration has stripped the Solicitor General of that distinction, and eliminated his role as the government's legal conscience.

In the fall of 1985, as Charles Fried began his tour as S.G. by appearing before the Senate Judiciary Committee in his confirmation hearings, William Bradford Reynolds, who earlier had been rejected by the same Committee for Associate Attorney General, was now sitting in on meetings in the S.G.'s office as the Reagan-Meese

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political overseer. This was a precedent, and seriously compromised the independence and authority of the S.G.'s office. Of course, Fried interpreted this fact less ominously. He explained that he "often turned to Reynolds for advice out of respect for his judgment."

(I find striking this parallel of Reagan's style to that of his arch enemy, the Soviet Union. I can imagine a Soviet bureaucrat expressing such approval of his or her political overseer.)

Caplan reports several effects of this politicization. In Fried's first nine months, over one-fourth of the assistants and deputies to the S.G. left. Fried developed and began consulting with a "kitchen cabinet" of outsiders instead of relying and confiding in his staff. As one of Fried's assistant explained,

> We're also the only lawyers who take a relatively neutral view. The agencies have axes to grind, because their programs are at stake in litigation. This Administration's senior executives are so political that their legal views are colored as well. That leaves the S.G.'s office, and one of things that people in the office like least is that Fried gets advice from the agency involved, the responsible part of the Justice Department, his kitchen cabinet, and us as if they were all on the same footing. He treats us like any other part of the government. That is what people in the office find most difficult to take.

In an experience comparable to my own, Julius LeVonne Chambers, director-counsel of the NAACP Legal Defense and Education Fund, stood on the steps of the Supreme Court after arguing the Gingles case (equal representation in voter redistricting) with Fried, and "said that Gingles was the first case in his long career as a civil-rights lawyer in which he faced the Solicitor General as 'the enemy.'" Though I, of course, did not argue before the Justices, I felt equally frustrated with our having to fight with the Solicitor General for our constitutional rights.

Caplan sheds light on Fried's curious ploy in our case wherein he replaced military necessity as the government's rationale for mass exclusion and detention with racism, in total disregard of the record:

> Fried's habit of representing Court opinions to be as he wanted them understood, and not as they were written, was related to a theme of the Court's criticism of him as Solicitor General—serious concern about his recurrent departures from settled practices of legal reasoning, in order to press for results favored by the Administration.

There is much more to Caplan's essay. I have highlighted a few points. I feel convinced that we are dealing with a politicized, hence tainted, legal process. I had always thought the law provided the leverage of logic and reason, based on facts. Little did I suspect that a so-called conservative President would mess up our legal system. I think conservatism means leaving be well-established practices, proceeding with careful deliberation, and certainly staying within the mainstream of tradition. The issue here is not the partisan politics of a Republican Administration versus a Democratic one. It's a problem of raw opportunism, unchecked by respect for history, tradition, and our constitutional democracy. One almost feels as though the principle of *caveat emptor,* let the buyer beware, has infiltrated our governmental processes. Instead of trust, one must constantly guard against governmental abuse.

We have been expending considerable effort in getting changed the extinguishment of claims clauses in the two redress bills. We have two concerns: 1) that the legislation does not jeopardize our lawsuit; and 2) that the House version does not force former victims to decide, before any payment is forthcoming, whether a) to accept payment and not join the lawsuit or b) not to accept payment and join the lawsuit. As presently written, this decision in 2) occurs within six months after a potential recipient has been notified by the Attorney General. Option 2a occurs automatically, when a potential recipient does nothing in six months following notification.

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Protection of all Minorities

Recently in Hawaii, a group of concerned residents met with the purpose and need to inform others on the Islands about the constitutionality of the wartime internment of Japanese Americans during World War II, and to assist NCJAR in their efforts to seek redress through the courts. The name of the group is SPAM (Society for the Protection of All Minorities).

The members of SPAM are Ernest Uno, brother of the late civil and human rights activist, Edison Uno, Ellen Godbey Carson, former counsel for NCJAR, and now practicing in Honolulu, Franklin Odo, Fuku Tsukiyama and Ed Takahata.

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There is much pressure to get the bills to a vote by both houses on the date of the bicentennial of the U.S. Constitution. That, I'm afraid, is show biz. The House Report on H.R.442—reports serve as explanation for the legislation—contains this comment by the Congressional Budget Office:

> The provision requiring people accepting the restitution payment to extinguish any claims against the federal government could offset the other costs in the bill. For example, a class-action suit on behalf of interned Japanese-Americans, United States against Hohri, is currently in federal appeals court. In that case, the plaintiffs are seeking $10,000 payment for each person interned during World War II. Because of the uncertainty as to the results of these proceedings, however, we cannot estimate what savings, if any, would result from this provision.

Despite the garbled explanation of our lawsuit (it's *Hohri et al. v. the U.S.* and 22 causes of action for approximately $220,000 per victim), this provides evidence of the intent behind the extinguishment of claims clause.

I don't know about you, but I've been busy. I've been invited to preach twice, once at Sage UMC in Monterey Park on September 6; I talked at a Hiroshima-Nagasaki commemoration; made a presentation before the Civil Rights Committee of the Chicago Regional Anti-Defamation League; being honored at this year's Manzanar Reunion in Los Angeles, September 5 and talking at an afternoon meeting September 6; and been invited to participate in a conference, "View from Within: the Japanese American Wartime Internment Experience," at the University of California, 155 Dwinelle, Berkeley on September 19-20. On the afternoon of the 19th, the panel will be Ellen Carson, Aiko Herzig, and I, discussing "The Japanese American Class Action Suit and Legislative Redress."

I am truly grateful for those who've responded to our fund appeal. We've been able to meet our current expenses. But we still need to hear from that vast number who have yet to respond. We still have a ways to go, and need your support to make it.

Peace,
William Hohri

■ NOTE: Also scheduled to appear on September 19, 1987 are keynote speaker Peter Irons and Richard Drinnon, author of Keeper of Concentration Camps: Dillon S. Myer and American Racism. Invited for the panel of "Military Necessity Rationale, the Japanese American Test Cases, and the United States Supreme Court" are Fred Korematsu, Gordon Hirabayashi, Rod Kawakami, Peggy Nagae, and Dale Minami. An array of prominent speakers have been lined up for September 20.

■ Between July 25 and July 29, 120 delegates from California, New York, Massachusetts and Hawaii assembled in Washington, D.C. to urge members of Congress to back redress bills H.R.442 and S.1009. Speaking at the opening session on Saturday, July 26, in the Capitol Room of the Hyatt Regency was Aiko Herzig. The following *(below)* is the text of her address.

To preserve the right to judicial relief

For my husband, Jack Herzig, and myself as Washington, D.C. representatives of NCJAR, the National Council for Japanese American Redress, may I welcome you to the capitol of this country. We are aware of the many hours of planning, scheduling, and briefings that have been necessary in getting this lobbying delegation together and we congratulate NCRR (National Coalition for Redress/ Reparations) for the work that has gone into this effort. We hope that you will go home satisfied with the fruits of your labor for the days you will have spent on The Hill.

As you may know, a class action lawsuit was filed in March 1983 here in Washington, D.C. by NCJAR and plaintiffs were selected to represent the class. Some of these plaintiffs have also filed in the name of their deceased parents. I have been invited to give you an overview of an action taking place in the judiciary branch of the government.

The official title of the case is *William Hohri et al. vs. the United States*. William Hohri is chairperson of NCJAR and the primary named-plaintiff in the lawsuit. The named-plaintiffs were selected as representatives of the classes of Japanese Americans who were affected by the U.S. government's exclusion program of World War II. These include the Issei, the first generation Japanese arrested and detained after the war began. This group of Issei were imprisoned in Justice Department Immigration and Naturalization Service internment camps and in War Department POW camps. Other plaintiffs represent Japanese Americans who were held in War Relocation Authority camps. NCJAR has included in its lawsuit *all* Japanese Americans who were exiled into the interior, detained, and denied their lawful rights as the result of the selective exclusion program of the government, as well as heirs of deceased victims.

> If money damages are awarded in this lawsuit, the Court will determine who are eligible for compensation. This money will come from a source set aside for awards made by the Court, called the "Continuing Fund." Awards from this Fund are not subject to Congressional approval.

Should *Hohri v. U.S.* be successful, there is no way we can predict what the amount of the award will be. However, one of the greatest benefits we will have had is the opportunity to present details of the government's fraud upon the high court and perhaps lay the basis for reconsideration by the Supreme Court of legal precedences by their brethren in the 1940s.

In April of this year, the Supreme Court heard the petition of the government in the *Hohri* case and in June ruled that the case should have gone to a different Court of Appeals. The next step is for the Supreme Court to issue a mandate to the lower court. The Federal Circuit of Appeals will hear the case. If we win on this level, the Justice Department may file an appeal in the Supreme Court. If we lose, we shall certainly take an appeal back to the Supreme Court.

It is difficult to give a timetable on court cases. It is very possible that we may have a hearing in the Federal Circuit Court of Appeals next spring and be placed on the docket for a Supreme Court hearing at its next term, which begins in October of 1988. In that event, a hearing by the

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Supreme Court of *Hohri v. U.S.* might take place even *before* the Appropriations Committee acts on the redress bill, if it is enacted this year or in 1988.

We feel good about the fact that the Supreme Court hearing of the *Hohri* case has had the salutory effect of propelling action in Congress on the legislative bills. Congressmen we have talked to have attested to this fact. News stories about *Hohri v. U.S.* have brought national attention to the redress movement. We have received editorials from newspapers throughout the country—not just the Japanese American vernacular. These editorials have criticized the decision of the Supreme Court and voiced strong support for compensation to Japanese Americans.

Japanese Americans have experienced a long and hard fought battle in both the Congress and the courts to remedy government-sanctioned constitutional violations against them. Civil rights and law groups, the churches, and other organizations have supported the proposed legislation also joined in the lawsuit as *amici,* friends of the court. NCJAR has participated in numerous community educational meetings and Congressional hearings on the redress bills.

NCJAR supports the legislative effort and has not sat by passively while the bills made their way through the congressional process. William Hohri has testified in behalf of the bills in both the House and the Senate. My husband, Jack Herzig, has also testified in both Houses as well as at the *coram nobis* trial of Gordon Hirabayashi. Damaging allegations were made before Congress and at the Hirabayashi trial by a former National Security Agency official and other redress opponents who claimed that intercepted intelligence cables, called MAGIC, showed that there were Nisei espionage agents working for imperial Japan. They claim these cables justified the mass exclusion of all persons of Japanese ancestry. Jack's testimony demolished the credibility of their accusations.

We look forward to the enactment of H.R.442 and S.1009, but we must admit that we do have serious problems with Section 205(e), the "Extinguishment of Claims" clause in the Senate bill, but even more so with Section 7(a), "Restitution," in the House bill. We sincerely hope that proponents of the bill recognize the ramifications of these clauses.

NCJAR has taken the initiative to have these matters clarified because we feel it is surely not intentional on the part of the framers of the bill to extinguish itself, or to have made, inadvertently, ambiguous the matter of the choice to opt in or opt out of the bill even before appropriations are made. Nevertheless, unless the language is made specific, we see difficulties ahead.

Our effort is to preserve the right to judicial relief in the lawsuit already in litigation, to preclude double compensation under the legislation, and to protect the benefits to eligible individuals.

Getting back to the lawsuit itself, not being a lawyer, I am unable to answer fully legal and technical points of law. If there are questions of this nature, please write them down and we shall discuss it with our counsel.

I take the liberty of capsulizing our concern about the bill by quoting NCJAR attorney, Benjamin Zelenko.

> "We remain convinced that the rights of litigants in the pending redress litigation to see the suit through to final judgment should be preserved. And..."[A] serious defect...concerns the unfair predicament that would occur if notification to an eligible individual is made...*before* appropriations occur. The opt-in or opt-out decision required to be made within 6 months of such notice would then be imposed on all individuals, at a time when funding still was undecided. The result could visit

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Professor of Human Rights at Rutgers

Appointed as the Raoul Wallenberg Distinguished Visiting Professor of Human Rights at Rutgers, the state university of New Jersey, was Peter Irons, professor of political science at the University of California in San Diego. His tenure as chair will begin in January and end in December of 1988. Irons was chosen in part because of his efforts as a lawyer and historian in securing legal vindication for Fred Korematsu, Gordon Hirabayashi, and the late Minoru Yasui. The three challenged the curfew and internment orders implemented in 1942.

> The Wallenberg Professorship was created by the New Jersey legislature in 1986 to honor the diplomat and humanitarian who, in his position as Swedish consul in Hungary, was responsible for saving several thousand Jews from Nazi concentration camps. He disappeared shortly after the war ended and reportedly died in a Soviet prison in 1947, although his death has never been confirmed.

Peter Irons will be coming out with his new book, The Courage of Their Convictions, which profiles those who were involved in important civil rights and civil liberties cases over the past 50 years. His first book was Justice at War: The Story of Japanese American Internment Cases. [See page 9 book listing.] Irons graduated from Harvard Law School and received a Ph.D. in political science from Boston University.

He was a guest of NCJAR earlier this year, when both Irons and Ellen Carson spoke at the February 19th EO 9066 commemorative here in Chicago.

■ NOTE: The edited article *(above)* appeared in the July 25, 1987 HOKUBEI MAINICHI.

The original Executive Order

The Smithsonian Institution's exhibit "A More Perfect Union: Japanese Americans and the U.S. Constitution" opens on October 1, as the celebration of the 200th birthday of the United States Constitution gets under way.

Visitors will have much to see. Besides a replica of a camp guard tower with machine gun; works of art; anti-Japanese immigration and propaganda literature from 1885 to 1945; and many, many other unforgettable exhibits: there is on display one item that should not be overlooked, and that is the *original* Executive Order 9066 signed by President Franklin D. Roosevelt on February 19, 1942—a piece of paper which led to the mass exclusion and detention of persons of Japanese descent from the West Coast during World War II. This historical exhibit will be open to the public for at least five years. e.s.

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> a cruel penalty on Japanese Americans who may not receive the full amount of compensation envisioned [in the bill] and may also lose the right to judicial redress."

I hope that I have provided you with some understanding of NCJAR's position on the redress bill. It is in the interest of the Constitution, the entire nation and specifically the Japanese American community to get the redress bill enacted *and* enacted with the class action lawsuit intact.

In closing, I hope that you find stimulating the lobbying work you are about to experience. It is a legitimate and important process in our democratic society.

I wish to say that Washington is a beautiful city. There are many important and historic sites to see and I hope that you will have some time to enjoy yourselves. I appreciate NCRR's invitation to make this address to you and I *thank you* for your kind attention. ☐

AIKO HERZIG

CONTRIBUTORS

ARIZONA: Shigeki Hiratsuka, M/M Terry Matsumoto.
CALIFORNIA: M/M Kazumi Adachi, Jonah Chang (United Methodist Church), Jack/Grace Fujimoto, Tomi Fujita, Art/Debbie Hansen, Nobue Hatchimonji, Hannah Tomiko Holmes, Kimiyo T. Tom, M/M Thomas T. Horiguchi, Fred Ichinaga, Jon/Ruby Ichinaga, George R. Ikeda, Mickie M. Igarashi, M/M Hiro Imai, M/M Tamotsu Isozaki, Toshiko Ito, George Iwao, M/M Izumi, Kim Kanatani, Hiroshi Kashiwagi, George/Ikuko Kiriyama, K. Kiyomura, Kiyo Kunisawa, Futami Maeda, Amy Mass, Gary Matsuda, Noboru Mikasa, Paul T. Minerich, Samuel O. Nukazawa, C. Ogata, George/Mary T. Ogawa, Luther Ogawa, M/M Ed Okuno, Kathryn Miyake Robinson, M/M George N. Saiki, H.R. Sakamoto, Nancy Shimotsu, Lester/Seda Suzuki, Yanie/Wataru Takahashi, Masao Takeshita, Barbara Taniguchi, Walter Tatsuno, Tiz'Alice Tsuma, Ansho Uchima, Mas Uyesugi, Mitzi Yamamoto, Ike/Grace Yokomizu, Bessie S. Yokota, Fumi Yokota, Sonny S. Yonesawa, William/Carole Zaima.
CANADA: Akira Kubota, Roger Obata.
CHICAGO: David/Ahlia Aylesworth, M/M harry Endo, Kazuko M. Fujishima, Brian B. Hirami, Yutaka Itano, Kenneth Kokukata, Jan Linfield, Joe/Sueno Migaki, Seiichi Motoki, M/M Walter C. Moy, Sam/Harue Ozaki, Ida Terkel, Misao Shiratsuka, Gary H. Yasutake.
COLORADO: John Iwakiri. CONNECTICUT: Ken Matsuda.
FLORIDA: Lillian McCoy.
HAWAII: Kumi M. Boutz, Elsa Kudo, Lowell Kurashige, Walter T. Matsumoto, Toshie Muromachi, U. Tanigawa.
ILLINOIS: Paul/Frances Arakawa, Sandra Hoke, John/Helen Izumi, M/M Tosh Kasai, H. Kuramitsu, Casey Omori, M/M Bright Y. Onoda, M/M Emmett H. Shintani, Henry/Kayoko Suzukida, Benjamin S. Tani.
INDIANA: Roy Y. Hori. LOUISIANA: Hajime Yenari.
MAINE: Robert/Elizabeth Crandall.
MARYLAND: Jean Thoits Coolidge, Bill Himel, M/M Edward J. Lisee, Yoshihiro Takata.
MASSACHUSETTS: Horace W. Furumoto, Margot Kempers.
MICHIGAN: Robert T. Akamatsu. MINNESOTA: Martha Oye.
NEW JERSEY: Mike/Honey Wada.
NEW YORK: Janet Aisawa, Min Hara, Akira Hirami, Kazu Iijima, Kenneth Inada, Kimie Ito, Cheryl Ikemiya, Smile Kamiye, Gene Kubo, Phil Nash, L. Toyo Obayashi, Tamaki Ogata, Roger/Lani Sanjek, Takako Kusunoke Wada, Takeko Wakiji, Walter/Michi Weglyn.
OHIO: Toyo S. Kawakami, Ellen R. Mayhew.
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VIRGINIA: Brian Le Bert-Francis, Mary Walton Livingston, WASHINGTON: Sumie Akizuki, Charles M. Henderson, Chizuko Omori.
WASHINGTON, DC: Judith Dollenmayer, Charles Kamasaki.
WISCONSIN: James/Ruth Hasegawa, Rosie Kuramoto, Charles B. Schudson.

■ If you do not wish to have your name listed, please indicate when you remit.

LETTERS

I join with you and the many dedicated supporters of the Supreme Court to arrive at a more definitive decision. Nothing worth the quest comes easily. One must persevere!

Our racial pride and dignity demands it and common decency within us all cry out to repair this monumental violation.

I have every confidence that those who have travelled the long, frustrating road with you will not fail.

Whether or not the goal is ever attained, the efforts, itself, has been and will be worth the quest.

Continue the struggle!

JIMMIE OMURA
Denver, Colorado

We are with you.
Keep up the good work.

TERRY MATSUMOTO
Nogales, Arizona

When the going gets tough, the tough get going.
God Bless
your concerted effort.

MAS UYESUGI
Orange, California

We appreciate the work you are doing and keeping us informed.

Many thanks!

M/M M. FUJISHIMA
Chicago, Illinois

NCJAR newsletter
editor: Eddie Sato
Doris Sato

ATTENTION!

From the *New Yorker*

☐ THE TENTH JUSTICE (I) August 10, 1987
by (II) August 17, 1987
Lincoln Caplan

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