

Department officials objected to Burling's footnote and the printing of the brief was stopped in midstream.⁸ Despite protestations by Edward Ennis that the footnote should remain, the Justice Department ultimately omitted the footnote from the government's Korematsu brief.⁹

On November 10, 1983, in Federal District Court, Judge Marilyn Hall Patel ruled that the government's failure to substantively respond to Korematsu's petition was "tantamount to a confession of error."¹⁰ Referring to the congressional report of the Commission on Wartime Relocation and Internment of Civilians and the documents attached to the Korematsu petition as exhibits, Judge Patel stated that the claim of military necessity justifying Executive Order 9066 was based upon unsubstantiated facts and distortions.¹¹

On April 19, 1984, Judge Patel issued her written opinion formally vacating Korematsu's conviction.¹² Referring to the newly discovered government documents attached as exhibits to the petition, Judge Patel wrote, "The substance of the statements contained in the documents and the fact the statements were made demonstrate that the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case."¹³ Citing the instance of the original Burling footnote which revealed that the Justice Department attorneys possessed reports contradictory to the allegations of espionage and sabotage, Judge Patel noted, "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. Judge Patel stated, "These omissions are critical."¹⁴ Judge Patel continued, "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."¹⁵

In concluding that coram nobis relief exists for a claim of prosecutorial impropriety,¹⁶ Judge Patel wrote, "There is substantial support in the record that the government deliberately omitted relevant information and provided misleading information and papers before the Court."¹⁷ "The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the Court."¹⁸

Judge Patel closed by stating:

"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."

In a decision dated February 10, 1986, Judge Donald Voorhees, of the Western District of Washington similarly found that the government failed to disclose crucial evidence and that Hirabayashi was "in fact very seriously prejudiced by that non-disclosure."²⁰ In making this finding, Judge Voorhees vacated Gordon Hirabayashi's conviction for violation of exclusion orders.

In the latest judicial pronouncement from the United States Court of Appeals on January 21, 1986, District of Columbia Circuit Justice Skelly Wright wrote:

In the spring of 1942, the government of the United States forcibly removed 120,000 of its Japanese citizens from their homes and placed them in internment camps. There they remained for as long as four years. When the constitutionality of this action was challenged in the Supreme Court, the government justified its action on the ground of "military necessity." The Supreme Court deferred. Nearly 40 years later, a congressional commission concluded that the government's asserted

justification was without foundation. It is now alleged that this fact was concealed from the Supreme Court when it rendered its historic decision in Korematsu v. United States. Yet today, now that the truth can be known, the government says that the time for justice has passed. We cannot agree.²¹

The Circuit Court of Appeals reviewed the documentary evidence that the government had engaged in misconduct and had suppressed crucial evidence which undermined the government claim of "military necessity." The Court held that the statute of limitations is not a bar to the property damage claims raised by Japanese Americans if they can prove that the government fraudulently concealed material evidence. This ruling is now on appeal to the United States Supreme Court and it will be some time before a definitive determination is made with respect to claims for damages by Japanese Americans. It should be noted that while the decision, at least at this point, seems to allow property claims to go forward, Japanese Americans are precluded from suing the government for personal injury, loss of business opportunity, false imprisonment or other torts.

The courts seem to be reaching a consensus that our government committed grave acts of misconduct and suppression of evidence before the Supreme Court. However, the prospects for full relief through litigation are still speculative. Regardless of the ultimate availability of relief through the courts, it is singularly appropriate that Congress enact promptly the legislation before you providing for appropriate redress, including monetary compensation, so that Japanese Americans might receive some measure of justice from the U.S. Government for their suffering.

The leading cases upholding the legality of the internment have now been discredited on the ground that the landmark precedents that were issued in 1943 and 1944 were based upon an incomplete and distorted legal record. As attorneys and officers of the court, members of the American Bar Association feels a special duty to ensure the integrity and strength of our basic freedoms. This obligation is even stronger when a Congressional Commission has found a grave injustice was committed, and the Federal Judiciary has found that the government intentionally manipulated the evidence to facilitate that injustice. Accordingly, the American Bar Association urges the Congress of the United States to support legislation which would provide appropriate recognition for Japanese Americans.

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Subcommittee for inviting us to present these views. I would be pleased to answer any questions you or members of the Subcommittee may have.

FOOTNOTES

1. Lt. Gen. J. L. DeWitt, Final Report: Japanese Evacuation From the West Coast, 1942: "There were hundreds of reports nightly of signal lights visible from the Coast, and of intercepts of unidentified radio transmissions. Signaling was often observed at premises which could not be entered without a warrant because of mixed occupancy. The problem required immediate solution. It called for the applications of measures not then in being." Quote, at p.8. "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. It included in excess of 115,000 persons deployed along the Pacific Coast. Whether by design or accident, virtually always their communities were adjacent to very vital shore installations, war plants, etc. While it was believed that some were loyal, it was known that 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," at p. 10. See also Hirabayashi v. the United States, 320 U.S. 81 at p. 99, "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted and menace to the national defense and safety..."
2. "Report on the Japanese Question", by Lt. Commander Kenneth D. Ringle, U.S. Navy, Office of Naval Intelligence, January 26, 1942.
3. Memorandum from Edward Ennis (Director, Department of Justice Alien Enemy Control Unit) to Solicitor General Fahy, April 30, 1943.
4. Memorandum from J. Edgar Hoover, Director, Federal Bureau of Investigation, to Attorney General Frances Biddle, February 7, 1944.,
5. Letter from F.C.C. Chairman James L. Fly, to Attorney General Francis Biddle, April 4, 1947, at p. 3.
6. "Memorandum for the Attorney General Re: General DeWitt's Final Report on Japanese Evacuation", from Edward J. Ennis to Francis Biddle, February 26, 1944.

7. Memorandum from J. L. Burling to Asst. Attorney General Herbert Wechsler, September 11, 1944.
8. Memorandum from J. L. Burling to Asst. Attorney General Herbert Wechsler, September 11, 1944; memorandum from J. L. Burling to Edward Ennis, October 2, 1944.
9. See Korematsu v. the United States, 584 F. Supp. 1406 (1984) at 1417 and 1418. Judge Patel notes regarding the footnote revision: "The final version 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. Petitioner's Exhibits A to FF. 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."
10. Transcript from proceedings of "Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu before the Honorable Marilyn Hall Patel", San Francisco, California, November 10, 1983, at p. 35.
11. Transcript from proceedings of "Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu Before the Honorable Marilyn Hall Patel", San Francisco, California, November 10, 1983, at p. 37.
12. Korematsu v. the United States, 584 F. Supp 1406 (N.D. Cal. 1984), at p. 1409
13. Ibid., p. 1417.
14. Ibid., p. 1418.
15. Ibid., p. 1419.
16. Ibid., p. 1420.
17. Ibid.
18. Ibid.
19. Ibid.
20. Hirabayashi v. the United States, February 10, 1986 No. C83-122V at page 33.
21. Hohri v. the United States 782 F.2nd. 227 (D.C. Cir. 1986) at 231