UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES

Gordon Hirabayashi, Minoru Yasui, Fred Korematsu

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> "The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court. [T]he court is not powerless to correct its own records where a fraud has been worked upon it or where manifest injustice has been done."
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> District Judge Marilyn Hall Patel, in vacating the conviction of Fred Korematsu. [1]

> "In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. . . . Similar public expiation in the case of the internment of Japanese Americans from the West Coast would be good for the Court, and for the country. Unless repudiated, they may encourage devastating and unforeseen social and political consequences."
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> Professor Eugene V. Rostow, "The Japanese American Cases-- A Disaster" [2]

INTRODUCTION

June 21, 2013, will mark the seventieth anniversary of the United States Supreme Court decisions in the cases of *Hirabayashi v. United States* and *Yasui v. United States*. [3] In these cases, the Court unanimously upheld the criminal convictions of two courageous young Japanese Americans, Gordon Hirabayashi and Minoru Yasui, for disobeying military curfew orders that preceded and were followed by the forced removal from the West Coast and subsequent imprisonment of some 110,000 Americans of Japanese ancestry, two-thirds of them native-born citizens. Eighteen months later, on December 18, 1944, the Court upheld—over three powerful and prophetic dissents--the conviction of a third courageous young Japanese American, Fred Korematsu, for violating a military order to report for internment in a "relocation center" that was in reality a concentration camp. [4]

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In 1982, Professor Irons initiated and served as counsel to Fred Korematsu and Gordon Hirabayashi in their coram nobis actions to vacate their wartime internment convictions. These

Anniversaries often remind us of significant events that should be remembered, some to inspire us with accounts of heroic deeds and acts, others to chasten us with lessons from ignoble or even horrific events. The recent one hundred and fiftieth anniversary of President Abraham Lincoln's issuance of the Emancipation Proclamation is an example of the first; the anniversary of the Supreme Court's decisions in the *Hirabayashi* and *Yasui* cases stands as a reminder of the second. The Supreme Court, in the Japanese American internment cases, turned a blind eye to the "grave injustice" imposed on this entire ethnic and racial minority, whose members were guilty of nothing more, as Fred Korematsu later told a federal judge who vacated his conviction, than "looking like the enemy."

This essay presents the case for the Supreme Court to follow President Lincoln's example by formally repudiating its decisions in the Japanese American internment cases, issuing a public statement acknowledging that these decisions were based upon numerous and knowing acts of governmental misconduct before the Court, and were thus wrongly decided. These acts of misconduct, documented and discussed herein, were committed by several high-ranking military and civilian officials (including the Solicitor General of the United States) before and during the pendency of the internment cases before the Supreme Court. Consequently, the Court was forced to rely in making its decisions on records and arguments that were fabricated and fraudulent. Sadly, the Court's unquestioning acceptance of these tainted records, and its upholding of the criminal convictions of Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu, has left a stain on the Court's integrity that requires the long overdue correction of public repudiation and apology, as both the legislative and executive branches of the federal government—to their credit—have now done.

(con't) actions, and the petitions upon which they were based, resulted in part from Professor Irons' research for a book on the wartime cases, *Justice at War: The Story of the Japanese American Internment Cases* (1983; republished with an Epilogue, 1993) [cited below as Irons, *Justice at War*]. This book was based on archival research in the records of the Justice Department, War Department, War Relocation Authority, and other federal agencies. A later book, *Justice Delayed: The Record of the Japanese American Internment Cases* (1989), includes the text of the coram nobis petitions, opinions of the Supreme Court in the original cases, and opinions of the district courts and court of appeals in the coram nobis cases.

This essay is dedicated to Ms. Aiko Herzig-Yoshinaga, whose research for the Commission on Wartime Relocation and Internment of Civilians uncovered crucial evidence for the coram nobis petitions. An internment survivor, Aiko has never abandoned her search for justice for all.

I would like to thank Professor Lorraine Bannai of the Seattle University School of Law, a member of the original Korematsu coram nobis legal team, for her many helpful suggestions in shaping this essay, and her friendship for more than thirty years.

1. *Korematsu v. United States*, 584 F.Supp. 1406, 1407, 1420 (N.D.Cal., 1984).

2. 54 Yale L. J. 489, 533 (1945).

Although this essay is directed to a general, and hopefully wide readership, it is primarily aimed at an audience of nine: the current justices of the Supreme Court, who have the inherent power to erase this stain on its record and to restore the Court's integrity. Admittedly, a public repudiation of the Japanese American internment cases would be unprecedented, considering that the cases are technically moot, since the Solicitor General of the United States at the time, Charles Fried, did not ask the Court to review the decisions of the federal judges who vacated the convictions, pursuant to writs of error coram nobis [5] that were filed in all three cases in 1983 and decided in opinions issued in 1984, 1986, and 1987. The government's decision to forego appeals to the Supreme Court left the victorious coram nobis petitioners in a classic Catch-22 situation: hoping to persuade the Supreme Court to finally and unequivocally reverse and repudiate the decisions in their cases, they were unable—as prevailing parties in the lower courts—to bring appeals to the Court.

The evidence of the government's misconduct in these cases is clear and compelling, and rests on the government's own records. It reveals that high government officials, including the Solicitor General, knowingly presented the Supreme Court with false and fabricated records, both in briefs and oral arguments, that misled the Court and resulted in decisions that deprived the petitioners in these cases of their rights to fair hearings of their challenges to military orders that were based, not on legitimate fears that they—and all Japanese Americans—posed a danger of espionage and sabotage on the West Coast, but rather reflected the racism of the general who promulgated the orders. As a result of the government's misconduct in these cases, the integrity of the Supreme Court was compromised. With a full record of the government's misconduct in these cases now before it, the Supreme Court has both the inherent power and duty to correct its tainted records through a public repudiation of the wartime decisions.

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3. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). For an account of Yasui's and Hirabayashi's violations of the military curfew and exclusion orders, and their backgrounds and motivations, see Irons, *Justice at War*, 81-93. For accounts of their trials in the district courts, and the government's preparation for them, see id. at 135-143 (Yasui trial) and 154-159 (Hirabayashi trial).

4. *Korematsu v. United States*, 323 U.S. 214 (1944). For an account of Korematsu's violation of the exclusion order, and his background and motivations, see Irons, *Justice at War*, 93-99; his trial is discussed in id. at 151-154. For a detailed account of the Supreme Court's internal deliberations in the Korematsu case, see id. at 319-341.

5. The provision for writs of error coram nobis is in the All-Writs Section, 28 U.S. Code, Sec. 1651(a). The Court's decision in *United States v. Morgan*, 346 U.S. 502 (1954), deserves some discussion here, relating to the prudential doctrine of mootness, which might be thought to bar the Court from acting sua sponte to repudiate the internment cases. Logically, every coram nobis action involves a moot case, since petitioners in them have exhausted all available appeals

I. PROCEDURAL HISTORY OF THE INTERNMENT CASES

The procedural histories of the wartime internment cases, both in the original proceedings that resulted in the defendants' convictions and the affirmance of those convictions by the Supreme Court, and in the later coram nobis proceedings that led to the vacation of those convictions, are laid out in the Court's original opinions in 1943 and 1944, and in the opinions of the District Courts and Court of Appeals that are discussed below.

As a preliminary matter, the prosecutions of the defendants in these cases stemmed from President Franklin D. Roosevelt's issuance, on February 19, 1943, of Executive Order 9066, which stated that "successful prosecution of the war requires every possible protection against espionage and against sabotage" of defense installations. It went on to authorize the Secretary of War and his military subordinates to "prescribe military areas . . . from which any and all persons may be excluded" and to place further restrictions on "the right of any person to enter, remain in, or leave" such areas at the discretion of military authorities. [6] Congress subsequently enacted Public Law 503, making violation of any military orders to implement EO 9066 a criminal misdemeanor, punishable by a year in prison. [7] Three young Japanese Americans—Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu—violated military orders issued pursuant to EO 9066 and were arrested and convicted. After trial and sentencing, all three cases reached the Supreme Court on appeal, which affirmed the convictions of Hirabayashi and Yasui in June 1943, and that of Korematsu in December 1944. As noted above, all three men filed coram nobis petitions in 1983, seeking vacation of their convictions on grounds of governmental misconduct before the Supreme Court.

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and completed their sentences. In *Morgan*, the petitioner had completed a four-year federal sentence imposed in 1939, but was convicted in state court in 1950 on an unrelated charge and sentenced to a longer term as a second offender because of the prior federal conviction. His coram nobis petition attacked the federal conviction on the ground that he had been denied counsel at his trial; since the trial record did not show his representation by counsel, the Supreme Court affirmed the ruling of the Second Circuit Court of Appeals that the case be remanded to the district court for a hearing on this issue.

It bears noting that federal courts have authorized coram nobis writs in cases involving findings of prosecutorial misconduct, as in the internment cases. See, e.g., *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981), in which the defendant, having completed a sentence for wire fraud, presented evidence that prosecutors had relied on false testimony at his trial. The court of appeals noted that "prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, especially when the taint in the proceedings seriously prejudices the accused." Id. at 571.

6. Executive Order 9066 (February 19, 1942), 7 Fed. Reg. no. 38 (Feb. 25, 1942).

7. Pub. Law 503, 7 Fed. Reg. 1407 (1942).

The Supreme Court's opinions in these cases are found in *Hirabayashi v. United States,* 320 U.S. 81 (1943); *Yasui v. United States,* 320 U.S. 115 (1943); and *Korematsu v. United States,* 323 U.S. 214 (1944). The opinion of District Judge Donald Voorhees on the coram nobis petition of Gordon Hirabayashi is at 627 F.Supp. 1445 (W.D.Wash. 1986); the opinion of Circuit Judge Mary Schroeder on the cross-appeals from Judge Voorhees' decision on the Hirabayashi petition is at 828 F.2d 591 (9th Cir. 1987); the opinion of District Judge Marilyn Hall Patel on the coram nobis petition of Fred Korematsu is at 584 F.Supp. 1406 (N.D.Cal. 1984).

In the Yasui coram nobis proceedings, Oregon District Judge Robert Belloni granted the government's motions to vacate the conviction and dismiss the petition in 1984, without making any findings on the petition. Yasui appealed to the Ninth Circuit Court of Appeals from the dismissal, which held in 1985 that his appeal had been filed too late and was untimely, but remanded the case to Judge Belloni to allow Yasui to present an argument for "excusable neglect" in missing the 10-day appeal deadline. Yasui's death in 1986, however, mooted the appeal and no further action took place. *Yasui v. United States,* No. 83-151-BE (D. Or. 1984); 772 F.2d 1496 (9th Cir. 1985).

II. SUMMARY OF ALLEGATIONS OF GOVERNMENTAL MISCONDUCT BEFORE THE SUPREME COURT IN THE INTERNMENT CASES

Petitions for Writs of Error Coram Nobis were filed in January and February, 1983, in the U.S. District Courts for the Northern District of California (for Fred Korematsu); the District of Oregon (for Minoru Yasui); and the Western District of Washington (for Gordon Hirabayashi). Aside from their separate headings, all three petitions had identical wording and contained identical allegations: "Petitioner has recently discovered evidence that his prosecution was tainted, both at trial and during the appellate proceedings that followed, by numerous and related acts of governmental misconduct." The petitions included three main charges. First, that government officials "altered and destroyed evidence" in the cases that would have revealed the racial motives for the internment. Second, that government officials "suppressed evidence relative to the loyalty of Japanese Americans and to the alleged commission by them of acts of espionage." And third, that government officials "failed to advise the Supreme Court of the falsity" of the espionage charges. This suppressed evidence about the loyalty of Japanese Americans and the falsity of espionage charges would have revealed the lack of "military necessity" for the military orders at issue, the ground upon which the Supreme Court decisions rested. [8]

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8. The coram nobis petitions are in the case records of the district courts in the Korematsu, Hirabayashi, and Yasui cases; a full copy is also reproduced in Irons, *Justice Delayed*, at 125-210.

A. The Alteration and Destruction of General DeWitt's *Final Report*

A key document in these cases was the *Final Report, Japanese Evacuation From the West Coast, 1942*, prepared under the direction and signed by General John L. DeWitt, commander of the Western Defense Command, under whose authorization the military curfew and evacuation orders were issued and challenged in these cases. This report purported to defend these orders on three related grounds: first, that the probability of a Japanese invasion of the West Coast required prompt action to prevent Japanese Americans from assisting the invading forces through acts of espionage and sabotage; second, that the "racial characteristics" of Japanese Americans predisposed them to assist the Japanese forces; and third, that it was "impossible" to distinguish the loyal and disloyal members of this racial group. Consequently, General DeWitt advocated the forced removal of the entire group and its incarceration in remote internment camps during the entire duration of the war. [9]

War Department officials objected to portions of DeWitt's report that asserted, without supporting evidence, that Japanese Americans were likely to commit acts of espionage and sabotage, and that it was impossible to separate the disloyal from the loyal through individual investigation. The report was subsequently revised (over DeWitt's objections) to alter those statements, asserting instead that insufficient time to conduct such investigations required the mass removal of Japanese Americans from the West Coast. In response to these revisions, General DeWitt ordered that all copies of his original report be recalled, records of its existence be destroyed, and all copies be burned. [10]

As a consequence of these acts by military officials, Justice Department officials (including the Solicitor General) presented the Supreme Court with a revised version of the *Final Report* that concealed General DeWitt's racist motivations for the military orders he issued, while retaining its false espionage allegations. [11] The destruction of the original report, and its subsequent alteration, constitute acts of governmental misconduct before the Supreme Court that amply justify the repudiation of its decisions in these cases.

B. The Withholding of the *Ringle Report* on the Loyalty of Japanese Americans

One key document relating to the loyalty of Japanese Americans and the alleged commission by them of acts of espionage (the prevention of which was the premise of Executive Order 9066) was withheld from the Supreme Court, over the strenuous (but unheeded) objections of senior Justice Department attorneys.

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9. Final Report, Japanese Evacuation from the West Coast, 1942 (Government Printing Office, 1943).

10. See Irons, *Justice at War*, 211.

11. For an account of the debates over the Final Report, its alteration, and its citation to the Supreme Court in the Korematsu case, see Irons, *Justice at War*, 278-302.

This crucial document was the "Report on Japanese Question," prepared by Lt. Comm. Kenneth D. Ringle, a Japanese-speaking naval intelligence office who had been detailed to investigate the possible extent of disloyalty among Japanese Americans. Submitted to the Chief of Naval Operations on January 26, 1942, and made available to Gen. DeWitt and other Army officials, the so-called "Ringle Report" estimated the number of Japanese Americans "who would act as saboteurs or agents" of Japan as "less than three percent of the total, or about 3500 in the entire United States." Because these individuals were "already fairly well known" to naval intelligence and the FBI, they could be quickly apprehended if necessary. Commander Ringle's conclusion was clear: "In short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people [and] should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis." (emphasis in original) [12]

During the government's preparation of its Supreme Court brief in the *Hirabayashi* case in April 1943, Assistant Attorney General Edward Ennis discovered the Ringle Report, which undermined the government's argument that separation of the loyal and disloyal among Japanese Americans was impossible. Ennis warned Solicitor General Fahy: "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 this represents the view of the Office of Naval Intelligence. *It occurs to me that any other course of conduct might approximate the suppression of evidence."* (emphasis added) [13]

General Fahy ignored Ennis's warning, and the Supreme Court never learned of this crucial document and the information that contradicted one of the government's primary justifications for the internment program. Again, this act of misconduct justifies the repudiation of the decisions in these cases.

C. The Withholding of FBI and FCC Reports on Espionage Allegations

During preparation of the government's brief to the Supreme Court in the *Korematsu* case, Assistant Attorney General Ennis and his deputy, John Burling, secured the approval of Attorney General Francis Biddle to ask the FBI and the Federal Communications Commission (FCC) to investigate General DeWitt's allegations in his *Final Report* that Japanese Americans had in fact communicated, by radio and on-shore signaling, with Japanese submarines.

In the *Final Report*, General DeWitt stated that his decision to recommend forced removal of all Japanese Americans "was in part based upon the interception of unauthorized radio communications which had been identified as emanating from certain

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12. Irons, *Justice at War*, 202-206.

13. Id. at 204.

areas along the coast. Of further concern to him was the fact that for a period of several weeks following December 7th, substantially every ship leaving a West Coast port was attacked by an enemy submarine. This seemed conclusively to point to the existence of hostile shore-to-ship (submarine) communication. . . . There were hundreds of reports nightly of signal lights visible from the coast, and of intercepts of unidentified radio transmissions. . . . The problem required immediate solution." *Final Report*, at 4, 8. DeWitt provided no sources for these allegations, which were presented to the Supreme Court in the *Korematsu* case and were not disavowed by Solicitor General Fahy, leaving the Court to assume they were true.

On February 7, 1944, FBI Director J. Edgar Hoover sent Biddle a "Personal and Confidential" memorandum in which, summarizing the results of a thorough search of FBI records, Hoover wrote that "there is no information in the possession of this Bureau . . . which would indicate . . . any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights." [14]

On April 1 and 4, 1944, the FCC Chairman, James L. Fly, likewise informed Biddle that "the Commission's investigations of hundreds of reports, by the Army and others, of unlawful or unidentified radio transmission showed that in each case there was no radio transmission involved or that it was legitimate, [and] that the statements in [General DeWitt's] Report indicating the existence of illicit radio signaling along the West Coast cannot be regarded as well founded." [15]

As a result of the FBI and FCC reports, Edward Ennis and John Burling sent a scathing memorandum to Deputy Attorney General Herbert Wechsler on September 2, 1944, in which they wrote: "The general tenor of [General DeWitt's] 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 out in an official publication, go uncorrected."* (emphasis added) [16]

Solicitor General Fahy received this memorandum from Wechsler, but nonetheless disregarded its red-flag warning, later assuring the Supreme Court in his oral argument in the *Korematsu* case that he personally vouched for the veracity of "every line, every word, and every syllable" in DeWitt's report. [17] By this act, the Solicitor General's misconduct misled the Court and justifies the repudiation of its decisions in these cases.

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14. Id. at 280-281.

15. Id. at 282-285.

16. Id. at 286-292.

17. The transcript of this argument is in the record in the Hirabayashi coram nobis proceedings before Judge Voorhees. The transcript, along with an account of its discovery in March 1985, can also be found in P. Irons, "Fancy Dancing in the Marble Palace," 3 *Constitutional Commentary* 35-60 (1986). Unfortunately, no official transcripts of the oral arguments by all counsel in Hirabayashi, or of Korematsu's counsel in that case, have been found, and apparently

III. FINDINGS OF THE DISTRICT COURTS AND COURT OF APPEALS IN THE CORAM NOBIS PROCEEDINGS

The preceding summary of the most serious acts of misconduct by government officials in the presentation of the internment cases to the Supreme Court will serve as a preface to the discussion below of the findings of the district courts and court of appeals on the coram nobis petitions of Fred Korematsu and Gordon Hirabayashi. Some repetition of those summaries is necessary, but will help readers understand the careful and thorough review by the judges of the records in the coram nobis petitions.

A. THE CRUCIAL ROLE OF GENERAL DEWITT'S "FINAL REPORT" IN THESE PROCEEDINGS

During the coram nobis proceedings in the Hirabayashi and Korematsu cases, counsel for both petitioners presented the district courts with evidence proving that the War Department withheld from Department of Justice lawyers statements in a crucial document that revealed the racial animus toward Japanese Americans that prompted the military orders at issue in those cases. This document, entitled "Final Report: Japanese Evacuation From the West Coast 1942," was prepared at the direction of General John L. DeWitt, who headed the Western Defense Command and issued the military orders, the violation of which petitioners had been convicted and their convictions affirmed by the Supreme Court. [18]

The Supreme Court heard oral arguments in the Hirabayashi case on May 10 and 11, 1943. Shortly before these arguments, General DeWitt submitted to the office of the Secretary of War printed and bound copies of his Final Report. In a transmission letter, dated April 15, 1943, General DeWitt wrote: "The evacuation was impelled by military necessity. The security of the Pacific Coast continues to require the exclusion of Japanese from the area now prohibited to them and will continue for the duration of the present war." 627 F.Supp. 1445, 1449 (W.D. Wash. 1986). Chapter II of this original version of the "Final Report" was titled, "Need for Military Control and Evacuation." In it, General DeWitt stated:

> 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. . . . While it was believed that some were loyal, it was known that

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do not exist. However, verbatim excerpts of the oral arguments in the Hirabayashi, Yasui, and Korematsu cases in 1943 can be found in 11 U.S. Law Week 3344-3347 (1943). For an account of these arguments, see Irons, *Justice at War*, 219-227.

18. Final Report, Japanese Evacuation From the West Coast, 1942 (GPO, 1943).

> 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. Id.

John J. McCloy, the Assistant Secretary of War, was disturbed when he read these words, both by DeWitt's statement that he intended the internment of Japanese Americans to continue "for the duration of the present war," and his claims that it was "impossible" to determine the loyalty of individual Japanese Americans, and that "[i]t was not that there was insufficient time in which to make such a determination. . . ."

Secretary McCloy presented his objections to these statements to General DeWitt, through DeWitt's principal deputy, Colonel Karl Bendetsen. Bendetsen sent McCloy's suggested revisions to DeWitt, stating that McCloy objected "to that portion of Chapter II which said in effect that it is absolutely impossible to determine the loyalty of Japanese no matter how much time was taken in the process. He [McCloy] said that he had no objection to saying that time was of the essence and that in view of the military situation and the fact that there was no known means of making such a determination with any degree of safety the evacuation was necessary." Id. at 1451.

General DeWitt resisted this pressure to revise his report, informing Bendetsen that "[m]y report as signed and submitted to the Chief of Staff will not be changed in any respect whatsoever either in substance or form and *I will not repeat not consent to any revisions made over my signature.*" (emphasis added) Id.

General DeWitt backed up his objections to any revisions of his report with an order, sent on May 9, 1943, through Bendetsen to Brigadier General Arthur Barnett: "You are prohibited from submitting to Assistant Secretary of War any drafts of amended report. . . . All copies heretofore sent to the War Department (not including inclosures) will be called in by you and *you will have War Department records of receiving report destroyed* inasmuch as such revision as is finally sent to the War Department will have a later dated transmittal letter…." (emphasis added) Id.

McCloy, however, insisted that revisions be made to the Final Report, despite DeWitt's objections. A revised version, issued on June 5, 1943, removed the paragraph that included DeWitt's "racial" argument for the evacuation and his statements that it was "impossible" to "separate the sheep from the goats" and that "it was not that there was insufficient time" to make such determinations of loyalty. The revised version substituted these words: "To complicate the situation, no ready means existed for determining the loyal and the disloyal with any degree of safety. It was necessary to face the realities—a positive determination could not have been made." Id. Significantly, this revised version of the Final Report reached the War Department after the briefing and arguments to the Supreme Court in the Hirabayashi case. Had its alteration and efforts to destroy all copies of the original version been known to Solicitor General Fahy, the

Supreme Court's decision in *Hirabayashi* might well have been affected, and the outcome might well have been different.

In her opinion for the Ninth Circuit in the *Hirabayashi* case, Judge Mary Schroeder noted the aftermath of this internal War Department dispute, about which Justice Department officials remained unaware: "The revised, official version of the report was dated June 5, 1943. The War Department tried to destroy all copies of the original report when the revised version was prepared. This record contains a memorandum by Theodore Smith of the Civilian Affairs Division of the Western Defense Command, dated June 29, 1943, certifying that he witnessed the burning of 'the galley proofs, galley pages, drafts and memorandums of the original report of the Japanese Evacuation.'" 828 F.2d 591, 598 (9th Cir. 1987). However, as we will see, one copy of the Final Report escaped the bonfire and was discovered (almost by chance) in 1982 in the National Archives by Ms. Aiko Herzig-Yoshinaga, a researcher for the congressionally-created Commission on Wartime Relocation and Internment of Civilians; this surviving copy of the original report formed a crucial part of the coram nobis petitions.

In fact, as documented in the coram nobis petitions, the Final Report of General DeWitt that was presented to the Supreme Court and relied upon by Solicitor General Fahy in his Korematsu argument, was a version that had been revised, at the insistence of War Department officials, to remove and conceal the purely racial motivation of General DeWitt that had prompted his decision to issue the military orders for the curfew and evacuation of Japanese Americans.

The opinions of District Judge Marilyn Hall Patel, who ruled on the petition of Fred Korematsu, District Judge Donald Voorhees, who conducted an extensive evidentiary hearing on the coram nobis petition of Gordon Hirabayashi, and of Circuit Judge Schroeder, who wrote for a Ninth Circuit panel that reviewed Judge Voorhees's decision, provide ample support for their findings that War Department officials, at the insistence of General DeWitt, altered, concealed, and destroyed copies of the original report in order to prevent Justice Department officials, including Solicitor General Fahy, from learning of DeWitt's racial motivations, and reporting these crucial facts to the Supreme Court. The account below is taken from the opinions of all three judges.

B. JUDGE PATEL'S FINDINGS AND RULING ON FRED KOREMATSU'S CORAM NOBIS PETITION

In her opinion vacating Fred Korematsu's conviction for violation of the exclusion order, Judge Patel relied in large part on the findings of the Commission on Wartime Relocation and Internment of Civilians, established by Congress in 1980 and directed to investigate the causes of the wartime internment and to recommend to Congress and the Executive branch remedies for violations of the rights of those who had been interned. Pub.L. No 96-317, Sec. 2, 94 Stat. 964 (1980). She wrote as follows in her opinion:

> [The Commission] was directed to review the facts and circumstances surrounding Executive Order 9066 and its impact on American citizens and

> permanent resident aliens; to review directives of the United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including those of Japanese ancestry; and to recommend appropriate remedies. … The Commission was composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens. It held approximately twenty days of hearings in cities across the United States, taking the testimony of over 720 witnesses, including key government personnel responsible for the decisions involved in the issuance of Executive Order 9066 and the military orders implementing it. The Commission reviewed substantial numbers of government documents, including documents not previously available to the public. In light of all these factors, the Report carries substantial indicia of trustworthiness. … Personal Justice Denied (Washington, D.C. 1982) presents the findings of the Commission. . . . The findings and conclusions of the Commission were unanimous. In general, the Commission concluded that at the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal.
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> The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that 'broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership.' As a result, 'a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.' Personal Justice Denied at 18.
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> The Commission's Report provides ample support for the conclusion that denial of the motion [for coram nobis relief] would result in manifest injustice and that the public interest is served by granting the relief sought. 584 F.Supp. at 1416-17.

Judge Patel also cited and relied upon documents from government files that had been included in Korematsu's coram nobis petition. She discussed them at some length in her opinion:

> Petitioner offers another set of documents showing that there was critical contradictory evidence known to the government and knowingly concealed from the courts. … They consist of internal government memoranda and letters. Their authenticity is not disputed. . . . The substance of the statements contained in the documents . . . demonstrate that the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case. Id. at 1417.

Judge Patel found one document from the Justice Department file on the Korematsu case particularly revealing. In a memorandum to Assistant Attorney General Herbert Wechsler, dated September 30, 1944, Assistant Attorney General Edward J. Ennis, who served as Director of the Alien Enemy Control Unit in the Department of Justice, referred to the revised version of General DeWitt's "Final Report." Ennis took pains to rebut the Report's claims that the Justice Department

> would not take the necessary steps to prevent signaling [by Japanese Americans to enemy submarines] whether by radio or by lights. It asserts that radio transmitters were located within general areas but this Department would not permit mass searches to find them. It asserts that signaling was observed in mixed occupancy dwellings which this Department would not permit to be entered. Thus, because this Department would not allow the reasonable and less drastic measures which General DeWitt wished, he was forced to evacuate the entire population. The argument is untrue both with respect to what this Department did and with respect to the radio transmissions and signaling, none of which existed, as General DeWitt at the time well knew. … *The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them."* (emphasis added) Id. at 1421-22.

Judge Patel also discussed the assertions in the Final Report that radio and land-based signaling had occurred, and the Justice Department's possession of reports from the FBI and FCC that found no evidence of such acts:

> The final version [of the government's Supreme Court brief] 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. . . . 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. … These omissions are critical. In the original proceedings, before the district court and on appeal [to the Supreme Court], the government argued that the actions taken were within the war-making powers of the Executive and Legislative branches … and they were beyond judicial scrutiny so long as they were reasonably related to the security and defense of the nation and the prosecution of the war. Id. at 1418.

Judge Patel made particular note of the Supreme Court's reliance on the revised (and expurgated) version of the Final Report which the government submitted to the Court in the Korematsu case:

> [General DeWitt's] evaluation and version of the facts informed the court's opinions. Yet, omitted from the government's representations was any reference

to contrary reports which were considered reliable by the Justice Department and military officials other than General DeWitt.

There is no question that the Executive and Congress were entitled to reasonably rely upon certain facts and to discount others. The question is not whether they were justified in relying upon some reports and not others, but whether the [Supreme Court] had before it all the facts known by the government. Was the court misled by any omissions or distortions in concluding that the other branches' decisions had a reasonable basis in fact? 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. Whether a fuller, more accurate record would have prompted a different decision cannot be determined. Nor need it be determined. Where relevant information has been withheld, it is ample justification for the government's concurrence that the conviction should be set aside. It is sufficient to satisfy the court's independent inquiry and justify the relief sought by petitioner. Id. at 1419.

[T]here is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination, although it cannot now be said what result would have obtained had the information been disclosed. Because the information was of the kind peculiarly within the government's knowledge, the court was dependent upon the government to provide a full and accurate account. Failure to do so presents the 'compelling circumstance' contemplated by *Morgan*. [19] *The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.* (emphasis added) Id. at 1420.

C. THE OPINION AND FINDINGS OF JUDGE VOORHEES ON THE CORAM NOBIS PETITION OF GORDON HIRABAYASHI

At the request of Hirabayashi's counsel, Judge Voorhees conducted an extensive evidentiary hearing, spanning two weeks, in June 1985. He stated in his written opinion, issued on February 10, 1986, that

in determining whether petitioner's convictions should be vacated, the Court has carefully considered the record of petitioner's trial, the arguments made by the government in the brief submitted by it to the Supreme Court, the reasoning of the

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19. *United States v. Morgan*, 346 U.S. 502 (1954) (leading case on coram nobis writ).

> testimony of those who were called as witnesses at the hearing upon petitioner's petition, the voluminous exhibits which were admitted into evidence at the hearing, and the arguments made by counsel for petitioner and for the government in their post-hearing briefs. 627 F.Supp. 1445, 1448 (W.D.Wash. 1986).

Judge Voorhees found in the coram nobis record evidence of General DeWitt's racial animus. He cited the transcript of a telephone conversation between DeWitt and General A.W. Gullion, the Army's Provost Marshal General, on January 14, 1942, in which DeWitt said: "I don't see how they can determine the loyalty of a Jap [sic] by interrogation…or investigation. … *There's no such a thing as a loyal Japanese and it is just impossible to determine their loyalty by investigation—it just can't be done…"* (emphasis added) Id. at 1451.

In his opinion, Judge Voorhees set out at length his conclusion that the War Department's concealment from the Justice Department of General DeWitt's racial animus towards Japanese Americans had affected the Supreme Court's decision to affirm Gordon Hirabayashi's conviction: "In its brief to the Supreme Court in petitioner's appeal the government did not take the position that it was impossible to separate the loyal Japanese residents from those who were not. Rather, it was a lack of time that prevented that separation." He quoted the Government's Supreme Court brief on this point: "The grave emergency called for prompt and decisive action." Brief of the United States at 61. Judge Voorhees continued:

> The opinion of the Supreme Court in *Hirabayashi vs. United States*, reflected the court's acceptance of the government's argument that the lack of time to separate the loyal from the disloyal justified action directed toward all individuals of Japanese ancestry.
>
> A copy of the original version of the Final Report was never made available to the Justice Department. In consequence, all through the course of petitioner's appeal, that Department was unaware of General DeWitt's stated reason for the exclusion of the Japanese from the West Coast. The Justice Department assumed and argued to the Supreme Court that the military necessity arose out of a lack of time to make a separation rather than out of an impossibility of making that separation.
>
> Although the Justice Department did not knowingly conceal from petitioner's counsel and from the Supreme Court the reason stated by General DeWitt for the exclusion of the Japanese, *the government must be charged with that concealment because it was information known to the War Department, an arm of the government.* It is petitioner's position that the concealment by the government of the reasons stated by General DeWitt for the exclusion of the Japanese from the West Coast was a suppression of evidence which requires the vacation of petitioner's convictions. (emphasis added).

> The central issue before the Supreme Court in the appeal of petitioner from his conviction was whether exclusion was in fact required by military necessity. Nothing would have been more important to petitioner's counsel than to know just why it was that General DeWitt made the decision that he did. The attorneys for the Justice Department assumed, and argued to the Supreme Court, that it was the need for prompt action that made the exclusion a military necessity. The statements by General DeWitt in his Final Report belied that assumption. Id. at 1456.

Judge Voorhees also cited the testimony of Edward Ennis at the coram nobis hearing: "At the hearing on petitioner's petition Edward Ennis, who was in charge of the preparation of the brief for the government, testified that the whole thrust of the government's argument before the Supreme Court was that there was not sufficient time to make a differentiation between the loyal Japanese and those who might be disloyal. When asked what he would have done had he learned in March or April, 1943, of General DeWitt's statement, he answered that it would have presented 'a very serious problem' and that it would have been 'very dangerous' to take that position before the Supreme Court." Id.

Judge Voorhees concluded his finding on Hirabayashi's conviction for violating the exclusion order with these words:

> The Court finds that the failure of the government to disclose to petitioner, to petitioner's counsel, and to the Supreme Court the reason stated by General DeWitt for his deciding that military necessity required the exclusion of all those of Japanese ancestry from the West Coast was an error of the most fundamental character and that petitioner was in fact very seriously prejudiced by that non-disclosure in his appeal from his conviction for failing to report. In consequence, petitioner's conviction on the failure to report count must be vacated. Id.

However, Judge Voorhees declined to vacate Hirabayashi's conviction for violation of the curfew order, holding that the curfew, although "burdensome" on Japanese Americans, "was nevertheless relatively mild when contrasted with the harshness of the exclusion order" and was "relatively short lived. As soon as the exclusion orders became effective, the curfew order was supplanted by them." Id. at 1467.

D. JUDGE SCHROEDER'S OPINION AND FINDINGS ON THE APPEALS FROM JUDGE VOORHEES' RULINGS ON GORDON HIRABAYASHI'S PETITION

Following Judge Voorhees's divided rulings on Hirabayashi's convictions for violating the curfew and exclusion orders, both Hirabayashi's counsel and the government filed cross-appeals with the Ninth Circuit Court of Appeals. Writing for a panel of the Ninth Circuit that included Circuit Judges Alfred Goodwin and Jerome Ferris, in a unanimous opinion issued on September 24, 1987, Judge Mary Schroeder first noted that Judge Voorhees

> held a full evidentiary proceeding on Hirabayashi's claims. It reviewed hundreds of documents and heard the testimony of several witnesses. They included Edward Ennis, who had been the Director of the Alien Enemy Control Unit of the Department of Justice and a principal author of the government's briefs in both the Hirabayashi and Korematsu cases; William Hammond, who had been the Assistant Chief of Staff for the entire Western Defense Command; Aiko Herzig-Yoshinaga, a researcher for the Commission on Wartime Relocation and Internment of Civilians from 1981 to 1983 and the person who discovered the original version of the final report." 828 F.2d 591, 593-94 (9th Cir. 1987).

Judge Schroeder also noted that

> [t]he event which triggered the [coram nobis] lawsuit occurred in 1982, when an archival researcher [Ms. Herzig-Yoshinaga] discovered the sole remaining copy of the original report prepared by the general who issued the curfew and exclusion orders. This report was intended to explain the basis for those orders. War Department officials revised the report in several material respects and tried to destroy all of the original copies before issuing the final report. The Justice Department did not know of the existence of the original report at the time its attorneys were preparing briefs in the Hirabayashi and Korematsu cases. … In his coram nobis petition, Hirabayashi contended that the original report, the circumstances surrounding its alteration, and recently discovered documents provided the proof, unavailable at the time of his conviction, that the curfew and evacuation orders were in fact based upon racial prejudice rather than military exigency. Hirabayashi further alleged that the government concealed these matters from his counsel and the Supreme Court, and that had the Supreme Court known the true basis for the orders, the ultimate decision in the case would probably have been different. Id. at 593.

Judge Schroeder addressed the significance of General DeWitt's Final Report: "Support for the finding that the decision [to issue the curfew and exclusion orders] was General Dewitt's is abundant in this record. … There has been no showing that General DeWitt even consulted with War Department officials in Washington before issuing the orders Hirabayashi refused to obey. It is now clear that DeWitt did not consult with Washington before preparing his final report." Id. at 599.

Judge Schroeder noted a significant fact: *"The government* [in this appeal] *agrees with petitioner and the district court that General DeWitt acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence."* She added, however, that "the material in the record before the Supreme Court showing General DeWitt's racism was limited to a newspaper clipping [in the appendix to Hirabayashi's Supreme Court brief]." This article quoted DeWitt as stating: "It makes no difference whether the Japanese is theoretically a citizen … A Jap is a Jap." San Francisco News, April 13, 1943, at 1. Id. at 601. (emphasis added)

Judge Schroeder also discussed the "Ringle Report" that Edward Ennis had unsuccessfully urged Solicitor General Fahy to bring to the Supreme Court's attention in the Hirabayashi case in 1943. She wrote:

> As the Justice Department prepared its brief, Ennis came into possession of the intelligence work of Lt. Commander Kenneth D. Ringle, an expert on Japanese intelligence in the Office of Naval Intelligence. Ringle had reached conclusions directly contradicting the two key premises in the government's argument. Ringle found (1) that the cultural characteristics of the Japanese Americans had not resulted in a high risk of disloyalty by members of that group, and (2) that individualized determinations could be made expeditiously. See K. Ringle, Report on the Japanese Question 3 (Jan. 26, 1942). Ennis therefore concluded: '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 this represents the view of the ONI. *It occurs to me that any other course of conduct might approximate the suppression of evidence.*' Memorandum from Ennis to Solicitor Re: Japanese Brief, April 30, 1943 [emphasis added]. Notwithstanding Ennis' plea, the Justice Department's brief in Hirabayashi made no mention of Ringle's analysis.

Judge Schroeder concluded: "We cannot hold that the district court erred in deciding that the reasoning of the Supreme Court would probably have been profoundly and materially affected if the Justice Department had advised it of the suppression of evidence which established the truthfulness of the allegations made by Hirabayashi and Korematsu concerning the real reason for the exclusion order." Id. at 603-04.

Turning to the curfew violation that Judge Voorhees had upheld, Judge Schroeder reversed his ruling and vacated that conviction:

> The district court based its distinction on the premise that the curfew was a lesser restriction on freedom than the exclusion. It does not follow, however, that the Supreme Court would have made such a distinction had it been aware of the suppressed evidence. The Supreme Court in l943 reviewed only the curfew order and clearly saw it as a serious deprivation of liberty. The Court therefore held that it would be justified only on the basis of a reasonable military judgment of military necessity. … The district court erred in distinguishing between the validity of the curfew and exclusion convictions. Id. at 608.

IV. SOLICITOR GENERAL FAHY'S MISLEADING OF THE SUPREME COURT IN HIS KOREMATSU ARGUMENT

Of particular significance to the Supreme Court's decision in the *Korematsu* case is the oral argument of Solicitor General Fahy before the Court in that case in 1944. As a preface to the following excerpts from General Fahy's argument in *Korematsu*, it should be noted that the government's brief in *Hirabayashi* had acknowledged that the "record in this case does not contain any comprehensive account of the facts which gave rise to

the exclusion and curfew measures here involved." Brief at 10-11. The government relied instead on "judicial notice" of "historical facts" and argued that "facts appear[ing] in official documents . . . are peculiarly within the realm of judicial notice." Id. at 11. The government's reliance on "judicial notice" continued in its *Korematsu* brief in the Supreme Court and in General Fahy's oral argument.

In his *Korematsu* argument, General Fahy responded to the arguments of Korematsu's counsel that General DeWitt's Final Report provided no justification for the claimed "military necessity" for the evacuation and the exclusion orders.

> MR. FAHY: It was suggested here yesterday [by Korematsu's counsel] … that notwithstanding the decision of the Court in the Hirabayashi case that the [military] orders were justified under the exercise of the war power, the Court did not then have before it all the facts, and that now, after the event, we know that the facts did not justify evacuation as a military measure.
>
> THE CHIEF JUSTICE: What do you mean by that? Is it argued that there was no basis on which the military judgment could be founded?
>
> MR. FAHY: It must be that, Your Honor, because that is the test. The final report of General DeWitt was held up to Your Honors yesterday as proving that he himself had no rational basis on which to make a military judgment. I am not going into the details of that report, because no doubt the Court will read it. However, I do assert that *there is not a single line, a single word, or a single syllable* in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast. (emphasis added)
>
> It is even suggested that because of some foot note in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case—that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and *no person in any responsible position has ever taken a contrary position*, and the Government does not do so now. Nothing in its brief can validly be used to the contrary." (emphasis added) [20]

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20. Supra n. 17, at 50.

In stating (with uncharacteristic hyperbole) that he stood behind "every line, every word, and every syllable" of General DeWitt's claim that the evacuation and exclusion orders were based solely upon "military necessity," General Fahy placed the prestige and imprimatur of his office behind a report that had been altered to conceal DeWitt's racist motivation and his animus toward Japanese Americans as collectively disloyal. To be fair, it was War Department officials who had altered, and tried to destroy all copies of the original report. However, as Judge Voorhees noted, the government was "chargeable" for this obvious misconduct.

General Fahy also misled the Supreme Court in claiming that "no person in any responsible position" within the government had ever taken the position that the evacuation had no basis in military necessity. In fact, Edward Ennis, who held a responsible position in that department, with primary responsibility for the government's briefs to the Supreme Court, had urged General Fahy to present the "Ringle Report" to the Supreme Court as showing the lack of any military necessity for the evacuation, and warned General Fahy that "any other course of conduct might approximate the suppression of evidence." However, General Fahy ignored that clear warning. In addition, Mr. Ennis had warned the Assistant Attorney General, Herbert Wechsler, that charges in General Dewitt's Final Report of acts of espionage by Japanese Americans were untrue, and that "it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected." Yet, those untrue charges remained in the Final Report, which General Fahy assured the Court "proves the basis for the exclusion orders' and that "[t]here is not a line in it that can be taken in any other way."

During his Korematsu argument, General Fahy engaged in a revealing colloquy with Justice Frankfurter that bears quotation, given the clear evidence in the record of the racial animus that prompted General DeWitt's military orders:

> JUSTICE FRANKFURTER: "Suppose the commanding general, when he issued Order No. 34 [the exclusion order that Korematsu disobeyed] had said, in effect, 'It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility [toward Japanese Americans] and clear the Japanese from this area.' Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?
>
> MR. FAHY: It would not have been. Id. at 50.

General DeWitt did, in fact, express his hostility toward Japanese on numerous occasions with crude candor. He expressed his racial animus in his Final Report: "The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted. . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today." Before a congressional committee, DeWitt said of native-born Japanese Americans: "It makes no

difference whether he is an American citizen. American citizenship does not necessarily determine loyalty." [21]

Given the unvarnished racism of General DeWitt, and General Fahy's knowledge of these sentiments, he was correct in telling Justice Frankfurter there "would not have been" any reasonable basis for the mass removal and incarceration of the entire Japanese American population. This knowledge, unfortunately, did not dissuade Fahy from defending DeWitt's military orders as necessary precautions against espionage, despite knowing from FBI and FCC reports that no such acts had been committed. This concealment of facts that Fahy had been urged to disclose to the Court adds to the government's misconduct, and to the case for repudiation of the internment decisions.

V. THE GOVERNMENT'S "CONFESSION OF ERROR" IN THE WARTIME INTERNMENT CASES PROVIDES AMPLE GROUND FOR REPUDIATING THOSE DECISIONS

One significant event that prompted the writing of this essay was the candid and revealing statement by Acting Solicitor General Neal K. Katyal, published on May 20, 2011, on the blogs of the Department of Justice and the White House, and entitled "Confession of Error: The Solicitor General's Mistakes During the Japanese American Internment Cases," [22] In that statement, General Katyal wrote the following:

> It has been my privilege to have served as Acting Solicitor General for the past year and to have served as Principal Deputy Solicitor General before that. The Solicitor General is responsible for overseeing appellate litigation on behalf of the United States, and with representing the United States in the Supreme Court. There are several terrific accounts of the roles that Solicitors General have played throughout history in advancing civil rights. But it is also important to remember the mistakes. One episode of particular relevance . . . is the Solicitor General's defense of the forced relocation and internment of Japanese-Americans during World War II.
>
> Following the attack on Pearl Harbor, the United States uprooted more than 100,000 people of Japanese descent, most of them American citizens, and confined them in internment camps. The Solicitor General [Charles Fahy] was largely responsible for the defense of those policies.
>
> By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the

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21. Quoted in *Personal Justice Denied*, at 66.

22. General Kaytal's statement, posted on May 20, 2011, can be found on the blogs of the Department of Justice and the White House on that date.

> Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court 'might approximate the suppression of evidence.' Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC [Federal Communications Commission]. And to make matters worse, he relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by "racial solidarity." The Supreme Court upheld Hirabayashi's and Korematsu's convictions. And it took nearly half a century for courts to overturn these decisions. One court decision in the 1980s that did so highlighted the role played by the Solicitor General, emphasizing that the Supreme Court gave 'special credence' to the Solicitor General's representations. The court thought it unlikely that the Supreme Court would have ruled the same way had the Solicitor General exhibited complete candor. Yet those decisions still stand as a reminder of the mistakes of that era.
>
> Today, our Office takes this history as an important reminder that the "special credence" the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans.

General Katyal's statement, and its abbreviated description of crucial documents withheld from the Supreme Court during the proceedings before it in 1943 and 1944 in the wartime internment cases, by itself constitutes sufficient ground for the Court to repudiate those decisions. True, his confession of error was not formally presented to the Court, given the lack of any current proceedings before the Court in them. Such a procedural barrier should not, however, prevent the Court from exercising its inherent powers to rectify past errors, once acknowledged by the Solicitor General.

VI. CONFESSIONS OF ERROR BY SOLICITORS GENERALS REQUIRE THE SUPREME COURT "TO EXAMINE INDEPENDENTLY" THE ERRORS CONFESSED

It is uncommon, but not without precedent, for the Solicitor General of the United States to submit a "confession of error" to the Supreme Court. As the federal government's representative to the Court, the Solicitor General—charged with the duty of "absolute candor" in his or her presentations to the Court---has an obligation to inform the Court when he or she discovers that such representations have been mistaken or false. Failure to make such confessions of error might well result in the Court rendering decisions that are mistaken in fact or law, or to correct—even after decisions have been issued—those

that have relied on the government's misrepresentation, whether intentional or inadvertent.

Particularly significant to the issues raised in this essay was the Solicitor General's confession of error in *Young v. United States*, 315 U.S. 257 (1942), in which the confession was made by Solicitor General Charles Fahy, whose "misconduct" in the Japanese American internment cases led to the later coram nobis actions. Having defended before a circuit court of appeals the conviction of a physician for having unlawfully "dispensed" controlled narcotics to his own patients, General Fahy subsequently decided that the statute in question, the Harrison Anti-Narcotic Act, did "not apply to a physician who administers exempt preparations solely to patients whom he personally attends", if the physician was not the "manufacturer, producer, compounder, or vendor" of the narcotic medications.

Writing for a unanimous Court in *Young*, Justice Murphy stated: "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. *But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.* . . . The public interest that a result be reached which promotes a well ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection, as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 U.S. 258-259 (emphasis added; internal citations omitted).

The words of Justice Murphy have particular and present relevance to the issues raised in this essay. Given the confession of error by General Katyal in the internment cases, quoted above, it seems incumbent on the Court "to examine independently the errors confessed" by him, based on the records set out in the coram nobis petitions and the opinions of the district and court of appeals judges who carefully examined and ruled upon the petitions. It bears notice that previous confessions of error by Solicitors General most often involved changes of position on the interpretation or application of criminal statutes, distinguishing them from the serious misconduct of the government in the internment cases.

VII. THE SUPREME COURT HAS, IN EFFECT, ALREADY REPUDIATED THE INTERNMENT DECISIONS, AND NEEDS TO FORMALIZE THAT REPUDIATION

Readers of this essay who are unfamiliar with the Supreme Court's rules, procedures, and practices may wonder why it urges the Justices to issue a public statement that "repudiates" the internment cases, rather than calling on them to reverse or overrule those decisions. This is an interesting and relevant question, and requires a brief discussion. The Constitution, in Article III, Section 2, limits the Court's appellate jurisdiction to

cases "arising under this Constitution, the Laws of the United States, and Treaties [to which the United States is a signatory]". In practice, the Court will only review "live" cases that have been decided by lower state and federal courts, on appeal by one or both parties. The Court will not review "moot" cases, in which further review would not affect the claims and rights of the parties.

However, the Court has, on more than a hundred occasions, reached back to reverse or overrule an earlier decision that conflicts in its holding or reasoning with a case before the Court, and which remains as precedent until its reversal. In fact, there is nothing in the Court's rules that govern when, and under what circumstances, earlier cases may be subject to reversal. This is entirely a matter of judicial discretion. Two examples will illustrate how some earlier cases are singled out for reversal. In 1883, in *Pace v. Alabama*, 106 U.S. 583, the Court upheld the conviction of a black man and white woman, who were unmarried but living together, for committing "adultery and fornication" in violation of Alabama's anti-miscegenation law. Eighty-four years later, a unanimous Court reversed *Pace* in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down the conviction of a white man and a black woman, who were married and had children, for violation of Virginia's anti-miscegenation law. *Pace* obviously conflicted with *Loving* and required reversal, despite being a "moot" case. Significantly, the Court in *Loving* cited both the *Hirabayashi* and *Korematsu* cases as examples of illegitimate racial discrimination: "Over the years, this Court has consistently repudiated [in later decisions] '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" [quoting from *Hirabayashi*, 320 U.S. at 100] Id. at 11. In my view, the Court in *Loving* could, and should, have gone beyond "repudiation" of the internment cases and flatly reversed them as inconsistent with *Loving* and other cases that struck down practices of racial discrimination, including, most famously, *Brown v. Board of Education*, 347 U.S. 483 (1954). In holding public-school segregation unconstitutional, the Court in *Brown* (contrary to popular belief) did not explicitly reverse the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896) , which upheld the "separate but equal" segregation of blacks and whites on railroad coaches in Louisiana. The damaging impact of school segregation on black children, the Court held in *Brown*, "is amply supported by modern authority. Any language in [*Plessy*] contrary to this finding is rejected.' 347 U.S. at 494-495. Of course, most people understand this treatment of *Plessy* as its reversal.

It bears notice that the Supreme Court has, in effect, already repudiated its decisions in the wartime internment cases. In the case of *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995), which involved race-based criteria for the award of government construction contracts, the Court (in the opinion for the Court of Justice O'Connor) discussed at length the application of the "strict scrutiny" standard in determining whether such race-based classifications served a "compelling governmental interest."

In her opinion, Justice O'Connor cited the *Korematsu* decision as an example of a race-based classification that violated the Constitution's guarantee in the Fourteenth Amendment of "the equal protection of the laws" to racial and ethnic minorities that had been subjected to official discrimination. She wrote: "*Korematsu* demonstrates vividly

that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification. . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." Id. at 236. Justice O'Connor also cited for authority the Civil Rights Act of 1988 (known as the "Japanese American Redress Act"), as congressional repudiation of the forced removal and imprisonment of Japanese Americans, which Congress found "were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." Id., citing Pub.L. 100-383. Significantly, none of the dissenting Justices in the *Adarand* case took issue with Justice O'Connor's statements about the "illegitimate racial classification" in *Korematsu* (and by implication in the *Hirabayashi* case as well), and the "error" of the Court in failing to apply the "strict scrutiny" standard to the government's wartime claims (unexamined by the Court) that "military necessity" justified the military orders at issue in the wartime cases. In a dissent joined by Justice Ginsburg, Justice Stevens labeled the racial discrimination in the internment cases as "invidious" and presumptively unconstitutional. Id. at 244. Justice Ginsburg, in a separate dissent in which Justice Breyer joined, wrote that the Court's decision in *Korematsu* "yielded a pass for an odious, gravely injurious racial classification." Id. at 275.

It seems clear that Justice O'Connor's critical statements about *Korematsu,* combined with those of the dissenters, constituted a repudiation of that decision in all but use of that word. In fact, those statements would have justified a formal reversal of the wartime decisions. Given the importance of the discussion of *Korematsu* in the *Adarand* case, placing that implicit repudiation on the record through a public statement by the Court seems amply warranted.

The point of this discussion, and its relevance to this essay, is that neither the "reversal" nor the "repudiation" of earlier decisions is covered in the Supreme Court's rules; they are entirely matters of judicial discretion. One might argue that the Japanese American internment cases have been "repudiated" by the use of that word to describe them in the *Loving* decision, and by their criticism in the *Adarand* opinions. Most reversals, of course, occur in cases that involve similar (but not necessarily identical) issues of fact and/or law. And most people consider it unlikely that the Court will again be faced with a case that involves the mass removal and incarceration of an entire racial or ethnic minority, placing the reversal of the internment cases directly at issue. Nonetheless, the Court often deals with cases that involve challenges to "invidious" racial discrimination (as in "affirmative action" cases). In my view, such cases would offer the Court the opportunity to reverse the internment cases as wrongly decided and no longer binding as precedent. Short of that, however, a public statement by the Court of their repudiation, especially in view of the serious governmental misconduct documented in the coram nobis decisions, and the "confession of error" issued by Acting Solicitor General Katyal, would fall within the Court's inherent power to "correct its records" in these cases. The fact that the Court has never before issued such a "repudiation" statement is no bar to the authority of the Justices to take such an action.

VIII. THE CAUTIONARY WORDS OF JUDGES PATEL AND SCHROEDER

The Supreme Court, in deciding whether the well-documented and judicially upheld record of the government's knowing and intentional misleading of the Court merits a public repudiation of the wartime internment cases, should consider the cautionary words of Judges Patel and Schroeder in their detailed and persuasive opinions in these cases. As Judge Patel put it:

> Fortunately, there are few instances in our judicial history when courts have been called upon to undo such profound and publicly acknowledged injustice. Such extraordinary instances require extraordinary relief, and the court is not without power to redress its own errors. 584 F.Supp. at 1410.
>
> 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. Id. at 1420.

And, as Judge Schroeder wrote: "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." 828 F.2d 591, 607. That statement applies with equal force, not only to Gordon Hirabayashi, but to Fred Korematsu and Minoru Yasui as well. [23]

CONCLUSION

Over the past seven decades, many distinguished scholars and judges have implored the Court to repudiate the internment decisions. It seems appropriate to note the first and perhaps most distinguished of these voices: just months after the *Korematsu* decision in December 1944, Eugene V. Rostow, the justly esteemed professor and dean at Yale Law School, published an article in the Yale Law Journal entitled "The Japanese American Cases – A Disaster." [24] In his article, which eviscerated the Court's opinions in these cases as based on unsupported racial stereotypes (and without the benefit of the evidence of governmental misconduct discussed above), Professor Rostow wrote that those

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23. For a personal, and moving, account of her involvement in the Hirabayashi coram nobis case, *see* Judge Mary M. Schroeder, What Gordon Hirabayashi Taught Me About Courage, 11 *Seattle Journal For Social Justice*, 65-75 (Summer 2012).

24. 54 Yale L.J. 489 (1945).

opinions, "[b]y their acceptance of ethnic differences as a criterion for discrimination . . . are a breach, potentially a major breach, in the principle of equality. *Unless repudiated, they may encourage devastating and unforeseen social and political conflicts."* He continued: "In the political process of American life, these decisions were a negative and reactionary act. The Court avoided the risks of overruling the Government on an issue of war policy. But it weakened society's control over military authority—one of those polarizing forces on which the organization of our society depends. And it solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society." (emphasis added) Id. at 492.

"[T]hat the Supreme Court has upheld imprisonment on such a basis constitutes an expansion of military discretion beyond the limit of tolerance in democratic society. It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty. . . . What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?" Id. at 533.

Professor Rostow urged in 1945 that "the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these war-time cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. After the Civil War, Ex parte Vallandigham was followed by Ex parte Milligan. The Gobitis case has recently been overruled by West Virginia v. Barnette. Similar public expiation in the case of the interment of Japanese Americans from the West Coast would be good for the Court, and for the country." Id. Failing to heed Professor Rostow's words in 1945 and in the years since then, the Court should now feel an obligation to provide the "expiation" for which he prophetically called.

POSTSCRIPT: APOLOGIES, REDRESS, AND RECOGNITION

For more than three decades after the internment and imprisonment of Japanese Americans was formally ended, many victims of the camps remained silent about their experiences, bearing the shame and stigma of racial "disloyalty" the Supreme Court decisions had imposed on them. Fred Korematsu's daughter, Karen, did not learn of her father's role in history until a junior-high classmate gave an oral report on the internment, mentioning the Korematsu case. She went home and asked, "Daddy, are we related to him?" Only then did Fred tell Karen the story of his stand and his case. However, beginning in the late 1970s, inspired by the movements of black Americans for civil rights, and the opponents of the Vietnam War, some internment survivors, and members of the younger generation of Japanese Americans, launched a campaign for "redress and reparations," seeking apologies from Congress and the Executive branch, as well as symbolic payments for the years they spent behind barbed wire in desolate concentration camps.

The redress and reparations campaign finally won recognition when Congress, with the support of President Jimmy Carter, established in 1980 the Commission on Wartime Relocation and Internment of Civilians. Its report, Personal Justice Denied, [25] was issued in December 1982, and concluded that the President Roosevelt's issuance of Executive Order 9066 "was not justified by military necessity, and the decisions which followed from it . . . were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria, and a failure of political leadership. . . . 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." Id at 18. In its formal report to Congress, the Commission recommended both a national apology for the internment and financial compensation to its surviving victims.

In response to the Commission's report and recommendations, Congress adopted in 1988 the Civil Rights Act, in which Congress stated its purpose to "acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II"; and to "apologize on behalf of the people of the United States" for the internment of this racial minority. Pub. Law 100-383 (1988). Congress also acknowledged in this Act that "these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation." Id., Sec. 2.

In signing this Act on August 10, 1988, President Ronald Reagan told those at the White House ceremony, and the American people, that "we gather here today to right a grave wrong. More than 40 years ago, shortly after the bombing of Pearl Harbor, 120,000 persons of Japanese ancestry living in the United States were forcibly removed from their homes and placed in makeshift internment camps. This action was taken without trial, without jury. It was based solely on race . . . For here we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law." The Act signed by President Reagan also provided for payments of $20,000 to each of the remaining 60,000 survivors of the internment camps, although the President admitted that "no payment can make up for those lost years." [26]

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25. Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (GPO, 1983).

26. Office of the White House Press Secretary, August 10, 1988.

A final measure of recognition for their defense of "liberty and justice for all" came to Fred Korematsu and Gordon Hirabayashi in White House ceremonies in which they received the Nation's highest civilian award, the Presidential Medal of Freedom. In January 1998, President Bill Clinton bestowed the medal on Fred Korematsu, calling him "a man of quiet bravery." The presidential citation issued with the award read:

> In 1942, an ordinary American took an extraordinary stand. Fred Korematsu boldly opposed the forced internment of Japanese Americans during World War II. After being convicted for failing to report for evacuation, Mr. Korematsu took his case all the way to the Supreme Court. The high court ruled against him. But 39 years later, he had his conviction overturned in federal court, empowering tens of thousands of Japanese Americans and giving him what he said he wanted most of all—the chance to feel like an American again. In the long history of our country's constant search for justice, some names of ordinary citizens stand for millions of souls: Plessy, Brown, Parks. To that distinguished list, today we add the name of Fred Korematsu. [27]

At a similar White House ceremony in May 2012, President Barack Obama conferred the same Medal of Freedom on Gordon Hirabayashi; unfortunately, it was a posthumous honor, since Hirabayashi died earlier that year, with the medal accepted by his children and wife. In the citation issued for the ceremony, President Obama said:

> Gordon Hirabayashi knew what it was like to stand alone. As a student at the University of Washington, Gordon was one of only three Japanese Americans to defy the executive order that forced thousands of families to leave their homes, their jobs, and their civil rights behind and move to internment camps during World War II. He took his case all the way to the Supreme Court, and he lost. It would be another 40 years before that decision was reversed, giving Asian Americans everywhere a small measure of justice. In Gordon's words, "It takes a lot of courage in the face of military power in the crisis to tell us that unless citizens are willing to stand up for the [Constitution], it's not worth the paper it's written on." And this country is better off because of citizens like him who are willing to stand up. [28]

Minoru Yasui (who was equally deserving of the Medal of Freedom) died in 1986; Fred Korematsu died in 1995; and Gordon Hirabayashi in 2012. But their spirits and examples live on in the hearts of millions of their fellow Americans. They stood up for their constitutional rights when most Americans stood silent in the face of the "grave injustice" of the internment. The time has come for the Supreme Court to stand up, and carry out its obligation to secure "Equal Justice Under Law" for all Americans by repudiating the internment decisions that have stained the Court's history and integrity.

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27. Id., January 15, 1998.

28. Id., May 29, 2012.

THE COURT CAN GIVE US ALL A DAY OF CELEBRATION

June 21, 1943, marked a sad day in the Supreme Court's history. Seven decades later, the Court has both the power and opportunity to make June 21, 2013, a day for celebration, not only for Japanese Americans but for all Americans who believe in "liberty and justice for all," words that the children pictured below recited as loyal American citizens.

"It makes no difference whether the Japanese is theoretically a citizen. There's no such thing as a loyal Japanese. A Jap is a Jap."

General John L. DeWitt

"Your Honor, I still remember 40 years ago when I was handcuffed and arrested as a criminal here in San Francisco. I thought that this decision was wrong and I still feel that way. As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing."

Fred Korematsu, speaking at his coram nobis hearing

"If I gave in to this, it would cause me to change my ideals, my beliefs, my whole philosophy of life. I knew I'd be accused of disloyalty, but I couldn't sit back and passively endorse the orders. Ancestry is not a crime."

Gordon Hirabayashi, speaking of his decision to resist the internment

PROPHETIC DISSENTS IN THE KOREMATSU CASE

"I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights. . . . [T]his is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated."

Justice Owen Roberts, 323 U.S. at 225-226

"[T]his forced exclusion was the result in good measure of [an] erroneous assumption of racial guilt, rather than *bona fide* military necessity. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. . . . I dissent, therefore, from this legalization of racism."

Justice Frank Murphy, 323 U.S. at 235-242

"[T]he Court has for all time validated the principle of racial discrimination . . . and of transplanting American citizens, The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring a plausible claim of an urgent need."

Justice Robert Jackson, 323 U.S. at 246