Reflections on the *Korematsu*, *Yasui*, and *Hirabayashi Coram Nobis* Cases on Their 40th Anniversary

Lorraine K. Bannai†

INTRODUCTION BY THE ASIAN AMERICAN LAW JOURNAL

This essay is based on a keynote address given by Professor Lorraine Bannai at the *Asian American Law Journal*'s Spring 2023 Annual Symposium, "'Let's Get Going': Lessons from the Young Lawyers Who Overturned *Korematsu*, *Hirabayashi*, and *Yasui*," held at the University of California, Berkeley, on January 28, 2023. The symposium commemorated the fortieth anniversary of the *coram nobis* cases that overturned the World War II convictions of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui based on proof that the government lied to the Supreme Court in arguing that the orders that led to the mass incarceration of Japanese Americans were justified by military necessity. The event's distinguished speakers included lead attorneys from the *Korematsu*, *Hirabayashi,* and *Yasui coram nobis* cases;[1] Judge Mary Schroeder, who authored the Ninth Circuit decision in the *Hirabayashi coram nobis* case; a panel of scholars and practitioners who addressed the modern parallels and continued relevance of the cases;[2] and closing remarks by Fred Korematsu's daughter, Karen Korematsu.

INTRODUCTION

Thank you, members of the *Asian American Law Journal*, Dean Chemerinsky, and Berkeley Law for sponsoring this program today, and thank you, all of you, for being here. My goal here is to provide a backdrop and introduction to help set the stage for the stellar panels you'll hear from

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†. Professor Emeritus and Director Emeritus, Fred T. Korematsu Center for Law and Equality, Seattle University School of Law. I am deeply grateful to Kathryn Bannai and Leigh-Ann Miyasato for taking the time to read and provide comments on this essay, as well as to Kristen Smith and Diana Lee for their very helpful editorial suggestions

1. The panelists discussing the *coram nobis* cases included Dale Minami, lead counsel for the *Korematsu coram nobis* case; Peggy Nagae, lead counsel for the *Yasui coram nobis* case; and Rod Kawakami, lead counsel for the trial and appeal of the *Hirabayashi coram nobis* case.

2. Panelists addressing the current relevance of the cases included Dean Erwin Chemerinsky, University of California, Berkeley, School of Law; Quyen Ta, Partner, King & Spalding LLP; and Eric K. Yamamoto, Emeritus Professor of Law, former Fred T. Korematsu Professor of Law and Social Justice, William S. Richardson School of Law, University of Hawaii.

today, including some historical background behind the infamous *Hirabayashi*, *Yasui*, and *Korematsu* cases, a brief overview of the reopening those cases forty years later, and some of my own thoughts on how these cases continue to have frightening relevance.

The Backdrop for the Japanese American Incarceration: A History of Embedded Racism

Any understanding of the orders that led to the wartime incarceration of Japanese Americans first requires understanding a history that viewed and treated Asian Americans as foreigners, unassimilable, and threats since they first arrived in the country—a history of discrimination we've seen experienced by other immigrant communities and communities of color.[3]

For example, in 1889, in the case of *Ping v. United States*, the Supreme Court upheld a law barring U.S. residents of Chinese ancestry from re-entering the country on returning from travel abroad. The Court explained that it was beyond question that Congress could act to prevent foreign encroachment by the "vast hordes of [Chinese] crowding in upon us."[4] In 1905, the Japanese and Korean Exclusion League argued that "[w]e cannot assimilate with them without injury to ourselves . . . We cannot compete with people who have such a low standard of civilization, living and wages."[5] Newspaper headlines read: "Crime and Poverty Go Hand in Hand with Asiatic Labor" and "Japanese a Menace to American Women."[6]

Asian immigrants could not become naturalized citizens. In 1922, in the landmark case of *Ozawa v. United States*,[7] the Court held that the naturalization statute at the time provided citizenship for only "free [W]hite person[s]"[8], and Asians were not White. At various points, as many as thirty-eight states had statutes prohibiting interracial marriage between an Asian person and a White person,[9] based on the view of Asian Americans as unclean and diseased.[10]

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3. For an overview of discriminatory laws that targeted Asian Americans, *see* ERIC K. YAMAMOTO, LORRAINE K. BANNAI & MARGARET CHON, RACE, RIGHTS AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION 29–86 (3d ed. 2021) [hereinafter YAMAMOTO, RACE, RIGHTS].

4. Ping v. United States, 130 U.S. 581, 606 (1889).

5. ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 28 (1977).

6. *Id.* at 25.

7. 260 U.S. 178, 198 (1922).

8. The naturalization statute was later amended in 1870 to allow naturalization to persons of African descent. *Id*. at 192.

9. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 92 (2009). The statutes also prohibited intermarriage between Black and White persons.

10. RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 17, 18, 36 (2001) ("Chinese were assumed by most of the delegates [at the California State Constitutional Convention] to be full of filth and disease . . . American institutions and culture would be overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral").

Asian American children were sent to segregated schools. California law allowed school boards to "exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent."[11] In 1927, Gong Lum brought suit after his nine-year-old American-born daughter Martha Lum was denied entry to a White school in the Rosedale consolidated school district in Mississippi.[12] The Court affirmed her exclusion, based on its line of cases approving "separate" but "equal" schools for Blacks.[13] In 1924, the exclusionists won a ban on further immigration from Asia.[14]

The Japanese American Incarceration

When Japan bombed Pearl Harbor in December 1942, it was in the context of this history that already treated Asian Americans as foreign and untrustworthy. Fear gripped the West Coast, and the country turned on the Japanese American community.[15] In the days following the bombing, the government arrested Japanese American community leaders, separating them from their families.[16] In the months following, the public, the popular press, civic organizations, and public officials at every level of government called for the round-up of all persons of Japanese ancestry, arguing that the entire group posed a threat of espionage and sabotage.[17]

On February 19, 1942, in response to these calls, President Franklin Delano Roosevelt signed Executive Order (EO) 9066, granting sweeping power to military authorities.[18] U.S. Army Lieutenant General John L. DeWitt, the commanding officer responsible for the Western states, was delegated authority to implement EO 9066 on the West Coast. He proceeded to issue a series of orders. First, he imposed a curfew on all persons of Japanese ancestry and Italian and German immigrants. He then imposed a freeze order, prohibiting persons of Japanese ancestry from leaving the West Coast except as directed by military authorities.[19] That was followed by a series of 108 Civilian Exclusion Orders, which in reality were removal orders, targeting only persons of Japanese ancestry and requiring them, in

11. CAL. POL. CODE § 1662 (1872) (repealed 1909).

12. Gong Lum v. Rice, 275 U.S. 78, 79–80 (1927).

13. *Id.* at 86–87.

14. Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952).

15. *See, e.g.,* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982) [hereinafter PERSONAL JUSTICE DENIED]; *see also* DENSHO: THE JAPANESE AMERICAN LEGACY PROJECT, for its outstanding collection of information, interviews, and archival materials on the incarceration, www.densho.org [https://perma.cc/HLJ8-9CQZ].

16. ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 200–203 (1988) ("About 1,500 Issei were arrested on the night of December 7th. Eventually more than 2,000 of them were interned in camps in Montana, New Mexico, North Dakota and elsewhere").

17. PERSONAL JUSTICE DENIED, *supra* note 15, at 66–72.

18. *Id.* at 72–86; Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

19. PERSONAL JUSTICE DENIED, *supra* note 15, at 100–12.

one area after another up and down the West Coast, to report to be taken from the West Coast.[20] They could take only what they could carry.

Over 110,000 persons of Japanese ancestry were removed from their West Coast homes[21], from babies in arms to the elderly. Two-thirds were American citizens,[22] including my parents, grandparents, aunts, and uncles and the families of many Japanese Americans at this symposium.

They were first removed to temporary confinement centers and then to ten more permanent camps in desolate regions in the interior United States.[23] They had no trials, and there was no evidence that any had engaged in or threatened to engage in any acts of espionage or sabotage.[24]

The Wartime *Hirabayashi, Yasui*, and *Korematsu* Cases

Three men were convicted of violating DeWitt's military orders and took their challenges to the orders all the way up to the United States Supreme Court. Minoru (Min) Yasui was a 26-year-old attorney in Portland, Oregon, who walked the streets of Portland with a copy of the curfew order in hand, seeking to be arrested to challenge its constitutionality.[25] Gordon Hirabayashi was a 24-year-old college student in Washington state when he defied the military orders as an act of civil disobedience.[26] He was convicted of violating both the curfew and removal orders.[27] Fred Korematsu was a 22-year-old welder living in Oakland, California, when he chose to violate the removal orders by remaining in Oakland with his Italian American fiancé.[28]

Each of these three men appealed their convictions, arguing that the orders were unconstitutional. In each case, the Supreme Court deferred to the government's arguments that its actions were a military necessity.

Gordon Hirabayashi's case was decided first in June 1943. While Gordon had been convicted of violating both the curfew and removal orders,

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20. *Id*.

21. *About the Incarceration*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/history/ [https://perma.cc/V4E7-EPC6].

22. *Id.*

23. For a discussion of the camps and living conditions in them, see PERSONAL JUSTICE DENIED, *supra* note 15, at 135–48 (temporary confinement centers) and 149-84 (more permanent camps).

24. *Id.* at 3.

25. Gil Asakawa, *Minoru Yasui*, DENSHO ENCYCLOPEDIA (Oct. 5, 2020), https://encyclopedia.densho.org/Minoru_Yasui/ [https://perma.cc/XLW3-UJJF]; *see also Never Give Up! Minoru Yasui and the Fight for Justice*, MINORU YASUI LEGACY PROJECT [https://perma.cc/YEX6-DWCQ].

26. Cherstin M. Lyon, *Gordon Hirabayashi*, DENSHO ENCYCLOPEDIA (Aug. 24, 2020), https://encyclopedia.densho.org/Gordon_Hirabayashi/ [https://perma.cc/4Y5W-K6AK]. For an excellent discussion of Gordon, his life, and his principles, see DANIEL JAMES BROWN, FACING THE MOUNTAIN: A TRUE STORY OF JAPANESE AMERICAN HEROES IN WORLD WAR II (2021) (discussing Gordon's life, along with the stories of young Japanese American men who served in the Army during World War II).

27. Hirabayashi v. United States, 320 U.S. 81, 83–84 (1943) [hereinafter *Hirabayashi I*].

28. LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 34–35 (2015) [hereinafter BANNAI, ENDURING CONVICTION].

the Court addressed only the constitutionality of DeWitt's curfew order.[29] The Court said it had to defer to the government's judgment:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, *it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs*.[30]

Although the Court expressed deference to the government, it still addressed the government's claims that its actions were justified. In arguing that the orders were a military necessity, the government could not point to any evidence that Japanese Americans had committed or threatened to commit any acts of espionage or sabotage. Instead, the government argued, in essence, that Japanese Americans possessed certain racial characteristics that rendered them prone to ally with Japan.[31] For example, the government maintained that Japanese Americans were unassimilated,[32] paying little mind to the history of discriminatory laws that barred the community from equal participation in American society. The government even claimed, without proof, that Japanese language schools, attended by Japanese American children, were ready sources of Japanese nationalistic propaganda.[33] In light of this "data," the Court said that the Executive and Congress could have reasonably concluded that conditions encouraged the continued attachment of Japanese Americans to Japan.[34] In Min Yasui's case, decided as a companion case with *Hirabayashi*, the Court similarly upheld the curfew order.[35]

It took the Supreme Court another year and a half to decide Fred Korematsu's case, in which Fred challenged the more egregious orders removing Japanese Americans from their West Coast homes. Although the removal order was infinitely more harmful than the curfew order upheld in *Hirabayashi*, the Court ruled that the same reasoning supporting the curfew order justified the removal orders.[36]

In addition, the Court deferred to the government's claim that the removal orders were necessary because there was insufficient time to separate the loyal from the disloyal.[37] This bald assertion was made despite

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29. Because Hirabayashi's sentences for his curfew and removal convictions ran concurrently, the Court decided that it need only address the constitutionality of his curfew conviction to affirm his conviction. *Hirabayashi I*, 320 U.S. at 85.

30. *Id.* at 93 (emphasis added).

31. *Id.* at 96–99.

32. *Id.* at 98.

33. *Id.* at 96.

34. *Id.* at 98.

35. Yasui v. United States, 320 U.S. 115, 117 (1943).

36. Korematsu v. United States, 323 U.S. 214, 217 (1944) [hereinafter *Korematsu I*].

37. *Id.* at 218 ("[W]e 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

the fact that the first removal orders were issued almost four months after the bombing of Pearl Harbor.[38]

And, further, although the orders were issued only against Japanese Americans, the Court went so far as to say that Fred's case was not about racial hostility; instead, the Court stated that his removal was necessary to protect the country.

> [Korematsu] was not excluded from the Military Area because of hostility to him or his race. He was excluded because . . . the properly constituted military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.[39]

The removal was not at all temporary; by the time of the Court's decision, many Japanese Americans had been held in camp for over two and a half years.

Three justices wrote vigorous dissents.[40] Justice Robert Jackson warned about the lasting impact of the Court's decision: "[A judicial validation of this order] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[41]

Newly Discovered Evidence

In the decades that followed, Fred, Gordon, and Min wished for an opportunity to reopen their cases. An opportunity arose almost forty years later when in 1982 Professor Peter Irons, then teaching at the University of Massachusetts, discovered shocking documents in the government's own records.[42] Those documents, with others found by archival researcher Aiko Herzig-Yoshinaga,[43] established that the government had suppressed, altered, and destroyed material evidence while arguing Fred, Gordon, and Min's cases before the Supreme Court during World War II.[44]

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separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.").

38. The U.S. Army removed 227 Japanese Americans from Bainbridge Island, Washington, on March 30, 1942, under its first removal order. PERSONAL JUSTICE DENIED, *supra* note 15, at 109; Anne Blankenship, *Bainbridge Island, Washington*, DENSHO ENCYCLOPEDIA (July 6, 2020), https://encyclopedia.densho.org/Bainbridge%20Island,%20Washington/ [https://perma.cc/YFV4-LGRT].

39. PERSONAL JUSTICE DENIED, *supra* note 15, at 223.

40. The dissenters were Justices Owen Roberts, Frank Murphy, and Robert Jackson. *Korematsu I*, 323 U.S. at 225–248.

41. *Id.* at 246 (Jackson, J., dissenting).

42. Interview by Alice Ito and Lorraine Bannai with Peter Irons in Seattle, Wash. (Oct. 27, 2000), DENSHO VISUAL HISTORIES, https://ddr.densho.org/?archive.densho.org=1 [https://perma.cc/67AN-P9QM]; BANNAI, ENDURING CONVICTION, *supra* note 28, at 137–39.

43. BANNAI, ENDURING CONVICTION, *supra* note 28, at 138, 145–46.

44. For a further discussion of the suppression of evidence, see PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1993) (hereinafter IRONS, JUSTICE AT WAR); BANNAI, *supra* note 28, at 137–48. For copies of the government documents supporting the *coram nobis* petitions' allegations of government misconduct, see *The* Coram Nobis *Litigation Collection*,

For example, the documents revealed that the Final Report of General DeWitt, which explained the basis for his orders and which the government submitted to the Court in Fred's case, had been altered to make it support, rather than contradict, the government's arguments before the Supreme Court.[45] Remember that, in Fred's case, the Court accepted the government's argument that mass removal was necessary because there was not sufficient time to separate the loyal from the potentially disloyal.[46] However, DeWitt's report explained that lack of time was not the basis for his orders.[47] Instead, DeWitt said, the reality was that one could never separate the "sheep from the goats" within the Japanese American community no matter how much time one had.[48] In essence, it expressed the racist notion that one could never discern whether a Japanese American had foreign loyalties.

When War Department official John J. McCloy discovered that DeWitt's report contradicted the government's argument before the Court, the report was revised to say that there was *in*sufficient time to separate the loyal from the disloyal, and the original versions of the report were destroyed.[49] One copy of the original report was not destroyed, and the soldier who destroyed the reports did not destroy his memo saying he had incinerated the reports.[50] The Supreme Court in Fred's case saw only the altered version of the report.

Further, Professor Irons found documents showing that the government had within its possession intelligence reports from the Federal Bureau of Investigation (FBI), the Federal Communications Commission (FCC), and the Office of Naval Intelligence (ONI) that refuted the necessity of any mass incarceration, and the government's attorneys failed to disclose these reports

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DENSHO, https://ddr.densho.org/ddr-densho-405/objects/ [https://perma.cc/AQ5D-C8TW] [hereinafter DENSHO, *Coram Nobis* Collection]. In addition, see the award-winning documentary film ALTERNATIVE FACTS: THE LIES OF EXECUTIVE ORDER 9066 (New Day Films 2019), and the short documentary films available at STOP REPEATING HISTORY, https://www.stoprepeatinghistory.org/6-minute-documentaries (last visited July 22, 2023) [https://perma.cc/2MAP-5GW4]. For materials that use the Japanese American wartime and *coram nobis* cases to teach topics in law school courses, see *Lorraine Bannai, Using Korematsu to Teach Across the Law School Curriculum*, SEATTLE UNIV. L. (2022), https://digitalcommons.law.seattleu.edu/using_korematsu_book/ (last visited July 22, 2023) [https://perma.cc/LXL8-KBJ5].

45. IRONS, JUSTICE AT WAR, *supra* note 44, at 206–12; BANNAI, ENDURING CONVICTION, *supra* note 28, at 145–48.

46. *Korematsu I*, 323 U.S. at 219.

47. IRONS, JUSTICE AT WAR, *supra* note 44, at 208; BANNAI, *supra* note 28, at 145–46.

48. John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast 1942*, HEADQUARTERS WESTERN DEFENSE COMMAND AND FOURTH ARMY (Apr. 15, 1943), Ex. D to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection, https://ddr.densho.org/ddr-densho-405-6/ [https://perma.cc/Q2DV-BG76].

49. IRONS, JUSTICE AT WAR, *supra* note 44, at 208–12.

50. The soldier wrote: "I certify that this date I witnessed the destruction by burning of the galley proofs, galley pages, drafts and memorandums of the original report of the Japanese Evacuation." Theodore E. Smith, *Memo by Theodore Smith of the Civil Affairs Division of the Western Defense Command*, HEADQUARTERS WESTERN DEF. COMMAND AND FOURTH ARMY (June 29, 1943), Ex. K to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection, available at https://ddr.densho.org/ddr-densho-405-13/ [https://perma.cc/88CT-BVQ4].

to the Court. Lieutenant Commander Kenneth D. Ringle of the ONI stated that thorough intelligence had been conducted on the Japanese American community, that any issues could and should be handled on an individualized basis, and, ultimately, that no basis existed for the mass incarceration of Japanese Americans.[51] Department of Justice (DOJ) lawyer Edward Ennis urged Solicitor General Charles Fahy that the government had a duty to inform the Court of the Ringle Report: "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 . . . It occurs to me that any other course of conduct might approximate the suppression of evidence."[52] His plea was ignored.

While preparing the government's brief in *Korematsu*, Ennis asked the FBI and FCC whether they could verify the DeWitt Report's claims that Japanese Americans had been involved in illegal radio transmissions and shore-to-ship signaling. Both agencies responded that the claims were unsubstantiated.[53] DOJ lawyer John Burling drafted a footnote to the government's *Korematsu* brief, seeking to inform the Court that intelligence reports in the department's possession contradicted DeWitt's claims of suspected espionage and sabotage.[54] On seeing Burling's footnote, Burling and Ennis's superiors stopped the printing of the government's brief and revised the footnote so that it failed to mention any problems with the credibility of DeWitt's Report.[55]

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51. Memorandum from Kenneth D. Ringle to the Chief of Naval Operations Re: Report on Japanese Question (Jan. 26, 1942), Ex. N to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection, available at https://ddr.densho.org/ddr-densho-405-16/ [https://perma.cc/TNB7-HF3V].

52. *Id.* at 204; Memorandum from Edward J. Ennis to Solicitor General Charles Fahy Re: Japanese Brief (Apr. 30, 1943), Ex. Q to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection, available at https://ddr.densho.org/ddr-densho-405-19/ [https://perma.cc/9QQN-6KWA].

53. IRONS, JUSTICE AT WAR, *supra* note 44, at 278–84; Correspondence from James Lawrence Fly to Attorney General Francis Biddle (Apr. 4, 1944), Ex. V to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection, available at https://ddr.densho.org/ddr-densho-405-24/ [https://perma.cc/627R-LV6X].

54. IRONS, JUSTICE AT WAR, *supra* note 44, at 286. Burling's original footnote read, in part, "The recital [in the Final Report] of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice." *See* Memorandum from John Burling to the Assistant Attorney General, War Division (Sept. 11, 1944), Ex. AA to the *Coram Nobis* Petitions, available at DENSHO, *Coram Nobis* Collection available at https://ddr.densho.org/ddr-densho-405-29/ [https://perma.cc/36PC-FVMG].

55. The revised footnote in the government's brief submitted to the Supreme Court in *Korematsu* read: "The Final Report of General DeWitt * * * is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Fnal* [sic] *Report* only to the extent that it relates to such facts." *See* Brief of the United States, *Korematsu I*, 323 U.S. 214, 1944 WL 42850, n.2; IRONS, JUSTICE AT WAR, *supra* note 44, at 284–92.

The *Coram Nobis* Cases

Based on the evidence that the government had lied to the Supreme Court, three legal teams formed to reopen Fred, Gordon, and Min's World War II cases and vacate their convictions: one in San Francisco for Fred; one in Portland for Min; and one in Seattle for Gordon.[56] I was privileged to serve on Fred Korematsu's legal team.

We filed petitions for writ of error *coram nobis*.[57] *Coram nobis* means "before us," and a petition for writ of error *coram nobis* asks the court to correct a fundamental error committed before it that resulted in a manifest injustice.[58]

The lawyers who joined these teams were remarkable.[59] They stepped forward to volunteer endless hours. They spent their evenings and weekends at long meetings, conducted legal research, prepared draft after draft of pleadings and motions, and reviewed discovery. They were joined by countless other lawyers, law students, and other volunteers who wrote research memos, reviewed thousands of documents, and raised money to support the bare bones operations of the teams. A group of law students made a huge chart on a stretch of butcher paper that summarized the government's actions at each stage while the wartime *Hirabayashi*, *Yasui*, and *Korematsu* cases made their way to the Supreme Court.

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56. Core members of the *Korematsu* legal team were Dale Minami (team leader), Lorraine Bannai, Eric Yamamoto, Marjie Barrows, Ed Chen, Dennis Hayashi, Peter Irons, Karen Kai, Donna Komure, Leigh-Ann Miyasato, Robert Rusky, Don Tamaki, and Akira Togasaki. Members of the *Hirabayashi* legal team were Kathryn Bannai (lead counsel through the hearing on the government's motion to dismiss) and Rod Kawakami (lead counsel for the trial and appeal), Camden Hall (co-counsel at trial), Nettie Alvarez, Arthur Barnett, Jeffrey Beaver, Daniel Ichinaga, Gary Iwamoto, Craig Kobayashi, Michael Leong, Jerry Nagae, Diane Narasaki, Karen Narasaki, Richard Ralston, Sharon Sakamoto, Roger Shimizu, and Benson Wong. The *Yasui* legal team comprised Peggy Nagae (team leader), Jeffrey Beaver, Frank Chuman, Fern Eng, Bert Fukumoto, Stephen Griffith, Scott Meisner, Mary Mori, Clayton Patrick, and Don Willner. Aiko Herzig-Yoshinaga and Jack Herzig were researchers and consultants whose work was crucial to the efforts of each of the legal teams.

57. For a discussion of the *coram nobis* cases, see *Coram Nobis Cases*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Coram_nobis_cases [https://perma.cc/R3JE-RSN4]; PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989) (hereinafter IRONS, JUSTICE DELAYED); YAMAMOTO, RACE, RIGHTS, *supra* note 3, at 221–99. For an index to the files of the *Korematsu coram nobis* legal team available at the UCLA Department of Special Collections, see FRED T. KOREMATSU V. UNITED STATES CORAM NOBIS LITIGATION COLLECTION, 1942-1988, https://oac.cdlib.org/findaid/ark:/13030/kt6z09r17k/ [https://perma.cc/QZ7Y-PY3E]. For copies of the *Hirabayashi v. United States coram nobis* federal district court case files, see Coram Nobis Proceedings, https://digital.sandiego.edu/ethics_internment/ [https://perma.cc/3YJN-95H5].

58. Margaret Chon, *Remembering and Repairing: The Error Before Us, In Our Presence*, 8 SEATTLE J. SOC. JUST. 643, 645 (2010). A *coram nobis* petition is similar to a *habeas corpus* petition, but *coram nobis* allows the vacatur of a conviction after the sentence has been served, while *habeas corpus* applies when the defendant is still in custody. YAMAMOTO RACE, RIGHTS, *supra* note 3, at 290.

59. For a more in-depth discussion of the work of the individual legal teams, see IRONS, JUSTICE DELAYED, *supra* note 57, at 3–46; Kathryn A. Bannai, *Gordon Hirabayashi v. United States: "This is an American Case,"* 11 SEATTLE J. SOC. JUST. 41 (2012) (hereinafter Bannai, K., *Gordon Hirabayashi*); BANNAI, ENDURING CONVICTION, *supra* note 28, at 150–89; Peggy Nagae, *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. 113, 1141–42 (2002) [hereinafter Nagae, *Community Justice*].

Although the lawyers brought these cases in the names of only three men, the legal teams knew that the cases involved much more. Because the cases also sought to prove how the entire Japanese American community had been terribly wronged, the lawyers worked with and within the community, which, in turn, supported the teams' work.

Members of the legal teams also felt that educating the public was just as crucial as winning in the courts of law. A legal win alone would be insufficient to prevent similar atrocities in the future. What was needed was a public that remembered what happened to Japanese Americans and that remained vigilant to protect other vulnerable communities. The legal teams spoke about the cases before civic and church groups, colleges and universities, and other organizations, and they continue to do so to this day.[60]

Many members of the teams were Japanese Americans whose families had been incarcerated. But it was also significant that the teams were multiracial, demonstrating allyship and support for the cause of Japanese Americans that was so sorely lacking during World War II.[61]

Every member of every team was driven by the need to address the wrong done to these men, the Japanese American community, and the constitutional values that they and their clients had been raised to believe.

The Korematsu coram nobis *case*

The teams collectively decided that Fred's team would file his petition first,[62] believing that there was a greater possibility of receiving a favorable judge in the federal U.S. District Court for the Northern District of California.[63] Identical petitions were filed two weeks later on behalf of Gordon in Seattle, Washington, and Min in Portland, Oregon.

As hoped, Fred's case was assigned to a judge whom the team believed would be favorable to his case, Judge Marilyn Hall Patel.[64] The government adopted a strategy of delay, arguing both that it needed more time to digest the numerous claims and documents involved in the case and that the courts should wait for the forthcoming report from the Commission on Wartime Relocation and Internment of Civilians ("CWRIC"), which had been

60. The cases were widely reported by both national, local, and community-based media. For example, the filing of Fred Korematsu's case was covered by the national press and news, as well as profiled in the television program 60 Minutes. BANNAI, ENDURING CONVICTION, *supra* note 28, at 165, 167–68.

61. Kathryn Bannai recalled that it was important to Gordon that his cause attracted a team of ethnically and racially diverse individuals. E-mail from Kathryn Bannai to Lorraine Bannai (Feb. 11, 2023) (on file with author).

62. The *Korematsu coram nobis* petition was filed on January 31, 1983. A copy of the petition is available at https://ddr.densho.org/ddr-densho-405-1/ [https://perma.cc/NC7Z-5XQ4].

63. BANNAI, ENDURING CONVICTION, *supra* note 28, at 160–61.

64. *Id.* at 163.

appointed to investigate the wartime incarceration and recommend remedies.[65]

On April 11, 1983, the legal teams representing Fred, Gordon, and Min jointly asked the Ninth Circuit Court of Appeals to consolidate the three cases before Judge Patel to "facilitate the just and efficient litigation of [the] petitions."[66] The motion, however, was denied, and the three cases then took different paths.

While the government in Fred's case continued to seek delay after delay, the case proceeded with discovery of documents and at times contentious discussions between Fred's counsel and the government's lawyer, Victor Stone. At one point, the government offered Fred, Gordon, and Min pardons.[67] Fred and the other men rejected the pardons, believing that they had committed no wrong to pardon. Fred said that it was the government, instead, that should ask him to pardon it.[68]

On October 4, 1983, the government finally filed its response to Fred's petition.[69] It moved to vacate Fred's conviction, but argued that, because it agreed to vacate his conviction, his petition and its claims of government misconduct should be dismissed.[70] Fred's legal team urged Judge Patel to deny the government's motion and address the evidence that the mass removal of Japanese Americans had been based on racism and fraud.

On November 10, 1983, before a courtroom packed with Japanese Americans who had been incarcerated, their children, and the press, Judge Patel heard arguments from counsel. While judges normally hear arguments and issue their decisions later, Judge Patel surprisingly issued her ruling from the bench. She denied the government's motion; found the government's repeated failure to substantively respond to the allegations of misconduct was tantamount to a confession of error; and, based on her independent review of the evidence presented, she vacated Fred's conviction.[71] Witnessing the reaction in the courtroom that day was one of the most moving experiences I have ever had. After Judge Patel stepped down from the bench and left, the courtroom erupted. The legal team exchanged joyous hugs and high-fives. Fred stood stunned until he was enveloped in congratulations and thanks from other Japanese Americans who, finally, after forty years, heard a court say what they always knew: that they had been wronged.[72]

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65. *Id.* at 168–169; PERSONAL JUSTICE DENIED, *supra* note 15, at 1.

66. BANNAI, ENDURING CONVICTION, *supra* note 28, at 171.

67. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, PART 2: RECOMMENDATIONS 8–9 (1983) (hereinafter PERSONAL JUSTICE DENIED, PART 2).

68. BANNAI, ENDURING CONVICTION, *supra* note 28, at 172.

69. Government's Response and Motion Under L.R. 220.6, Oct. 4, 1983, available at IRONS, JUSTICE DELAYED, *supra* note 57, at 210–12.

70. *Id.* at 211.

71. For Judge Patel's written opinion, see Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (hereafter *Korematsu II*).

72. BANNAI, ENDURING CONVICTION, *supra* note 28, at 180–89.

The Yasui coram nobis *case*

Min Yasui's case proceeded next. As it had in Fred's case, the government filed a motion to vacate the conviction and dismiss the petition.[73] However, the government added a further ground for dismissal: that Min no longer suffered injury from his conviction.[74] Unlike Judge Patel, Judge Robert C. Belloni granted the government's motion. Because the government had agreed to vacate Min's conviction, Judge Belloni saw no need to address Min's claims of misconduct.[75] Min appealed, arguing that Judge Belloni erred in dismissing the claims of government misconduct. Sadly, on November 12, 1986, Min passed away before the court could review his claim, and his widow's efforts to keep his case alive were rejected.[76]

The Hirabayashi coram nobis *case*

Gordon Hirabayashi's case was the last to conclude. The government in Gordon's case again filed a motion to vacate the conviction and dismiss the petition, but stepped up its defense with additional grounds for dismissal, including not only that Gordon suffered no continuing harm, but also that he had waited too long to bring his claim.[77] Judge Donald Voorhees rejected those arguments and ordered a full evidentiary hearing on the allegations of misconduct.[78]

The evidentiary hearing took place in June 1985.[79] Gordon's counsel presented their case, including testimony about the suppression of evidence from World War II Department of Justice lawyer Edward Ennis.[80] The government, unbelievably, responded by seeking to argue again, after more than forty years, that there was evidence that Japanese Americans had engaged in espionage and sabotage.[81] Judge Voorhees issued his opinion in February 1986, finding that the War Department had withheld DeWitt's Final Report from the Justice Department, even though Ennis had requested it; that the report had been altered to hide DeWitt's true reasons for his

73. Nagae, *Community Justice*, *supra* note 59, at 1141.

74. *Id.*

75. *Id.* at 1141–42.

76. *Id.* at 1142.

77. Bannai, K., *Gordon Hirabayashi*, *supra* note 59, at 46.

78. For a discussion of the arguments on the government's motion to dismiss and Judge Voorhees's order, see *id.* at 41.

79. *See* IRONS, JUSTICE DELAYED, *supra* note 57, at 33–45, for an account of the preparation for the hearing.

80. *Id.* at 37–38.

81. The government argued that World War II intelligence, specifically, intercepted Japanese diplomatic cables, the so-called "magic cables," demonstrated that Japanese Americans had been recruited to spy for Japan. Because the cables did not support that claim, the court rejected testimony regarding them. *Id.* at 34–36, 39–41.

orders; and that the withholding of the report severely prejudiced Gordon.[82] Judge Voorhees vacated Gordon's removal conviction, but not his curfew conviction, reasoning that the curfew was a lesser intrusion and likely would have been upheld by the Court even without the suppression of evidence.[83]

Both the government and Gordon appealed Judge Voorhees's ruling to the Ninth Circuit Court of Appeals, where the court held, in a unanimous opinion by Judge Mary Schroeder, that both Gordon's curfew and removal convictions should be vacated.[84] In response to the government's argument that Gordon did not continue to suffer injury from his wartime conviction, Judge Schroeder stated, significantly, that "[a] United States citizen who is convicted of a crime on account of race is lastingly aggrieved."[85]

Redress

At the same time that the *coram nobis* cases were taking place, Congress was addressing the issue of the Japanese American incarceration. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians ("CWRIC"), which was charged with investigating the causes of the wartime incarceration and recommending appropriate remedies.[86] In addition to conducting extensive research and receiving testimony from experts and government officials, the Commission traveled all over the country to receive testimony from those who had lived through the incarceration.[87] That, I think, was tremendously impactful—to invite those who had survived the incarceration to finally speak about their experiences and be heard. Lawyers who later joined the *coram nobis* teams also presented testimony before the Commission on the constitutional violations that occurred during the incarceration and remedies for them.[88]

Ultimately, the Commission concluded that the incarceration was the result of race prejudice, war hysteria, and a failure of political leadership.[89] And it recommended a national apology, reparations of $20,000 each to persons who were incarcerated and alive at the time of payment, and the establishment of an education fund to help ensure that the incarceration and its causes would be remembered and to prevent similar wrongs from

82. Hirabayashi v. United States, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986); IRONS, JUSTICE AT WAR, *supra* note 44, at 42.

83. IRONS, JUSTICE AT WAR, *supra* note 44, at 42–43.

84. Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987) (hereinafter *Hirabayashi II*); IRONS, JUSTICE AT WAR, *supra* note 44, at 43–45.

85. *Hirabayashi II*, 828 F.2d at 607.

86. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980).

87. PERSONAL JUSTICE DENIED, *supra* note 15, at 1–2.

88. Dennis Hayashi, and Lorraine Bannai of the *Korematsu* legal team and Kathryn Bannai of the *Hirabayashi* legal team presented testimony before the commission before the *coram nobis* cases began.

89. PERSONAL JUSTICE DENIED, PART 2, *supra* note 67, at 5.

happening again.[90] These recommendations became law with the Civil Liberties Act of 1988.

Continuing Lessons

This history provides us with some important lessons. First, as we find ourselves in the midst of a national conversation about race, the Japanese American incarceration teaches us much about the roots and costs of racism—how time and time again, the rights and human dignity of vulnerable communities have been sacrificed when the majority feels, or is persuaded to feel, that people who are different from them are a threat to their personal or economic well-being.

We've seen this repeatedly throughout history and still today as Muslims, persons of Middle Eastern descent, and those perceived to look like them, are cast as terrorists and maligned based on their beliefs and dress. We see it as persons of Mexican ancestry are branded as illegals and criminals. And we see it as people who are Black continue to be subject to prejudice and violence as a result of deep-seated racism that treats them as lesser and dangerous, not only as the result of overt, intentional discrimination, but also in deeply rooted and unconscious, but just as pernicious, ways.

In the aftermath of the COVID-19 pandemic, we simply need to look at the resurgence of anti-Asian hate to be reminded that the same stereotypes against Asian Americans that led to the wartime incarceration continue to exist—forever foreign, dangerous, diseased—lying just under the surface, raising their ugly heads time and time again, embedded and never eradicated.

Second, the wartime incarceration and *coram nobis* cases show the very real danger posed when courts fail to fulfill their constitutional role to act as a check on their coordinate branches of government. During World War II, the Supreme Court stepped aside and deferred to the government's claims that its orders were required to protect national security.[91] The Court, in so doing, was willfully blind in rubber-stamping the racial discrimination. Forty-four years later, the Court again stepped aside when the government claimed it acted in the name of national security. In the 2018 decision in *Trump v. Hawaii*, Chief Justice John Roberts, on behalf of the Court majority, upheld the President's ban on travel from mainly Muslim-majority countries.[92] Despite evidence that the ban was motivated by anti-Muslim

90. *Id.* at 8–9; Civil Liberties Act of 1988, 50 U.S.C. § 4211 et seq. (1988) [formerly 50 U.S.C. App. § 1989b].

91. *Hirabayashi I*, 320 U.S. at 93.

92. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). For a discussion of how the Court in *Trump v. Hawaii* gave new life to the wartime *Korematsu* case, see Lorraine K. Bannai, *Korematsu Overruled? Far From It: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. SOC. JUST. 897 (2018); ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY (2018); and YAMAMOTO, RACE, RIGHTS, *supra* note 3, at 409–53.

animus, the Court deferred to the government's claims that its actions were required by national security, just as it did in the wartime Japanese American cases. The *Trump* Court said, "[W]e cannot substitute our own assessment for the Executive's predictive judgments on [national security] matters, all of which 'are delicate, complex, and involve large elements of prophecy.''[93]

Justice Sonia Sotomayor's dissent in *Trump* drew parallels between the travel ban and *Korematsu*, including how the travel ban involved a group-based assumption of guilt and the Court's deference to the government's claims.[94] In response, Justice Roberts said that "*Korematsu* has nothing to do with this case."[95] While saying that the travel ban case was not at all like *Korematsu*, Justice Roberts still took the opportunity to repudiate *Korematsu*, stating "Korematsu was gravely wrong the day it was decided, and has been overruled in the court of history, and—to be clear—has no place in law under the Constitution."[96]

It is impossible to know what Justice Roberts meant in saying that *Korematsu* has been overruled "in the court of history."[97] and he did not overrule *Korematsu* expressly. In any case, the Court's opinion itself shows it did not overrule one of the most dangerous aspects of *Korematsu*—that courts should defer to the government whenever it claims its actions are "plausibly related" to national security.[98]

My own view is that the actions of Congress and the President must always be subject to constitutional limits, and the courts must always decide in the end whether Congress and the President have acted in a justifiable manner. As Judge Patel noted in her decision in Fred's *coram nobis* case, all of our institutions need to be vigilant to protect fragile rights:

> [Korematsu] 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.[99]

Third, the *coram nobis* cases teach much about the roles we have as lawyers. Are we the "hired guns" whose job it is to win at all costs? Or is our duty to serve justice? There were those during World War II who certainly could and should have done better: lawyers who were engineers of the mass

93. *Trump*, 138 S. Ct. at 2421 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

94. *Id.* at 2447–48 (Sotomayor, J., dissenting).

95. *Id.* at 2423.

96. *Id*.

97. *Id.*

98. *Id.* at 2420.

99. *Korematsu II*, 584 F. Supp. at 1420.

removal and incarceration and lawyers who suppressed, altered, and destroyed evidence to win before the Supreme Court. But it is also important to remember Department of Justice lawyers Edward Ennis and John Burling who spoke out against the actions of their superiors, as well as the lawyers who represented Fred, Gordon, and Min pro bono, for free, both during World War II and in reopening their cases decades later. As lawyers, our sworn duty to our clients is paramount in most every instance, but we must never forget our superior duty to uphold the Constitution.

Finally, the incarceration of Japanese Americans also reminds us of the critical importance of allyship and not turning away when we have the ability to act. During World War II, few spoke out against the wartime incarceration of Japanese Americans. None of the major civil rights groups at the time opposed it when it occurred, and a silent majority let it happen. We need to be vigilant and speak up on behalf of communities less able to speak up for themselves.

I hope the symposium today will inspire you to act, especially those of you who will soon be entering the profession. My colleagues on the *coram nobis* legal teams are my heroes. When given the opportunity to help address an egregious injustice, they said yes. Almost none were experienced federal court litigators, and most were quite young. I was two years out of law school. But I have to say that the people who made up these teams were some of the smartest, most skilled, and most committed people I have had the privilege of knowing. You'll soon be just like they were—in possession of a bar card and a unique access to knowledge and the court system sorely needed to aid people and communities achieve justice.

Thank you.