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The Reopening of *United States v. Hirabayashi*: Reflections from the Legal Team¹

Karen K. Narasaki²

Before I begin my discussion on the appellate phase of Gordon Hirabayashi's coram nobis case, I just want to take a minute to acknowledge Mitsuye Endo. Her case is often forgotten because, unlike in *Korematsu*,³ *Yasui*,⁴ and *Hirabayashi*,⁵ the United States Supreme Court ruled in her favor and effectively ended the internment.⁶ She was recruited by the American Civil Liberties Union (ACLU) to be a plaintiff in a test case.⁷ She had worked for the state of California and was one of the Japanese Americans summarily fired after Pearl Harbor.⁸ Her case was a petition for writ of habeas corpus, and the court held that once someone was shown not to be a national security risk, he or she had to be released.⁹ I want to acknowledge her as one of the individuals brave enough to challenge the internment—particularly as a woman at that time.

¹ This article originates in Karen Narasaki's February 2012 presentation at The 25th Anniversary of the *United States v. Hirabayashi Coram Nobis* Case: Its Meaning Then and Its Relevance Now, a conference hosted by Seattle University School of Law's Fred T. Korematsu Center for Law and Equality.

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³ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴ *Yasui v. United States*, 320 U.S. 115 (1943).

⁵ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁶ *Ex parte Endo*, 323 U.S. 283 (1944).

⁷ WENDY L. NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE 87 (2002).

⁸ *Id.*

⁹ *Ex parte Endo*, 323 U.S. at 302.

THE APPEAL

US District Judge Donald Voorhees ruled for Gordon on the internment order,¹⁰ but against him on the curfew order.¹¹ Although Judge Voorhees was appointed by President Richard Nixon, he was a life-long Democrat.¹² He overturned an anti-busing measure because he felt it was racist, and also ordered a desegregation plan.¹³ He was a careful and thoughtful judge—very highly respected—so it was considered somewhat difficult, on a general level, to challenge his opinions on appeal.

After hearing all the testimony, Judge Voorhees basically ruled that the curfew was less of an imposition than the internment order, and that the wartime Supreme Court would have been unlikely to reach a different conclusion.¹⁴ Gordon appealed in order to challenge the curfew ruling; the Government cross-appealed in order to challenge the internment ruling.¹⁵

Fred Korematsu had already been vindicated on the internment issue by US District Judge Marilyn Hall Patel, so his case had not gone to the Ninth Circuit.¹⁶ There was some risk, therefore, to Gordon's appeal because the Ninth Circuit could disagree with Judge Voorhees and Judge Patel on the internment order.

The US Department of Justice (DOJ) argued that Gordon was no longer suffering adverse consequences from the convictions, that laches barred relief, and that the Supreme Court would not have altered its decision had

¹⁰ I have chosen to refer to the exclusion orders issued by the US government as “internment orders” because the practical effect of excluding Japanese Americans from their West Coast communities was internment. See Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese Internment to Court*, 4 SEATTLE J. FOR SOC. JUST. 1, 7–8 (2005).

¹¹ *Hirabayashi v. United States*, 627 F. Supp. 1445, 1457–58 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

¹² The Associated Press, *Former Judge Voorhees Dies*, ANCHORAGE DAILY NEWS, July 9, 1989, at C5.

¹³ *Id.*

¹⁴ *Hirabayashi*, 627 F. Supp. at 1457.

¹⁵ *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

¹⁶ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

the information not been withheld.¹⁷ The DOJ actually tried to use the fact that Gordon had voluntarily reported to the police and refused the opportunity to drop the charges as a supporting argument for why there was no continuing legal detriment.¹⁸ It also argued that because General DeWitt's racist views were known earlier, the issue could have been raised earlier, and that Gordon could have requested his file under the Freedom of Information Act earlier.¹⁹

My personal favorite is the DOJ's argument that the district court was wrong to impose a fiduciary duty standard of behavior on the government. The government, particularly the DOJ, should be held to the highest of standards given its power and role.

PREPARING FOR ORAL ARGUMENT

I think I was the last attorney to join Hirabayashi's coram nobis legal team. I had been clerking for Ninth Circuit Judge Harry Pregerson, and I came on to help with the appeal. I knew several people who were already on the team, and one of my best friends from the University of California, Los Angeles, School of Law had been clerking for Judge Voorhees—I remember arguing with him about the split decision. My sister Diane, a long-time community activist, had been working with the legal team to help raise funds and do community outreach and organizing. Jeffrey Beaver, one of the associates in my class at Perkins Coie, was already working as part of the team helping to write sections of the brief. An African American, he had worked with Min Yasui's lead attorney, Peggy Nagae, when he attended University of Oregon School of Law. One of my main assignments was to work with Jeffrey to help prepare the team for oral argument.

Even then, the Ninth Circuit was the largest of the circuits in terms of both geography and number of judges. It was considered, as it still is, to be

¹⁷ *Hirabayashi*, 828 F.2d at 599.

¹⁸ *Id.*

¹⁹ *Id.* at 601.

one of the more liberal circuits, but it actually had a fairly diverse make up. The judges drawn for a panel can be an important factor in shaping your preparation. It is helpful to understand who is on your panel and, given their past opinions, what they are most likely to be interested in and concerned about.

Judge Pregerson, for whom I clerked, was in the group of judges appointed by President Jimmy Carter in 1979. That group also included Judge Joseph Jerome Farris and Judge Mary Schroeder. The three judges had sat on several panels together over the years.

When we saw the draw, we were cautiously optimistic. The judges on the panel had a reputation for being fair and having a good understanding of civil rights and constitutional concerns.

Based in Seattle, Judge Farris was the first African American to sit on the Ninth Circuit.²⁰ Judge Schroeder was based in Phoenix.²¹ She went on to become the first woman to serve as Chief Judge of the Ninth Circuit.²² Judge Alfred Goodwin was the senior-most judge on the panel. Originally based in Oregon, he was appointed to the Ninth Circuit by President Nixon in 1971.²³

While we did not take any judge for granted, we were most nervous about how best to approach the argument for Judge Goodwin because, as a Nixon appointee, he could sometimes be fairly conservative, although he would later author an opinion holding that including “under God” in the pledge of allegiance was unconstitutional.²⁴

²⁰ *History of the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/public/home.nsf/hisj> (last visited July 13, 2012).

²¹ *Id.*

²² *Woman’s Plaza of Honor: Mary M. Schroder*, THE UNIV. OF ARIZ., <http://womensplaza.arizona.edu/honor/view.php?id=667> (last visited June 18, 2012).

²³ *History of the Federal Judiciary*, *supra* note 20.

²⁴ *Newdow v. U.S. Cong.*, 328 F.3d 466, 490 (9th Cir. 2003), *rev’d sub nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

Rod Kawakami was the attorney who represented Hirabayashi and the legal team in the oral argument before the Ninth Circuit panel. On one of our conference calls with the joint coram nobis teams, we indicated our concern about Rod Kawakami's draft oral statement in light of what we knew about the three judges. Rod's opening was something to the effect of, "This is not just any case or any ordinary party. This is a case of utmost importance involving claims of historical proportion." Jeffrey and I cautioned the team that this statement was likely to be seen as rhetorical grandstanding—something generally unpopular with judges. Every attorney feels the same about his or her case. In particular, Jeffrey felt it was likely to not be well received by his former boss, Judge Norris. Rod, however, felt very strongly that if ever there was a case in which this could be said, this was the case, and he fought to keep it in. As I recall, Dale Minami, one of the lead attorneys in the Korematsu coram nobis case, and most of the other attorneys on the call also strongly backed Rod, who stood his ground and successfully kept the language.

We also stressed to Rod that he would not get more than two or three minutes into his statement before being interrupted, as these judges were known to be pretty active in jumping in with questions. One of the skills important to successful appellate advocacy is the ability to answer questions from judges while weaving in the points you want to make. Too often, attorneys spend a lot of time crafting their statement as though they are actually going to be able to read it uninterrupted, like during an opening statement in a trial.

One of the reasons Rod decided to keep his opening despite our advice is that he felt he would not just be speaking to the judges, but also to the community and media attending the oral argument.

ORAL ARGUMENT AND THE DECISION

Generally, unless it is a particularly splashy case, appellate courtrooms are empty except for the attorneys waiting to argue their cases, but the

courtroom was packed because Roger Shimizu, my sister, and other organizers had done such a good job of getting the community to show the judges their interest by attending. I arrived a little late, and I do not think I was even able to get inside the courtroom to hear the argument.

Rod recalls that he did not get far into his opening statement. As we predicted, one of the judges (Jeffrey thinks it was Judge Farris) did object to Rod's opening lines. Rod was asked if he thought the court would give lesser treatment and less fairness to lesser parties and lesser issues.

The case was decided on September 24, 1987. In a decision written by Judge Schroeder, the unanimous panel ruled in favor of Gordon, upholding the district court on the internment order and reversing it on the curfew.²⁵ The opinion said that Judge Voorhees erred in making a distinction because the Supreme Court had reviewed the convictions together and the DOJ had argued a single theory of military necessity to support both.²⁶ One of my favorite lines in the opinion focuses on the question of whether Gordon was currently harmed by the convictions: "*A United States citizen who is convicted of a crime on account of race is lastingly aggrieved.*"²⁷

I talked with Gordon after the opinion came out, expecting him to be happy and excited. Although he was happy, he wanted the Supreme Court to hear his case. He felt strongly that his position on the unconstitutionality of the internment would not be fully vindicated until the Supreme Court itself admitted the error. He asked me and others how he could appeal to the Supreme Court. He was disappointed when we explained that, since he had won a complete victory at the circuit level, at this point, only the government could appeal and we did not think they would. He asked us anyway to research to confirm that there was nothing we could do.

With the experience of having been in Washington, DC for twenty years, in hindsight, perhaps we could have tried to mount a campaign to convince

²⁵ *Hirabayashi*, 828 F.2d at 608.

²⁶ *Id.*

²⁷ *Id.* at 607.

the DOJ to appeal, although that would have been seen as quite odd and would have carried some risk. In the end, we do not know why the DOJ chose not to take the case to the Supreme Court.

REFLECTIONS SINCE THE APPEAL

Of course the impact of the coram nobis cases did not end with these decisions. The coram nobis victories were helpful in the fight for redress, the passage of the Civil Liberties Act in 1988, and its subsequent amendments and appropriations.²⁸ They contributed to organizing and the shaping of public opinion, and also provided an important rebuttal against the opposition.²⁹

I saw this firsthand when the Japanese American Citizens League (JACL) recruited me to direct its legislative office in 1992. One of my first jobs was to win passage of an amendment to ensure sufficient funding to cover the remaining eligible internees' redress payments—one of whom was my mother. The original bill had used actuarial tables to estimate the number of Japanese Americans who would be alive and eligible, but because of racism at the time, these tables were based on data pertaining to white males.³⁰ Turns out, the Nisei were hardier stock.

One of the battles was to save the public education fund provision that had been in the original bill. As I recall, the Bush administration and some members of Congress felt we should give up the \$20 million that was originally promised in order to cover the additional internees. Congressman Norman Mineta, who was Chair of the House Transportation Committee, and Senator Daniel Inouye, as well as the other Japanese American

²⁸ ERIC K. YAMAMOTO & LIANN EBESUGAWA, REPORT ON REDRESS: THE JAPANESE AMERICAN INTERNMENT 270 (2008).

²⁹ *Id.*

³⁰ LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988, at 188 (1993).

members of Congress, worked hard to pass the bill with the compromise of a civil liberties public education fund of \$5 million.³¹

The purposes of the fund were to sponsor research and public education activities, and to publish and distribute the reports of the Commission on Wartime Relocation and Internment of Civilians, so that the causes and circumstances would be remembered, illuminated, and understood.³² The fund was directed by a board that the late Congressman Bob Matsui swore in on April 1, 1996.³³ Dale Minami chaired the eight-member board, which included Don Nakanishi, Min Yasui's lead attorney Peggy Nagae, Dale Shimasaki as the Executive Director, and Martha Watanabe as the Deputy Director.³⁴ One of my jobs at JACL was to get the board members nominated and confirmed within a very short window in order to be able to spend the funds by the deadline.

The fund provided grants to 135 projects in over twenty states.³⁵ The projects covered curriculum, landmarks, exhibits, arts and media, research, and fellowships. The funded projects included a law school curriculum effort by Professors Margaret Chon, Carol L. Izumi, Jerry Kang, Frank H. Wu, and Eric Yamamoto that became the casebook *Race, Rights and Reparation: Law and the Japanese American Internment*.³⁶ The fund also hosted a curriculum summit; a National Day of Remembrance

³¹ *Nosei Network and Nihonmachi Outreach Committee: Statement on 61st Anniversary of E.O. 9066*, SAN JOSE JACL, <http://www.sanjosejacl.org/Press03/pr030216.html> (last visited May 31, 2012).

³² See H.R. Res 1377, 111th Cong. (2010); see also 134 CONG. REC. 6307 (1988).

³³ *Civil Liberties Public Education Fund Board*, FED. REGISTER, <https://www.federalregister.gov/agencies/civil-liberties-public-education-fund-board> (last visited May 31, 2012).

³⁴ U.S. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* viii (1982–83).

³⁵ *Biographical History*, CIVIL LIBERTIES PUBLIC EDUC. FUND, <http://socialarchive.iath.virginia.edu/xtf/view?docId=civil-liberties-public-education-fund-cr.xml> (last visited May 31, 2012).

³⁶ ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

commemoration in Washington, DC, which I think was the last time I saw Gordon; and a symposium with the Asian American Studies Program of University of California, Berkeley, to help disseminate the results of the various projects.

One of my jobs for the past twenty years has been trying to increase the number of Asian Americans and Pacific Islanders (AAPIs) working in the federal government in both career and appointed positions. The Asian American Justice Center, which I led, worked closely with the National Asian Pacific American Bar Association (NAPABA) to identify, assist, and support AAPI attorneys seeking high level positions and judgeships.

The election of President Obama came at the same time that AAPIs in the legal profession have more fully come of age. We now have a growing pool of attorneys with incredible experience and credentials.

One of those talented attorneys is Neal Katyal. He won a very competitive battle to be appointed deputy solicitor general—the first AAPI to hold that post.³⁷ Prior to holding that post, he won a landmark post-9/11 Supreme Court case in *Hamden v. Rumsfeld*, which challenged the constitutionality of the military tribunals in Guantanamo Bay.³⁸ When his boss, Elena Kagan, was confirmed to the Supreme Court, he became acting solicitor general.³⁹ For the readers who might not be lawyers, the solicitor general is the person who represents the federal government in arguments before the Supreme Court. The solicitor general has been called the tenth justice because the solicitor general's office has a special relationship with the court because it argues so many cases in front of the court and is sometimes invited to submit its views. Last May, during Asian Pacific Islander American Heritage Month, while serving as acting solicitor

³⁷ David G. Savage, *U.S. Official Cites Misconduct in Japanese American Internment Cases*, L.A. TIMES, May 24, 2011, <http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525>.

³⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁹ Savage, *supra* note 37.

general, Katyal issued a confession of error in the internment cases on behalf of the Office of the Solicitor General.⁴⁰

While acknowledging the role the Solicitor General's Office has also played in advancing civil rights, Katyal outlined in great detail the mistakes and ethical breaches made by the Solicitor General's Office in the briefing and arguing of the internment cases.⁴¹ He highlighted the decision by the then Solicitor General Charles Fahy to fail to disclose to the Supreme Court information that undercut the government's primary claim of military necessity.⁴²

Katyal also faulted Fahy for relying on "gross generalizations about Japanese Americans, such as they were disloyal and motivated by racial solidarity."⁴³ Fahy had withheld the information despite warnings from attorneys working on the case in DOJ that failing to tell the court "approximated suppression of evidence."⁴⁴

When Gordon died, Katyal wrote an op-ed for the Sunday *Washington Post* recalling Gordon's life.⁴⁵ He stated that challenging the government in a time of war is a terrifying act.⁴⁶ He shared that it was from Gordon's example that he drew strength when he took on the constitutionality of military tribunals.⁴⁷

Katyal's statement as acting solicitor general shows the continued relevance of the internment cases and the lessons we have learned from them. Unfortunately, in the aftermath of 9/11, we are still fighting against

⁴⁰ *Id.*

⁴¹ Tracy Russo, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUST. BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Neal Katyal, *The Legacy of Gordon Hirabayashi's Fight Against Internment*, WASH. POST, Jan. 6, 2012, http://www.washingtonpost.com/opinions/the-legacy-of-gordon-hirabayashis-fight-against-internment/2012/01/04/gIQASV6cFP_story_1.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

racial and religious profiling, indefinite detentions, and a growing erosion of due process and civil liberties during this never ending War on Terror.

Unlike after the bombing of Pearl Harbor during World War II, with the War on Terror there was no wholesale evacuation and internment of one community of citizens and immigrants based solely on race because of the efforts of individuals and organizations like the Korematsu Institute and the Korematsu Center. But there has been a rounding up of Arabs, South Asians, and Muslim immigrants. There has also been special registration and wholesale deportation. There continues to be racial and religious profiling and harassment at airports and borders.

It is open season on immigrants with the government evading due process protections by abusing civil immigration procedures instead. And one of the questions under current debate is whether there should be less due process protections for people within our borders simply because they lack citizenship. As we have seen, denying immigrants their rights is the beginning of the slippery slope. First noncitizens are stripped of their rights. Then policies are proposed to prevent citizenship, such as attacks on the Fourteenth Amendment's guarantee of citizenship for children born in the United States and efforts to strip citizenship from naturalized citizens.

Recently, Congress passed, and our President signed into law, a provision that blesses indefinite detention without trial of those merely accused of terrorism—arguably, even if they are American citizens.⁴⁸

It seems as though we are always refighting these battles. Yet, it is at times of war when we most need to find the courage to stand up for the rights of the most vulnerable. Symposiums like this are important to remind all Americans that we must continue to be vigilant. We must continue to remind our fellow Americans about the lessons of *Endo*, *Yasui*, *Korematsu*,

⁴⁸ Michael McAuliff, *Obama Signs Defense Bill Despite 'Serious Reservations,'* HUFFINGTON POST (Dec. 31, 2011, 6:22 PM), http://www.huffingtonpost.com/2011/12/31/obama-defense-bill_n_1177836.html.

and *Hirabayashi*, about the need to safeguard our most fundamental human rights.