VOLUME III, NUMBER 4 JUNE 1986
National Council for Japanese American Redress
NEWSLETTER
925 West Diversey Parkway
Chicago, Illinois 60614

NCJAR is seeking redress from the U.S. government through a class action lawsuit for the mass exclusion of 120,000 Japanese Ameericans during World War II.

FILED: May 30, 1986
No. 84-5460
Hohri, et al. v. United States of America

GOVERNMENT'S PETITION FOR REHEARING DENIED

AN ORDER WAS HANDED DOWN BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WHICH DENIED THE APPELLEE'S PETITION FOR EN BANC.

THE GOVERNMENT SOUGHT RE-HEARING EN BANC FROM THE FULL COURT. A VOTE WAS REQUESTED. A MAJORITY OF THE JUDGES IN REGULAR ACTIVE SERVICE DID NOT VOTE IN FAVOR OF RE-HEARING.

Circuit Judges:
Wright, Wald, Mikva, Edwards, Ginsburg
Bork, Scalia, Starr, Silberman, Buckley Chief Judge: Robinson

Plaintiffs in this case are nineteen individuals, all of whom were either Japanese-Americans subjected to internment during World War II or the representatives of such internees. They sought money damages and a declaratory judgment on twenty-two claims, based upon a variety of alleged constitutional violations, torts, and breaches of contract and fiduciary duties. The district court dismissed each of these claims. The court of appeals affirmed, except as to one claim founded on the fifth amendment to the Constitution. With respect to that claim, virtually every step of the panel majority's reasoning either adopts broad and troublesome propositions or is plainly wrong.

I think this decision was an unfortunate one, and would have preferred to see its plain-errors corrected by this court sitting en banc. Since only five judges—one short of the necessary majority—voted to rehear, the task falls instead to the Supreme Court, or perhaps to the United States Court of Appeals for the Federal Circuit. As the majority indicates, any appeal from the proceedings on remand will be to the Federal Circuit, since the Tucker Act claim is all that remains.

From dissenters' statement:
Bork, Scalia, Starr, Silberman, Buckley

The panel majority opinion deals particularly and precisely with the special facts of an extraordinary episode of injustice. It most assuredly "creates [no] rule of absolute and permanent judicial deference to any claim of 'military necessity.'" Rather, the opinion simply describes and turns on what we find to be the situation-specific holding of Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944): courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the World War II internment policy. That Supreme Court holding seems to us clear, pin-pointed, and definite. We therefore concluded that the former internees faced an insuperable obstacle to the present suit until the "war-making branches," released the federal courts from the grasp of Korematsu and Hirabayashi by indicating that deference was no longer due to the wartime judgment of military necessity for the mass evacuation.

From panel majority's statement:
Wright, Ginsburg

D E A R F R I E N D S ,

ANOTHER VICTORY! On May 30, 1986, the U.S. Court of Appeals for the District of Columbia Circuit denied the Government's petition for a re-hearing en banc. The vote was six-to-six, a tie. This narrowest of margins was made even narrower when Judge Skelly Wright, whose vote was one of our six, retired two days later, June 1st. But as we little boys used to chatter in our sandlot baseball, "A miss is as good as a mile."

Still, the issue was debated with heat. Judge Bork wrote a 24-page dissent from the denial. (The terms get tricky. There was no majority, hence no majority-minority opinions. The petition for re-hearing was denied. We have assenters and dissenters to the denial. But remember that in the appeals court decision of January 21, 1986, remanding our case to trial, there was a two-to-one majority decision by the three-judge panel. This decision is sometimes called the "panel majority's opinion" and the two judges who voted for the majority, the "panel majority.") He sets up a straw man by placing the most extreme construction on the panel majority's opinion:

> "The panel majority has created an unprecedented rule of absolute deference [by the courts] to the political branches whenever 'military necessity' is claimed, even where the claim is irrelevant and however spurious the claim is shown to be." (Page 1 of the dissenting statement.)

He is ascerbic:

> "... virtually every step of the panel majority's reasoning either adopts broad and troublesome propositions or is plainly wrong." (Page 1)

He then stretches to the extreme:

> "So sweeping is the panel majority's new rule, the executive branch may remove American citizens from their homes and impound them in camps, solely on the grounds of race, and courts will not interfere, no matter what facts are shown." (Page 2)
>
> "This means that a claim of military necessity, once made and upheld, may never be challenged in court, no matter what the facts are proved to be, until a political branch states that the claim was known to be baseless when made." (Page 7)

Once having set up this straw man, he of course proceeds to demolish it, thereby attempting to demolish the majority's opinion. Logically, it's no different from equating Japanese-Americans to the Japanese Imperial Navy's attack on Pearl Harbor as an argument for military necessity or, as John J. McCloy puts it, "retribution."

FORTUNATELY, THE ASSENTING opinion, written by Judge Wright and Ginsburg, is aware of Bork's ploy, and they reply:

> "... the temptation to exaggerate a decision with which one disagrees, thereby to make it an easy target for slings and arrows, ought to be resisted." (Footnote pages 5-6)

As they explain:

> "We did not announce a general rule of automatic judicial capitulation to the military's claims of military necessity. We ruled narrowly, specifically, and only that when the Supreme Court has definitely 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,'" (Pages 2-3)

They then follow with this:

> "... the dissenters overlook this reality: litigants do not have the academic luxury of indulging the belief that they can lay a solid foundation for their in-court pleas by insisting that the Supreme Court does not really mean what it says, or that a peacetime Court should not hesitate to repudiate a wartime Court for ignoring the Constitution's requirements." (Pages 3-4)

Continued on page 3

Continued from page 2 DEAR FRIENDS

THIS VICTORY CLEARS the way for the main event: the Supreme Court. It completes the appeals available at the U.S. Courthouse. The next level is the Court, with its presumptive capital "C" and its imposing facade. I think it likely that the Government will take its appeal upwards. As we have noted from the outset, from late 1980, its best defense is in these procedural matters of time limitations and sovereign immunity. It does not want our case to go to trial. The U.S. Court of Appeals has stood firm in remanding our case to trial. This remand can now be reversed by the Supreme Court.

We, too, have a strong interest in going all the way. You will recall that though our class action lawsuit has now won two major victories, its 22 causes of action are reduced to 1, and recipients of the 1948 Claims Act are excluded from the class. We want these restored.

THE NEXT STEP is in two stages. We will have 90 days to file for a Writ of Certiorari (ser-shi-o-ra-ri), which the Court may deny or allow. If denied, we return to the District Court for trial. If allowed, we prepare and proceed to the Court above.

In the Court, we can win or lose, more probably, win and lose. One cannot predict. The Court has latitude. It may affirm here, reverse there, and arrive at unexpected conclusions elsewhere. (I do not think we should be surprised if the Court addresses the Korematsu decision.) What we do know for certain is that our years of preparation and struggle have produced a body of arguments that has endured a gauntlet of adversarial sticks and stones. For this we owe a great debt to our law firm of Landis, Cohen, Rauh and Zelenko. (The debt is moral, not fiscal; we're completely paid up so far.)

I HAD STARTED to write this letter with my reaction to the April 28th hearings of the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations, but was overtaken by this victory. Briefly, I was depressed by the shoddy quality of the opposition: Representatives Stratton and Lungren, S.I. Hayakawa, Lillian Baker, David Lowman, Karl Bendetsen, Catherine Treadgold, Charlotte Elam. I think it's clear that H.R.442 is dead for this season of Congress.

Some unfinished business from April: my thanks to these people who helped make NCJAR meetings in Los Angeles such a success: Rev. Alan Jones, Walter Tanaka, Hazel Tominaga, and Aki Sakamoto at the West Los Angeles United Methodist Church; Rev. Wes Yamaka, Rose Yamaka, Jane Iwamoto, Sets Tani, Muts Higashi, Taye Umada, Sada and Hank Mayeda, Ets and Dave Nakamura, Joyce, Stan, and Russ Okinaka at Sage UMC; and Rev. Grant Hagiya and Mrs. Pat Kawamoto at the North Gardena UMC.

FINALLY, THERE IS more good news: Sage United Methodist Church became our 45th ronin. Room for only two! Sage UMC has been our base of support and operations in Los Angeles. We welcome them as ronin. (A historical note: Sage's pastor Wes Yamaka, is descended from one of the original 47 ronin.)

We welcome your support, too. If you haven't contributed recently—in a year or so—do it now. And please send us names and addresses of friends and relatives who would or should be interested in their lawsuit.

Peace,

William Hohri

THERE HAVE BEEN questions raised in the Japanese community as to the source of funds in court-awarded cases. Misleading information has been circulating that if Japanese Americans become entitled to compensation because of government violation of their constitutional rights through a court ruling in the class action lawsuit, Hohri et al v. U.S., such judgment must have Congressional approval. This is incorrect. [See article below]

AIKO HERZIG-YOSHINAGA

JUDGMENT FUND AN OBSCURE GOVERNMENT ACCOUNT

WHEN THE LONG arms of Gramm-Rudman-Hollings reached out last month, they missed grasping the "judgment fund," an obscure government account that dispenses from $250 million to $500 million a year but is exempt from the budget-balancing law. The fund, now 30 years old, is one of a rare species in government spending—a permanent appropriation. It has no ceiling and no fiscal year strictures, and no one has to go to Congress every year to ask that money be appropriated.

According to an attorney for the General Accounting Office, the judgment fund "is a doorway into the general fund of the Treasury." The GAO holds the keys that open the door. The fund is tapped when a federal court—or any agency, by negotiated settlement—finds that Uncle Sam is liable for monetary damages. The attorney said they have paid a class action consisting of the entire federal judiciary, as well as attorney fees to the Ku Klx Klan. The General Accounting Office chief of claims adjudication, who administers the fund, said, "If they win, they win." The GAO does not make judgments. They just make payments.

THE ACCOUNTING OFFICE handles an average of 3,000 judgment fund cases a year. They have ranged from a payment of $10 for a plaintiff's court costs to the record $278 million paid New Mexico to resolve tax-liability dispute. For decades, federal agencies had to seek specific appropriations to pay judgments everytime the government lost or settled a suit. In 1956, at GAO's behest, Congress created the judgment fund so damages could be paid without congressional action. In 1977, a $100,000 judgment ceiling was removed.

"This is an indefinite appropriation," said the chief of claims adjudication. "The money's always there." But some agencies are excluded from the fund. The U.S. Postal Service and the Internal Revenue Service pay their own judgments; government corporations do not use the judgment fund, and land condemnations in general are not handled by the fund.

In 1980, a large payment of $105 million was paid to the Sioux Nation of Indians for 7 million acres that the government ceded to the Sioux in 1868 for a reservation, but took back in 1877 after gold was found in the Black Hills. Another large judgment fund check was $80 million issued to the Klamath Indians issued in a land condemnation case.

THE HUNDREDS OF millions of dollars that the judgment fund pays out each year could be only the tip of an iceberg of unknown dimensions. The judgment fund does not represent all judgments against the government, said the attorney. "No one in the government has any idea of the total amount that's paid out per year in court judgments," he said.

■ The (*above*) edited article; "One Account That Can't Be Cut" by staff writer Peter Masley was printed in the April 17, 1986 WASHINGTON POST.

ADMINISTRATION'S OPPOSITION TO LEGISLATION

APRIL 28TH WAS the day when proponents for redress and those against testified at the hearing on H.R. 442, the Civil Liberties Bill of 1985. What was not heard, but submitted to Representative Peter W. Rodino, chairman of the House Judiciary Committee, was a letter from Assistant Attorney General John R. Bolton of the Justice Department. The significance of the letter is that it presents the administration's position on the legislation and does not go along with the findings of the Commission on Wartime Relocation and Internment of Civilians. (The legislation is based on the findings of the CWRIC.)

The letter states: "We question the wisdom... of accusing leaders of the United States government during World War II, both civilian and military, of dishonorable behavior. The wartime decisions... were taken against a backdrop of fears for the survival of our nation; we recently had been attacked by a totalitarian regime which had enjoyed a virtually unbroken string of military successes, both before and immediately after it commenced war on us."

We recall that in his testimony before the CWRIC, John J. McCloy used the word *retribution*. Could the statement here be considered in the same light?

BOLTON'S LETTER CONTINUES: "....In most instances, the persons so accused are not alive to defend themselves today. Moreover, some of the Commission's conclusions and its selection of evidence marshaled in support of its conclusions are suspect. These are matters best left to historical and scholarly analysis rather than debated by Congress."

Historians cannot write Congressional bills, however.

The Justice Department further points out that...."Congress has already enacted a comprehensive statutory scheme which provided a reasonable and balanced contemporaneous remedy to affected individuals. By enacting the 1948 American-Japanese Claims Act, Congress recognized long ago that many loyal Americans... were injured by the wartime relocation and internment program. The American-Japanese Claims Act did not include every item of damages that was or could have been suggested."

The government awarded claims of over $37 million.

AGAIN, THE LETTER says: "Moreover, in 1956, Congress considered legislation that directly called into question the adequacy of the claims settlements provided in the 1948 Act. The bill as introduced would have liberalized the relief provisions of the Act by granting expanded compensation for certain losses. Congress rejected this proposal because 'it would substantially reopen the entire project.'"

The letter also says that...."several hundred of the detainess were fanatical pro-Japanese... and had voluntarily sought repatriation to Japan after the end of the war....It would be unfair to the United States and to the loyal persons of Japanese descent if the benefits of this legislation were made available to persons who were disloyal to the United States."

Would those persons have chosen to be sent to a country that had been impoverished by losing the war if their own country, the United States, had treated them as it did citizens of other ethnic groups?

AND THERE IS this matter regarding the bill's provisions for the Aleuts of Alaska: "....We do not believe that wartime hardships of persons properly removed from a war zone provide any factual predicate for consideration of especial, favorable treatment for this group as opposed to other individuals whose lives were disrupted and who suffered hardship or death during World War II. Many activities undertaken by our goverment during World War II could be criticized, with hindsight, as untimely or poorly planned. We do not believe that such criticism can appropriately form the basis for special compensation."

Assistant Attorney General Bolton's concludes by saying: "For all of the foreging reasons, the Department of Justice recommends against enactment of this legislation. The office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program."

DORIS SATO

JAPANESE CANADIANS PRESENT MEANINGFUL REDRESS PACKAGE

■ The letter (*below*) dated May 20, 1986 was received by the Editor.

I'M EN ROUTE from last weekend's [May 16-19] National Association of Japanese Canadians' conference at Winnipeg. It was a good conference; constructive and productive. We were able to hammer out with strong consensus a meaningful redress package.

The Price Waterhouse (a reputable consulting firm frequently used by the government also) did a war loss survey of the period ('42-'49), and came out with a $443 million loss (property and income) translated to 1986 dollars. This is a valuable figure to have, not for bargaining, but for educational and historical record. Of course, the human rights losses which are the more serious and greater magnitude, are not included in the Price Waterhouse study.

THE NAJC REDRESS package will be presented to the Prime Minister on May 28. So far, his office and that of the Minister of Multiculturalism have been stone-walling the NAJC, but leaking to the press a figure of $10 million for "foundation" or "trust." But after expressing Canadian concern for human rights at Korea recently, the Prime Minister will risk further deterioration of credibility if he does not meet with NAJC to resolve this internal abrogation of human rights. I'm hopeful of an early meeting between NAJC and the government. We have delegated full authority to President Art Miki and his small team, to negotiate to a resolution this issue.

In haste,
GORDON HIRABAYASHI

The following recommendations pinpoint the key items listed in NAJC's redress proposals presented at the conference.

a) Individual compensation of $25,000 to each living Japanese Canadian affected by the injustices during and after World War II. (Estimate of those stii living is 12,000.)

b) A community controlled fund of $50 million for projects, facilities and activities to rebuild the Japanese Canadian community. Such a fund will remain as a permanent memorial to those who are deceased.

That the Government of Canada:

a) Establish a Human Rights foundation to foster human rights and racial equality;

b) Amend the War Measures Act and to initiate a review and amendment of the Charter of Rights and Freedoms to ensure that the rights of individuals will never again be abrogated on the basis of ancestry.

NAJC OPPOSE UNILATERAL SETTLEMENT

Edited: HOKUBEI MAINICHI
June 7, 1986

IN A STORY reported by the (Ottawa) Globe and Mail, it said that Japanese Canadians would rather see the federal government abandon plans to compensate them for wartime wrongs than impose a unilateral settlement. Said Art Miki, of the National Association of Japanese Canadians to the Commons' multiculturalism committee: "I think we would rather have the issue not resolved than endorse a move like that."

Miki warned the Conservatives that they will face harsh criticism from a host of minority groups if they do not negotiate before drawing up a redress package for Japanese Canadians interned during World War II. The Canadian Cabinet is considering several proposals to compensate Japanese Canadians. Multiculturalism Minister Otto Jelinek insists he has consulted widely and he has warned that the government may soon have to act. Miki said he has had only one round of negotiations with the minister.

MIKI REMINDED REPORTERS, that "this is what happened in '42 *when* the whole thing was imposed upon people without any consultation. If it's going to happen again, let history repeat itself, but we'll not be a part to it."

ENDURING GRATITUDE

Last year, a booklet titled "*Kansha*: In Appreciation--The 100th Anniversary of Japanese in Hawaii" was published. In its introduction, it says that *Kansha* acknowledges certain people in one's life who stand out because they truly cared and made a profound impact on that individual's growth and the development.

Kansha is the Japanese word for enduring gratitude or appreciation. It is derived from two Chinese characters: *kan*, which means feeling, and *sha*, which means appreciation.

Kansha also embraces the sentiment that in the history of an ethnic group, certain remarkable individuals come to mind who befriended and supported the group at personal loss and sacrifice, often acting against prejudice, unjust community pressures, and prevailing antagonisms directed at the ethnic group.

Among the twenty-two distinguished individuals profiled in *Kansha*, the one of Robert L. Shivers is printed here because of it's relevancy to WWII and the internment of persons of Japanese ancestry.

ROBERT L. SHIVERS (1894-1950)

AS WAR WITH Japan grew more likely, the Federal Bureau of Investigation sent agent Robert L. Shivers to Honolulu in mid-August of 1939 to study the handling of Hawaii's large Japanese population in case of hostilities. He opened the Honolulu office as its agent in charge and continued in charge of it until relieved in April 1943 due to a heart ailment attributed to overwork.

The record shows a spectacular contrast between handling of resident Japanese in Hawaii and on the U.S. West Coast after December 7, 1941. All 110,000 West Coast Japanese were evacuated to relocation centers inland early in 1942. In Hawaii, even closer to the war scene, only 1,441 Japanese out of 160,000 were detained and 461 of these were later released so that net internments of Hawaii Japanese totalled 980.

Shivers later wrote that, during the time he held his FBI post in Honolulu, "not a single person could be interned or released from internment without my approval." He had developed between 1939 and December 7, 1941 an abiding faith in the loyalty and patriotism of Hawaii's Japanese residents--124,351 of them citizens, 35,183 aliens. Of those he ordered interned, 578 were aliens and 402 were U.S. citizens. Of the aliens, 234 were so-called *toritsuginin*, or consular agents, who assisted alien Japanese residents in filing vital statistic records, such as births, deaths, and marriages with the consulate. Of the citizens, 374 were so-called Kibei who had been born in Hawaii but were educated in Japan and held dual Japanese and American citizenship.

RETROSPECT SHOWS THAT even this group of internees included people who were not security risks. However, given the war passions aroused by the surprise December 7 attack, the restraint in internments represented a strong act of faith by the FBI director and the Hawaii military government leaders who supported him. He was quick to respond to postwar stories in December 1945 dredging up secret 1941 testimony from Admiral Husband Kimmel that there was damaging fifth column activity in Hawaii following the bombing. Shivers replied immediately: "In spite of what Admiral Kimmel or anyone else may have said... there was no such activity in Hawaii before, during or after the attack on Pearl Harbor.... The confusion in Hawaii was in the minds of the confused and not because of fifth column activities.

"It was not the civilian population that was confused. Nowhere under the sun could there have been a more intelligent response to the needs of the hour than was given by the entire population of these islands. It is high time that the people of the United States should be told of Hawaii's contribution to this war, which is unequalled in the annals of our country."

The next month, Shivers gave substantially the same testimony to a Congressional committee, stating that there was not one single act of sabotage in Hawaii during the course of the entire war. He also detailed the complex racial situation in Hawaii, with one-third of the population of Japanese extraction, and other immigrant groups (Filipinos, Koreans and Chinese) whose homelands were threatened by Japan's expansionist drive. The importance to the war effort of keeping ethnic groups working together as a united community was overwhelming, he said.

▪ Our thanks to Berry Suzukida for providing us with a copy of *KANSHA*.

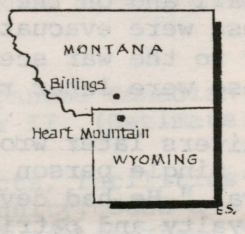
ALL THAT WE ASK FOR IS A LITTLE WARMTH AND COMPASSION...

FOR MANY WHO were interned during World War II and after leaving camp, managed somehow to make a go of it despite the hardships and racial prejudice encountered along the way, the turn of events varied for each internee. There were to be those who would never achieve their goals in life and be successful. As the writer of the letter (printed here) said: "Too many stories are covered up, or just not told, so that no toes are stepped on, and we are left ignorant on what is going on about us." e.s.

April 28, 1986

Dear_____,

Some people have been wondering why we are honoring _____ _____with a benefit party. Some have said, "She's an artist, an author... she must be well off..." As most of you may know, she was the white-haired Caucasian woman married to _____ _____ She wrote a book titled "Lone Heart Mountain."



I was asked by the Bureau of Reclamation in Billings, Montana, to find her and get her permission to use her drawings for a plaque at the Heart Mountain Relocation Center Memorial Park. I found her living in a rundown basement apartment—several windows were broken—the wind and the rain were coming through.

She was in a wheelchair—both of her legs were amputated below the knee because of gangrene. She was fed one hot meal a day from her land lord. She recently had a stomach operation, so she must eat lightly several times a day. She had cans of soups and a six-inch hot plate to get her by. She just left the hot plate on to warm her room. She was penniless. She had signed over her Social Security to her landlord for her room and board.

About six months later, she apparently suffered a small stroke, so she was taken to a convalescent hospital... and abandoned. I finally found her again. She only had a few worn out clothes.

She told me several times: "I wish I could go to sleep, and *never* wake up."

Many of you probably never knew her in camp. Even though she has had some bad times, we are not asking for donations for her—we are simply asking for a little warmth and compassion—a "Hi,_____ you're book is great...," or a hug.

She is leaving us a valuable history of a place once called Heart Mountain.

Sincerely,
BACON SAKATANI

■ Permission granted to print letter.

LETTERS

Thank you for your efforts!

SARAH M. SOGI
Elmsford, NY

Japanese Americans are making more progress on redress than I figured. Whether JACL, NCJAR, JA, whatever, legislative or courts; it is better than doing *nothing*.

Even if we don't win any restitution, Americans will receive an education.

O.S. HONDA
White Bear Lake, MN

Many thanks for all the hard work and hours you have put into our cause. We Japanese Americans appreciate everything you are doing for us.

Much success for our future court trial, toward a victory for all those who were put into concentration camps.

FUMIKO PROFFIT
Brooklyn, NY

THANK YOU FOR the May bulletin.
William Hohri's presentation before the House Subcommittee, while by necessity, was longer than Lincoln's Gettysburg Address, yet was of merit comparable to that famous speech.

I consider myself privileged to have met the members of the Council, to have known Nikkei in camp and since, and to have been able in a small way to cheer the Council on their efforts to curb the rapacity of irresponsible elements in government.

WERE THE EFFORTS of the Council no more than a "Gimme," as some short-sighted opponents have accused, I would have had nothing to do with your work. But what you are doing will hopefully give cause to those who might, at some future time, consider another "Evacuation" expedient. I am rather sorry to say that my interest in your struggle is selfish— your success will assure a more responsible U.S. government and thus a better place for my own family.

WOULD THAT I could qualify as a "Ronin". This would be the most effective way to express my approval— but my contributions will have to be in *dribbles, not chunks!* Nevertheless, "I'm with you!" I enclose a small check.

DAVID C. MOORE
Phoenix, AZ

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