

TESTIMONY OF THE COMMITTEE TO REVERSE
THE JAPANESE AMERICAN WARTIME CASES IN SUPPORT
OF S. 2116

Submitted to the U.S. Senate Governmental Affairs Subcommittee
on Civil Service, Post Office and General Services.

August 16, 1984

Summary of the Testimony of the Committee
to Reverse the Japanese American Wartime Cases

The Committee to Reverse the Japanese American Wartime Cases' (CRJAWC) testimony will center around the petitions for writs of error coram nobis filed by Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui to vacate their convictions for violations of military exclusion and curfew orders promulgated pursuant to Executive Order 9066 and Public Law 503. The CRJAWC will focus on recently discovered evidence that top government officials knew at the time they prosecuted Mr. Korematsu, Mr. Hirabayashi, and Mr. Yasui that their arguments that internment was justified by military necessity was extremely questionable, at best, and more likely completely inaccurate.

In addition, the CRJAWC will present a summary of the opinion of Judge Marilyn Patel of the Northern District of California, which explains that Judge Patel vacated Mr. Korematsu's conviction on the basis of government misconduct in the original prosecution and appeals of his case, as well as raises questions about the continued validity of the Supreme Court case bearing his name.

Testimony of the Committee to
Reverse the Japanese American Wartime Cases

The Committee to Reverse the Japanese American Wartime Cases (CRJAWC) submits this written statement to the Senate Subcommittee on Civil Service, Post Office and General Services in support of S. 2116. It is the belief of our group that passage of this bill is necessary in order for this country to meaningfully confront and rectify the injustice perpetrated on its citizens forty years ago.

The CRJAWC was formed in 1982 as a result of the discovery by Professor Peter Irons of the University of California, San Diego, of evidence indicating that top United States officials and attorneys were aware at the time of the incarceration of Japanese Americans that no military necessity existed to justify the enactment of Executive Order 9066 and subsequent military orders. More strikingly, the government documents showed that these same officials, in reaction to legal challenges to the constitutionality of Executive Order 9066, suppressed, altered and destroyed key evidence of the lack of military necessity in order to influence the outcome of these important cases. Based on this evidence, the CRJAWC formed as a coalition of attorneys representing Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, the defendants in the United States Supreme Court cases upholding the legality of the internment.

Minoru Yasui was originally convicted on November 16, 1942 of violating a military curfew order issued pursuant to Public Law 503, and sentenced to one year imprisonment and a fine of \$5,000. Gordon Hirabayashi was originally found guilty of violating both the curfew order and Civilian Exclusion Order No. 34 on October 20, 1942, and sentenced to ninety days on each count. Fred Korematsu's original conviction for violation of the exclusion order came on September 8, 1942, and he was sentenced to five years probation with imposition of sentence suspended.

In order to vacate these convictions, attorneys in the CRJAWC prepared petitions for writs of error coram nobis, filed in the Federal District courts of Oregon, Washington, and the Northern District of California. The writ of error coram nobis, an obscure writ with its roots in English law, is designed to vacate convictions obtained as a result of manifest injustice, prosecutorial impropriety being one such example.

On November 10, 1983, Judge Marilyn Hall Patel, federal district judge for the Northern District of California, granted Mr. Korematsu's petition, vacating his conviction and dismissing the underlying indictment. She subsequently issued a written opinion on April 19, 1984. On January 26, 1984, Judge Robert Belloni, federal district judge for the District of Oregon, vacated Mr. Yasui's conviction.

Mr. Hirabayashi's petition is set for a hearing in June, 1985.

What follows below is a brief summary of some of the key evidence contained in the coram nobis petitions documenting government misconduct in proceeding with prosecutions known to be factually unsupportable. In addition, key sections of Judge Patel's written opinion are summarized because of its significance as the first attempt by the judicial system to confront the serious constitutional and human rights violations previously validated by the courts.

Summary of Petition For Writ of Error

Coram Nobis

In 1943 and 1944, the convictions of Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi for violations of military exclusion and curfew orders were appealed to the United States Supreme Court. In a series of unprecedented decisions, the high Court held that the exclusion and internment of Japanese Americans en masse was justified by military necessity. (Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); Korematsu v. United States, 323 U.S. 214 (1944)).

The finding of "military necessity" by the Court was based upon government representations that Japanese Americans were committing espionage and sabotage by signalling enemy ships from shore.

The Court also accepted government arguments that the loyalty of Japanese Americans was suspect because of the racial characteristics of the population. "[W]e cannot reject as unfounded the judgment of the military authorities and that of Congress that there were disloyal members of [the Japanese American] population whose number and strength could not be precisely and quickly ascertained," wrote the Court in the Hirabayashi decision.

The allegations of espionage, sabotage and disloyalty were contained in an official document entitled the Final Report, issued by Lt. General John DeWitt, Commander on the West Coast, who ordered the evacuation and internment. These allegations were "repeated often verbatim in the Court briefs of the Justice Department and the Attorneys General of the States of California, Oregon and Washington.

In their recent petitions, Yasui, Hirabayashi and Korematsu charged that the Justice Department and the War Department were aware of high level reports from the Office of Naval Intelligence, the FBI, the FCC, and the Army's own military Intelligence Division (G-2), which directly refuted the espionage, sabotage, and disloyalty allegations. These reports, which undermined the "military necessity" claims, were withheld from the Supreme Court.

As one example, the Office of Naval Intelligence conducted a two-year study of the West Coast Japanese American population. Authored by the ONI authority on Japanese, Americans,

Lt. Commander 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," wrote Ringle in February of 1942.

Edward Ennis, Director of the Enemy Alien Control Division of the Justice Department and the attorney responsible for supervising the drafting of the Justice Department briefs to the Supreme Court, 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 the view of the Office of Naval Intelligence... Any other course of conduct might approximate the suppression of evidence."

This evidence, however, was never produced.

Similarly, in response to a request by Attorney General Francis Biddle to verify the accuracy of the Final Report, J. Edgar Hoover wrote in February 1944: "Every complaint [of shore to ship signalling 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 signalling from shore to ship..."

A Request to James Fly, the Chairman of the FCC, about such activities, brought the following response:

"There were no radio signals...which would not be identified, or which were unlawful."

In a February 1944 memo to Attorney General Biddle, Ennis 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..."

Another Justice Department attorney, John Burling, wrote in a memo to Assistant Attorney General Herbert Wechsler: "You will recall that General DeWitt's report makes statements concerning radio transmitters and ship to shore signalling which are categorically denied by the FBI and the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods..."

Ennis also wrote to Wechsler: "The general tenor of the [Final] Report is not only 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 in an official publication, go uncorrected.

This is the only opportunity which this Department has to correct them."

Another act of misconduct involved revision of an initial draft of General DeWitt's Final Report to more closely reflect the government's desired political position rather than facts as they existed. The first version of the Report stated that mass evacuation was necessary not because there was insufficient time to make individual loyalty determinations, but because it was "impossible" to separate the loyal from the disloyal no matter how much time was taken in the process.

The Justice Department had consistently argued to the Court that mass evacuation was necessary precisely because there was insufficient time to hold individual hearings. War Department officials were also concerned that the Supreme Court might view DeWitt's position that it was "impossible" to determine the loyalty of Japanese Americans as racist.

The Report was altered, the original Final Report was burned, and records indicating the issuance of the first Final Report were destroyed to conceal its existence.

Perhaps most disturbing, however, was that after receiving the reports by the Federal Bureau of Investigation and the Federal Communications Commission refuting

the allegations of military necessity, John L. Burling, Assistant Director of the Alien Enemy Control Unit of the Justice Department inserted a footnote in the government's Korematsu brief to the Supreme Court, which was subsequently withdrawn. The footnote alerted the court that the Justice Department possessed information which contradicted the military necessity allegations contained in General DeWitt's Final Report, particularly those referneces in the Report to illegal radio transmissions and shore-to-ship signalling by Japanese Americans:

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January, 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recitals of those facts contained in the Report.

Before the brief was submitted, however, War Department officials intervened and urged removal of the footnote. As a result of this intervention, the Solicitor General directed that the footnote be revised. Since the Korematsu brief

failed to advise the Court of the falsity of DeWitt's claims, it misled the Court as to their veracity.

These are some of the key acts of misconduct engaged in by government officials during the course of the petitioner's trials. After reviewing the above evidence, Judge Marilyn Patel of the Northern District of California vacated Mr. Korematsu's original conviction and explained her action in a written opinion.

Summary of Judge Patel's Opinion

On April 19, 1984, Judge Patel issued a written opinion in which she explained the court's reason for granting Fred Korematsu's petition to vacate his 42-year old conviction. Although Judge Patel's opinion dealt at length with some procedural issues unique to this case, what is of interest to this Subcommittee are her comments on the Report of the Commission on Wartime Relocation and Internment of Civilians (CWIRC) and on the evidence presented in Mr. Korematsu's petition.

With regard to the CWIRC Report, Mr. Korematsu had requested that the court, in its consideration of evidence relevant to his petition, take judicial notice of the Report's factual findings and its conclusions. According to Judge Patel's opinion (pp. 17-19), the court took judicial notice of the general conclusions contained in the CWIRC report. Those conclusions were as follows:

1. At the time of the executive and 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 the exclusion and imprisonment of Japanese Americans;
2. Military necessity did not warrant the exclusion and detention of Japanese Americans;
3. The broad historical causes which shaped the decisions were race prejudice, war hysteria and failure of political leadership;
4. As a result, "a grave injustice" was perpetrated on Japanese Americans.

In taking notice of the report's conclusions, the court was not saying that it deemed those conclusions to be correct. It was saying, however, that the court recognized that the CWRIC was a trustworthy body. Those conclusions could therefore be relied upon to support the court's finding that manifest injustice would occur if the petition were not granted.

Judge Patel then turned her attention to the evidence of government misconduct and corresponding documents indicating the lack of military necessity to justify the internment (pp. 20-24). After reviewing the World War II government documents, Judge Patel concluded that "the substance of the statements contained in the documents and the fact that the statements were made demonstrate that

the government knowingly withheld information from the Supreme Court when it was considering the critical question of military necessity". The document cited in the opinion as most reflective of this suppression of evidence was the footnote which conscientious attorneys within the Department of Justice attempted to insert in the draft of the government's Korematsu brief. As explained above, the footnote was designed to alert the Supreme Court to the Justice Department's possession of evidence which directly refuted Commander DeWitt's statements about the existence of espionage. That footnote was altered at the War Department's insistence to eliminate reference to contradictory material.

Judge Patel's decision to grant the petition also rested on the other evidence submitted along with the petition. Judge Patel referred to such evidence as a "record...[so] replete with protestations of various Judge Department officials that the government had the obligation to advise the courts of the contrary facts and opinion". The opinion quotes one memorandum which points out the "willful historical inaccuracies and intentional falsehoods" contained in the DeWitt report. These omissions were considered critical by Judge Patel because the World War II courts were attempting to determine if those charged with the responsibility of our national defense had reasonable grounds for believing that the threat of espionage and sabotage was real.

These omissions by the government, including its failure to cite the ONI, FBI and FCC reports which directly contradicted General DeWitt's statements, meant that the Supreme Court had before it a selective record.

In her conclusion (pp. 26-28), Judge Patel summarizes the significance of the above evidence, stating:

[The government deliberately omitted relevant information and provided misleading information in papers before the [Supreme] court. The information was critical to the court's determination... 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 account...The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.

Although acknowledging that her decision could not directly overturn the Supreme Court's 1944 Korematsu decision, since a writ of coram nobis can only correct errors of fact and not law, Judge Patel does note that the decision is deemed to be an "anachronism" and "overruled in the court of history". Her opinion eloquently summaries the Korematsu decision current status:

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.

Conclusion

In light of the above, the Committee to Reverse the Japanese American Wartime Cases recommends swift passage of S. 2116. Justice's true ends can be served only by such purposeful action.

COMMITTEE TO REVERSE THE JAPANESE
AMERICAN WARTIME CASES

Dennis W. Hayashi
Asian Law Caucus, Inc.

Dale Minami
Lorraine K. Bannai
Minami & Lew

Robert L. Rusky
Hanson, Bridgett, Marcus, Vlahos
& Stromberg

Karen N. Kai

Donald K. Tamaki

Peter Irons

Edward Chen
Coblentz, Cahen, McCabe & Breyer

Eric Yamamoto