THE JAPANESE AMERICAN CASES, 1942-2004: A SOCIAL HISTORY

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This essay addresses—and attempts to explain—the changing reactions (or, in some cases, the lack of reaction) by the government and by the public to the incarceration of the Japanese Americans of the West Coast during World War II and in the six decades since then. The legal literature about the cases is vast and will not be recapitulated at any length here.

I

THE LAW'S DELAY

The Japanese American cases arose from actions taken by the federal government stemming from President Franklin D. Roosevelt's Executive Order 9066, issued on February 19, 1942.[1] Even before the process of incarcerating Japanese American citizens began in March 1942, government attorneys in both the War Department and the Department of Justice feared that federal judges would consider the process unconstitutional.[2] These fears, alas, were largely chimerical. As had been the case in many previous national crises—and has been the case since—the judiciary was more solicitous about what it conceived to be the safety of the state than about the civil liberties of its citizens. Although the presidential Commission on the Wartime Relocation and Internment of Civilians (CWRIC) focused primarily on the actions of the executive and legislative branches, its 1982 conclusion that the broad historical causes shaping the decisions about Japanese Americans—"race prejudice, war hysteria and a failure of . . . leadership"—may confidently be applied to the judiciary as well.[3]

The Japanese American cases, so-named by Eugene V. Rostow in 1945, were brought by four young Nisei who did not know one another. Three of them—Minoru Yasui, Gordon K. Hirabayashi, and Mitsuye Endo—deliberately challenged the federal government's plot to deprive them of their liberty. The fourth, Fred T. Korematsu, initially went into hiding and agreed to be the focus of a test

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1. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the War Secretary to prescribe military areas and exclude certain individuals for national security reasons).

2. PETER IRONS, JUSTICE AT WAR 52-54 (1993).

3. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982).

case only after his apprehension by the FBI. A number of other Japanese Americans had taken similar evasive action with similar results. The government, anxious to avoid court challenges, merely filed complaints against such persons and usually hustled them off to "Assembly Centers" or "Relocation Centers." Attorney Ernst Besig, trolling in Bay Area jails for a candidate for a test case, found three. Two turned him down; but he found his man in Fred Korematsu.[4]

Even in the first legal skirmishes, few federal judges looked askance at the government's treating Japanese American citizens as if they were aliens. In the case of Minoru Yasui, which involved only curfew regulations promulgated by Gen. John L. DeWitt, Oregon Federal District Judge James Alger Fee (1888–1959) held that the general's order was "void as respects citizens." Judge Fee nevertheless ruled that Yasui, who was at the time of Pearl Harbor employed by the Japanese consulate in Chicago, had by virtue of that employment chosen "allegiance to the Emperor of Japan," despite Yasui's birth in Oregon, his membership in the bars of that state and Illinois, and his commission as a lieutenant in the U.S. Army Reserve.[5] This decision was affirmed by the Supreme Court on June 21, 1943,[6] and his case was remanded to Fee, who expunged his earlier remarks about citizenship from his revised opinion in obedience to the court's decision in *Hirabayashi v. United States.*[7]

More typical was the performance of Northern California Federal District Court Judge Michael J. Roche (1878-1964), who received a *habeas corpus* petition from Mitsuye Endo's attorney, James Purcell, on July 12, 1943, asking that his client, by then incarcerated by the War Relocation Authority in the camp at Tule Lake, be released. Roche heard argument on the petition eight days later, but held the petition for 356 days before denying it on July 3, 1943, without giving any reasons for either his delay or his action.[8] This occurred just 13 days after the Supreme Court had decided the case of Gordon Hirabayashi.

By June 1943, not only had the tide of battle clearly turned against Japan in the Pacific, but five months previously, President Roosevelt, supporting the formation of an all-Japanese American military unit, had written, "No loyal citizen of the United States should be denied the democratic right to exercise the rights of citizenship. . . . Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry."[9] Nevertheless, a unanimous Supreme Court found college student Gordon Hirabayashi guilty of violating a curfew that had forced him and other Nisei students to leave the University of Washington library while all other citizen students could

4. Interview with Ernst Besig, Attorney (1968): *see also 3 Japanese Defy Curbs*, N.Y. TIMES, June 14, 1942 at 8.

5. U.S. v. Yasui, 48 F. Supp. 40, 54-55 (D.C. Or. 1942)

6. Yasui v. U.S., 320 U.S. 115 (1943).

7. United States v. Yasui, 51 F. Supp. 234, 235 (1943); *see also* Hirabayashi v. United States, 320 U.S. 81, 85 (1943) (holding that the issue of renunciation of American citizenship need not be decided).

8. Glen Kitayama, *Endo, Ex Parte*, in ENCYCLOPEDIA OF JAPANESE AMERICAN HISTORY 159-60 (Brian Niiya, ed., 2001).

9. BILL HOSOKAWA, NISEI: THE QUIET AMERICANS 365-67 (1969).

remain. That curfew and accompanying travel restrictions affected both "alien enemies" of any nationality and United States citizens of Japanese ancestry whom DeWitt's aides habitually described as Japanese "non aliens." One justice, Frank Murphy, had originally written a dissent but had been persuaded to submit only a curious concurrence—"curious" because the concurrence retained the sting of the dissent.[10] Another justice, Owen J. Roberts, argued more than a year later that *Hirabayashi* was merely a matter "of keeping people off the streets at night."[11] But most of his brethren, having once allowed differential treatment of one group of citizens, found it impossible to say that forcing that same group of citizens to report for what the government called "relocation" was against the law.[12] Roberts was doubly complicit: having been sold a bill of goods by military officials in Hawaii in the weeks after Pearl Harbor, he signed a report in late January 1942 which claimed, falsely, that the Pearl Harbor attack had been greatly abetted by Japanese spies including "persons having no open relations with the Japanese foreign service."[13]

The cases of Fred Korematsu and Mitsuye Endo took even longer to decide and caused significant division in the Court before being announced on Monday, December 18, 1944—forty-one days after the presidential election.[14] Although *Endo* had been settled in conference on October 16, 1944, with all justices agreeing that she, as a loyal citizen, should be released and allowed to return to her home in California, Chief Justice Stone held the opinion until after the election. Nonetheless, apparently he and Justice Frankfurter separately made the result of the opinion known to the government in advance of its formal announcement.[15] Thus, on Sunday, December 17, the day before the Court itself released the opinion, the Army announced that exclusion of loyal Japanese Americans from the West Coast would be ended as of January 2, 1945.[16]

Fred Korematsu's case, discussed in conference at the same time as Endo's, resulted in a divided Court. Three justices—Murphy, Roberts, and Robert H. Jackson—published dissents, and William O. Douglas circulated a dissent, but withdrew it on December 6.[17] The two decisions produced a paradoxical result. The Court, which technically had failed to endorse incarceration, held in *Korematsu* that, on the one hand, an American citizen could be jailed for not submitting to an order based only on his ancestry, and, on the other, that a citizen of unquestioned loyalty could not be incarcerated or prevented from returning to

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10. For example, "[T]his goes over the brink of constitutional power," became "[T]his goes to the very brink of constitutional power." *See* Sidney Fine, *Mr. Justice Murphy and the* Hirabayashi *Case*, 32 PAC. HIST. REV., 239-57 (1964).

11. Korematsu v. United States, 323 U.S. 214, 225-26 (1944) (Roberts, J., dissenting).

12. *Id*. at 215-25.

13. *Pearl Harbor Attack: Hearings Before the Joint Comm. on the Investigation of the Pearl Harbor Attack Pursuant to S. Con. Res. 27*, 79th Cong., pt. 39, at 12-13 (1946) (report of the Roberts Commission).

14. THE SUPREME COURT IN CONFERENCE, 1940-1985 687-93 (Del Dickson ed., 2001).

15. *Id*. at 692-93.

16. *Id*. at 693.

17. *Id*. at 691.

a West Coast home. Not only were these cases marked by divisions amongst the members of the Court and by the reasoning of the opinions themselves, but it can also be argued that two members of the five-man majority should have recused themselves. Howard Ball has contended that Justice Black's long friendship with General DeWitt ought to have prevented him from ruling on DeWitt's order. And, before the United States was actually at war, Justice Felix Frankfurter had served as an unofficial advisor to the War Department on its policies toward aliens and had arranged, as was his wont, to have one of his protégés assigned there to help oversee policy toward aliens.[18]

II

WHAT DID THE PUBLIC KNOW?

It is notorious that virtually no protest was heard against the mass violation of the civil liberties of Japanese Americans during the war, either from the ethnic community before it was sent to camp or from the larger public then and later. Why was this the case? Chiefly because both the press and those organizations that had been the traditional defenders of the civil liberties of minorities were silent. While the finger is often pointed at West Coast newspapers, the national press was little better. The *New York Times*, for example, acted as a kind of cheerleader for a drastic solution to what it and other organs called the domestic "Japanese problem." For example, an account headlined "Pacific Coast Aliens" was published in the *Times*' widely read weekly review of the news four days before the promulgation of Roosevelt's EO 9066, which had already been drafted in the War Department. The paper described newly issued regulations affecting "enemy aliens," but pointed out that many Californians wanted military action taken against the Nisei who "enjoy protective rights as native-born Americans." The item concluded:

> There appeared last week ample proof to substantiate Pacific Coast fears. The F.B.I. announced some of the results of raids recently carried out in districts inhabited by enemy aliens. In raids on a single area, it was said, Federal agents had seized 60,839 rounds of rifle ammunition, 18,907 rounds of shotgun ammunition, thirty-one shotguns, rifles and revolvers, eighty-four knives, a dozen binoculars, twelve cameras, nine receiving sets, and more than a score of assorted signaling devices including searchlights.[19]

Similarly, when news of EO 9066 was released, the *Times*' coverage was thorough but mixed. Its page-one story was headlined "ARMY GETS POWER TO MOVE CITIZENS INLAND," but its third paragraph claimed that "there would be no mass removals at present."[20] It also printed the text of EO 9066 on

18. Howard Ball, *Judicial Parsimony and Military Necessity Disinterred: A Reexamination of the Japanese Exclusion Cases, 1943-44*, in JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 184 (Roger Daniels et al. eds., 1986); ROGER DANIELS, CONCENTRATION CAMPS, USA: JAPANESE AMERICANS AND WORLD WAR II 135 (1971) [hereinafter DANIELS, CONCENTRATION CAMPS].

19. *Pacific Coast Aliens*, N.Y. TIMES, Feb. 15, 1942, at E2.

20. *Army Gets Power to Move Citizens Inland*, N.Y. TIMES, Feb. 21, 1942, at 1.

an interior page, but headlined it "Text of Roosevelt's Alien Order."[21] And so it went. The *Times* and other major papers printed news of the Japanese American cases and on occasion even mentioned the "concentration camps" for Japanese.[22] But it and other major papers continued to try to put the best face on the government's actions. In its account of the *Korematsu* and *Endo* decisions—one of the few Japanese American stories to appear on its front page—the *Times* headline for the *Endo* case read, benignly, "Supreme Court Upholds Return of Loyal Japanese to West Coast." The correspondent's lead for the story on the *Korematsu* case, however, noted more forthrightly, "The constitutionality of the wartime regulations under which American citizens of Japanese ancestry were evacuated from Pacific Coast areas was upheld by a vote of 6 to 3."[23]

Even the American Civil Liberties Union, after initially agreeing to help defend Gordon Hirabayashi's challenge to DeWitt's curfew regulations, soon reneged, leaving its small Seattle chapter to bear the burden alone.[24] And when Roger N. Baldwin (1884–1981), the head of the ACLU, received a personal letter from a leader of the nascent draft resistance movement in the Heart Mountain, Wyoming, concentration camp, requesting the ACLU's assistance with that movement, Baldwin responded in a letter made public before it was delivered. In it Baldwin stated that the protestors had "a strong moral case" but "no legal case at all."[25] By late 1944, the ACLU had quietly filed an amicus curiae brief for Fred Korematsu, something it still brags about in its literature while ignoring its prior silence. The response of the Communist Party, which had defended minority civil rights vigorously from the time of the *Scottsboro* case of the early 1930s, was no better: the Party supported mass incarceration and instructed its few Japanese American members to go willingly to the camps.[26] This meant that many of those on the left, sometimes called "fellow travelers," were likewise silent—or worse. Carey McWilliams (1905–1980), who before the war ended would become an important defender of Japanese Americans, as California's Commissioner of Immigration and Housing initially supported mass evacuation of Japanese aliens and was ambivalent about citizens.[27] The socialist leader Norman Thomas was the only national leader to denounce the incarceration in 1942.[28] Some fellow Socialists joined him, but the Party as a

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21. Franklin D. Roosevelt, *Text of Roosevelt's Alien Order*, N.Y. TIMES, Feb. 21, 1942, at 6.

22. *Army Opens Ranks to Japanese Units*, N.Y. TIMES, Jan. 29, 1943, at 9.

23. Lewis Wood, *Supreme Court Upholds Return of Loyal Japanese to West Coast*, N.Y. TIMES, Dec. 19, 1944, at 1.

24. ROGER DANIELS, ASIAN AMERICA: JAPANESE AND CHINESE IN THE UNITED STATES SINCE 1850, at 277 n.119 (1988).

25. *Id*. at 272.

26. *See* DANIELS, CONCENTRATION CAMPS, *supra* note 18, at 79.

27. *National Defense Migration: Hearings Before the Select Comm. Investigating National Defense Migration Pursuant to H. Res. 113*, 77th Cong. 11788-97 (1942) (testimony of Carey McWilliams, Chief of California Department of Immigration and Housing).

28. *See generally* NORMAN THOMAS, DEMOCRACY AND JAPANESE AMERICANS (1942) (decrying the relocation and internment as unconstitutional and immoral).

whole failed to act. The only organized political group to protest formally against the mass incarceration was the Socialist Workers Party, a miniscule Trotskyite splinter. The Quakers and a few small Protestant sects protested, but no major denomination did.

The first sustained attack on the Japanese American cases in a major American media outlet came just as the war was ending, when Eugene V. Rostow, then an assistant professor at the Yale Law School, called them "Our Worst Wartime Mistake" in *Harper's Magazine*.[29] Writing in the *New York Times* the following year in praise of the Court's ruling in a case that declared much of Hawaii's post-Pearl Harbor martial law unconstitutional, he complained that the justices had failed "to undo their decisions in the Japanese American cases, and especially *Korematsu v. United States*."[30] In time, similar views were held by most legal scholars concerned with civil liberties.

Historians, however, generally caught up in the triumphalism generated by victory in World War II, paid little attention. In what was perhaps the most noteworthy American history college textbook of the immediate postwar decades—and certainly the most liberal—Richard Hofstadter and his collaborators in a 1957 volume of 758 pages could say only this in their section on "Civilian Mobilization" during World War II: "Since almost no one doubted the necessity for the war, there was much less intolerance than there had been in World War I, although large numbers of Japanese-Americans were put into internment camps under circumstances that many Americans were later to judge unfair or worse."[31] Such other college textbooks of the time as Morison and Commager's *The Growth of the American Republic*[32] made no mention of what happened to Japanese Americans.

By the 1970s, however, books about the wartime incarceration began to be included in college reading lists. The general ignorance among the educated continued well into the 1980s. I remember being asked by a bright senior history major at a good eastern liberal arts college in the mid-1970s if the wartime incarceration I had lectured about "really happened" and, if it had, why had he not heard about it.

III

THE COLD WAR ERA

During the Cold War Era, as we all know, anti-Communism could be used to justify almost anything. Most have forgotten, however, that liberals as well as conservatives led assaults on civil liberties, and in one instance liberals evoked the

29. Eugene V. Rostow, *Our Worst Wartime Mistake*, 191 HARPER'S MAG. 193-201 (1945); *see also* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 498, 489-533 (1945).

30. Eugene V. Rostow, *Hawaii Case Parallel Seen*, N.Y. TIMES, Apr. 4, 1946, at 22.

31. RICHARD HOFSTADTER ET AL., THE UNITED STATES: THE HISTORY OF A REPUBLIC 695 (1957).

32. SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC (5th ed. 1962).

Japanese American cases to craft a "legal" concentration camps bill. In 1950 a group of Democratic senators, including Hubert H. Humphrey and Herbert H. Lehman, sponsored what became the Emergency Detention Act of 1950. In a sequence deliberately mimetic of the procedure approved by the Supreme Court that was used to incarcerate Japanese Americans in 1942, the statute mandated that the government create camps for detention of persons for whom there were reasonable grounds to believe would commit or conspire to commit espionage or sabotage.[33] The camps were to be used only if the president issued an executive order declaring an "Internal Security Emergency," which would empower the attorney general and subordinates he delegated to begin the round up. Several camps, including the facility at Tule Lake, which had been used for Japanese Americans, were refurbished or created and placed on a standby basis. The liberals bragged that their bill was an improvement over the procedure used in World War II because it called for hearings to be provided for those incarcerated sometime after they were safely behind barbed wire. That proposal was enacted into law over President Harry S. Truman's veto as Title II of the Internal Security Act of 1950, also known as the McCarran Act.[34] In such an atmosphere it is not surprising that many Japanese American community leaders were not anxious to have their wartime suffering reexamined.

Twenty-five years after Roosevelt's Executive Order, my friend and colleague at UCLA, Harry Kitano, and I organized the first academic conference devoted to understanding the wartime exile and incarceration: it was called "Why It Happened Here." No Japanese American organization was willing to co-sponsor the event, which was supported by the UCLA Extension Division. Only years later did I learn that extreme pressure was placed on Harry to abandon the project. Among the tactics employed by community leaders was persuading some senior members of his family from the San Francisco Bay Area to call him up and tell him that what he was doing would be bad for the community and would even disgrace the family name. Although the conference was well-attended, it was impossible to get community funding to print the proceedings.

Had anyone said to us then that before the fiftieth anniversary rolled around in 1992, the process we call redress would be enacted and relatively large sums of money would be paid to survivors, we would not have believed it. Most of us were simply concerned with drawing the attention of scholars and of the public-at-large to the legal atrocity that had been inflicted upon the Japanese American people. The events of 1942 were of such little concern that when, in search of the "balance" that is part of the ritual of academic conferences, we attempted to get someone—anyone—to make a presentation defending the wartime deci-

33. Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1019-31.

34. *Id. See generally Allan W. Austin, Loyalty and Concentration Camps in America: The Japanese American Precedent and the Internal Security Act of 1950*, *in* LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 253-70 (Erica Harth, ed., 2001) (comparing the machinery of the McCarran Act to the method of Japanese internment).

sion, we failed. No Lillian Baker or Michelle Malkin had yet surfaced as apologists for wartime injustice.

We did manage to persuade the liberal Democrat Robert W. Kenny to appear. He had been the attorney general of California from 1943 through 1946 and had filed amicus curiae briefs with the Supreme Court supporting the federal government's action in depriving citizens of California of their liberty. In 1967, contrite and charming, he gave a limited apology. But we failed to get a statement from Kenny's wartime superior, Earl Warren, who, as California's attorney general in 1942, was a cheerleader for drastic action against all persons of Japanese ethnicity, and who as governor in 1944 urged the federal government to forbid any Japanese from returning to California. Warren, Chief Justice of the United States in 1967, did not deign to reply. Only in the months before his death in 1974, and in his posthumously published memoir, did Warren comment on the wartime incarceration. He called it "regrettable," but insisted that what he had done was in order "to keep the security of the state."[35] He claimed that he "had no prejudice against the Japanese"; but, in fact, Warren had joined anti-Japanese organizations as early as the 1920s, and, as one of his scholarly biographers points out, he "had never shown any sympathy toward Californians of Asian ancestry."[36]

As the 1960s came to an end, some young Japanese American activists, animated, at least in part, by anti-government attitudes engendered by reaction to the war in Vietnam, began a campaign for repeal of the Emergency Detention Act (but not the larger Internal Security Act of which it was a part).[37] Acting for the Nixon administration, then-Deputy Attorney General Richard Kleindienst informed Congress on December 2, 1969 that the Justice Department favored repealing the act. His reasons are instructive:

> [V]arious groups . . . look upon the legislation as permitting a reoccurrence of the roundups which resulted in the detention of Americans of Japanese ancestry during World War II. . . . [T]he Emergency Detention Act is extremely offensive to many Americans. . . . In the judgment of this Department . . . repeal . . . will allay the fears and suspicions—unfounded as they may be—of many of our citizens. This benefit outweighs any potential advantage which the Act may provide.[38]

The bill passed the House 356–49 and the Senate by voice vote. President Nixon signed it on September 25, 1971. As part of the repeal, Congress placed the following sentence in the United States Code, where it remains: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress."[39] In 1974 political scientist Richard Longaker hailed that

35. EARL WARREN, THE MEMOIRS OF EARL WARREN 149 (1977).

36. PAUL FINKELMAN, EARL WARREN, *available at* http://www.abn.org.

37. See Austin, supra note 34.

38. Letter from Richard Kleindienst, Deputy Attorney General, to James Eastland, Chairman of the Judiciary Committee (Dec. 2, 1969), *in* ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS 131-32 (1975).

39. 18 U.S.C. § 4001 (2000).

provision as "a positive prohibition of detention." In our time, however, it has been made nugatory by the Patriot Act.[40]

In 1976, after Watergate, Gerald R. Ford, a World War II veteran, issued a proclamation revoking FDR's Executive Order 9066 on its 34th anniversary. The president noted that, as part of the bicentennial year commemorations, what he called "an honest reckoning" had to include an acknowledgment of "our national mistakes": "We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans."[41]

IV

THE REDRESS MOVEMENT

By the time of Ford's Proclamation, three decades after the last camp had closed, activists in the Japanese American community were pushing for some kind of apology for the wartime incarceration and for, perhaps, monetary redress. The issue was controversial and badly divided the community on matters of both principle and tactics.[42]

In the summer of 1976, the convention of the Japanese American Citizens' League voted to pursue redress. A committee of the organization met in Washington with Japanese American members of Congress from Hawaii and California. It was advised to seek the appointment of a presidential commission to investigate whether any wrong had been done in execution of EO 9066, and, if so, what an appropriate remedy would be. This further divided the community, as many activists were already working to have a bill introduced in Congress granting monetary redress. The Japanese American legislators, Senator Daniel K. Inouye most insistently, felt that the only road to success was via a commission.[43]

In late 1980, just as Jimmy Carter was leaving the White House, he signed into law the act that created the Commission on the Wartime Relocation and Internment of Civilians (CWRIC). Its 1982 report, *Personal Justice Denied* established the ground rules for redress, which Congress finally accepted and President Ronald Reagan approved in late 1988. Only survivors alive at the time of the act—or their heirs—were to receive a tax-free payment of $20,000 and a letter of apology signed by the president. No appropriation bill was passed at that time, and it was more than two years before the payments began, with the oldest survivors being paid first. The process continued into 1999, more than a decade after the redress bill— formally, the Civil Liberties Act of

40. Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 395, 405 (1974).

41. Proclamation 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

42. For the most comprehensive account, see generally MITCHELL T. MAKI ET AL., ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS (1999) (providing details of the internal debate regarding redress issues).

43. *Id.* at 85.

1988—became law. Over those years more than $1.6 billion was paid to 82,210 survivors or their heirs.[44] In the course of the CWRIC's intensive investigation, one of its researchers, Aiko Herzig-Yoshinaga, discovered documents that made possible what had been thought impossible: a way to reopen *Korematsu* and the other long-closed Japanese American cases of World War II. Political scientist and attorney Peter Irons used some of Herzig-Yoshinaga's discoveries plus his own considerable research to produce the important study, *Justice at War*. Irons' study demonstrated that—despite awareness within the Department of Justice that critical elements in the War Department's case justifying the evacuation of Japanese Americans had simply been fabricated—its lawyers, including Solicitor General Charles Fahey, had presented briefs that misstated facts to the Supreme Court.[45] Irons has recounted that when he presented some of his evidence at a CWRIC hearing, one of the commissioners, Judge William Marutani, asked whether the wartime cases could be opened by use of a writ of *coram nobis*. *Coram nobis*—"the error before us"—is a little used writ from the English common law.[46] Irons pursued this possibility in collaboration with a remarkable group of Asian American attorneys, the Asian Law Caucus. All worked, pro bono, "for free."

The non-profit Asian Law Caucus, founded in San Francisco in 1972, began as a store-front operation staffed by volunteers and now has a sizable staff and an annual budget of nearly one million dollars. Its participation in the rehearings of *Korematsu* is perhaps its most illustrious accomplishment, since most of its cases involve local and administrative courts. (Other Asian American attorneys in Portland and Seattle handled the rehearings of *Yasui* and *Hirabayashi*.)

After a great deal of research, the legal team, led by Dale Minami, filed a petition for writ of *coram nobis* on January 19, 1983 with the clerk of the United States District Court of California in San Francisco, the same court in which Fred Korematsu had been convicted more than forty years before.[47] Minami remembers how delighted the attorneys were when the clerk told them that Judge Marilyn Hall Patel, a pronounced liberal recently appointed by Jimmy Carter, had been assigned to hear the case. After considerable delay, the government moved to va-

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44. *Redress for War Internees Ended*, N.Y. TIMES, Feb. 15, 1999, at A15.

45. *See* IRONS, *supra* note 2; *see also* Roger Daniels, Book Review, 89 AM. HIST. REV. 871-72 (1984) (providing insight regarding Justice at War's significance in the field of Japanese American internment history).

46. Peter Irons, *Introduction*, *in* JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 3, 7-9 (Peter Irons ed., 1989). The Supreme Court has held that coram nobis should be used "only under certain circumstances compelling such action to achieve justice" and to correct "errors of the most fundamental character." U.S. v. Morgan, 346 U.S. 502, 511-12 (1954). *See generally* ELI FRANK, CORAM NOBIS: COMMON LAW, FEDERAL, STATUTORY: WITH FORMS (1953) (outlining the use of the writ in great detail). For the best-known previous use of the writ in the United States, see ALGER HISS, IN THE COURT OF PUBLIC OPINION (1977).

47. The attorneys of record, in addition to Minami and Irons were: Dennis W. Hayashi, Donald K. Tamaki, Michael J. Wong, Robert K. Rusky, Karen N. Kai, Russell Matsumoto, and Lorraine K. Bannai. Other attorneys who made major contributions to the success of the effort were Eric Yamamoto, Leigh Ann Miyasato, Edward Chen, and Marjie Barrows. This and other information comes from documents, including briefs, which were supplied by Minami and a number of conversations with him.

cate Korematsu's original conviction, but it did not admit previous government misconduct. After a good deal of lawyerly filing and counter-filing, Judge Patel announced her decision on November 10, 1983. She ruled the government's motion out of order, accepted the petition, voided the original indictment, and reversed Korematsu's original conviction. Patel warned, however, that

> *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 time of distress the government 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 the authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[48]

The cases of Gordon Hirabayashi and Minoru Yasui were re-heard with varying results in district courts in Seattle and Portland.[49] The *coram nobis* legal team hoped that at least one of the cases would reach the Supreme Court, which would then have an opportunity to comment on and perhaps formally overrule or void its wartime Japanese American decisions. To avoid this, the Reagan administration's Department of Justice refused to appeal the reversals of *Korematsu* and *Hirabayashi*, and Minoru Yasui's death in November 1986 made his case moot.

Despite that disappointment, the lawyers had accomplished a great deal. To all appearances, this was the first time that a criminal conviction approved by the Supreme Court had been reversed. The cases provided a kind of vindication not only for their clients but for Japanese Americans generally. In addition, the court decision and the ensuing publicity was certainly a factor in the eventual approval of tangible redress through passage of the Civil Liberties Act of 1988.

V

AFTERSHOCKS AND AFTERMATH

Major historical events such as the experiences of Japanese Americans during World War II have aftershocks that continue to be felt for decades. This will also be true of the terrorist atrocity that we have learned to call 9/11, which destroyed New York's World Trade Center buildings, seriously damaged the Pentagon in Washington, and killed some four thousand persons.

Historical analogies are always tricky, particularly when one item of the comparison is a current event. "Contemporary" history is, after all, a contradiction in terms. Nevertheless, some differences and similarities can be readily seen. "Race prejudice, war hysteria and a failure of political leadership" were causative factors in both 1942 and 2001. Civil liberties were violated in War Relocation Centers and at Guantanamo. But in 2001, unlike 1942, warnings were

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48. From the transcript printed in IRONS, *supra* note 2, at 243; *see also* Korematsu v. United States, 584 F. Supp 1406, 1420 (N.D. Cal. 1984).

49. *Compare* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987), *with* Yasui v. U.S., 772 F.2d 1496 (9th Cir. 1985).

repeated at the highest levels of government to make no assumptions about guilt based on ethnicity or religion. Yet subsequent governmental and private actions often flew in the face of those warnings. Immigration officials applied different standards to "Middle Eastern" aliens who were in technical violation of certain regulations while ignoring the same violations when committed by other aliens.[50] Airport inspectors often focused on physical appearance rather than on evidence or legal status when subjecting passengers to special searches.[51]

Moreover, governmentally regulated airlines have forced individuals—citizens and aliens alike—who look like the "enemy" to leave flights for which they had tickets, sometimes winning praise for doing so. "I was relieved at the story of the plane passengers a few weeks ago who refused to board if some Mideastern-looking guys were allowed to board," wrote Peggy Noonan, a former Reagan speech writer, now a *Wall Street Journal* contributing editor. "I think we're going to require a lot of patience from a lot of innocent people. . . . And you know, I don't think that's asking too much."[52] Even more disturbing than such blathering is that the cabinet officer responsible for aviation, Secretary of Transportation Norman Mineta—himself a child victim of wartime incarceration and who often recounts going off to a 1942 Assembly Center in his Cub Scout uniform, made no public criticism of such blatant discrimination.

A striking difference is that although almost no public figures spoke out against the massive violations of the rights of citizens in 1942, the aftermath of 9/11 produced much public criticism of significantly lesser governmental violation of rights. And the analogy with the Japanese American experience was raised so often that it seems obvious that an increased awareness of its gross injustice was a factor in the heightened sensitivity within and without the government.

Clearly, when compared with what was done to Japanese Americans during World War II, government actions after 9/11 do not seem, at first glance, to amount to very much. Indeed, many media commentators have objected that even to mention them in connection with the massive violations of civil liberties by the Roosevelt administration is inappropriate.

This conclusion is an evasion—the kind of evasion that has allowed Americans to offer apologies for actions previously taken against a group once perceived to be outsiders—and then to do the same thing to a different group. Time and again, scholars (if not the government) have noted that the nation has violated the spirit of the constitution. Time and again, further violations have been made, usually against a different group under different circumstances.

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50. ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II 119 (2d ed. 2004).

51. *Id.*

52. Peggy Noonan, *Profiles Encouraged*, WALL STREET JOURNAL ONLINE, Oct. 19, 2001, at http://www.opinionjournal,com/journalists/pnoonan/?id=95001349.

Optimists assure us that a mass incarceration of American citizens in concentration camps will not recur and point to the relative mildness of the governmental reaction after 9/11 as support for that assurance. But reflection on our past suggests that we ought not be so sanguine. It was not just the disaster at Pearl Harbor, but the subsequent sequence of Japanese triumphs that triggered Executive Order 9066 seventy-four days later. Should we not then ask, "If terrorist attacks on American soil had continued after 9/11, would the current government reaction have been so moderate?" And, were there to be a recurrence of such attacks, would there not be those in our security establishment who would argue that the moderation after 9/11 was a contributing factor in the renewed assaults?