Opening Statement

WHEN OUR LEGAL SYSTEM FAILED: THE JAPANESE INTERNMENT CAMPS OF THE 1940s

KOJI F. FUKUMURA

The author is a partner with Cooley LLP, San Diego, and chair of the Section of Litigation.

As lawyers, we guide ourselves by ethical principles to advance only legally cognizable arguments and reliable factual assertions. It is a system, executed correctly, that should be impervious to the vagaries of political whim, the will of the mob, or undue influence, and that should focus solely on ascertaining the facts and upholding the rule of law.

There have been times in our history, however, when prejudice, fear, or expediency have corrupted this ideal. The forced relocation and incarceration of persons of Japanese ancestry during World War II is one of those instances. This year marks the 75th anniversary of a series of governmental actions (both executive and legislative) that led to the incarceration of about 110,000 persons of Japanese ancestry, including my mother, in detention camps for years, without individual determinations of whether a detainee posed a threat to military assets. Those actions and the lawsuits challenging those actions ultimately made their way to the U.S. Supreme Court. In those cases, the Supreme Court dealt with a complex interplay between the executive branch (the War Department, the Department of Justice (DOJ), and the Solicitor General's Office) and the legislative branch (Public Law 503 criminalizing violations of an executive order).

It is now undisputed that in *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Yasui v. United States*, 320 U.S. 115 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), the system broke down horribly. Those cases stand as a stark reminder that, in order to fulfill the promise of our democracy, we must always be vigilant as lawyers and as judges to adhere to our ethical and professional duties as well as the basic principles of our democracy. The discussion of the *Hirabayashi* and *Korematsu* cases in this article focuses on the conduct of the lawyers in connection with their briefing and argument to the U.S. Supreme Court. There was significant other misconduct that formed the basis for Hirabayashi's, Yasui's, and Korematsu's successful prosecution of writs of *coram nobis* in the 1980s (overturning their convictions); however, because that misconduct involved persons in the War Department and not the lawyers, I am not discussing it in this article. To learn more, I suggest reading *Justice at War* by Peter Irons, *Enduring Conviction: Fred Korematsu and His Quest for Justice* by Lorraine K. Bannai, or the Ninth Circuit's opinion in *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

On February 14, 1942, some 10 weeks after the bombing of Pearl Harbor, Lieutenant General John L. DeWitt drafted a memorandum to the secretary of war about the "Japanese problem." In this private memorandum, DeWitt recommended that the military remove all persons of Japanese ancestry from the West Coast. He reasoned that the "Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific coast over 112,000 potential enemies, of Japanese extraction, are at large today." Or, as he would more succinctly say later about this recommendation, "[i]t makes no difference whether the Japanese is theoretically a citizen. . . . A Jap is a Jap." *Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987).

Five days later, on February 19, 1942, President Roosevelt issued Executive Order 9066, which delegated to the secretary of war and his designees the power to issue orders excluding any person they chose from military areas to be identified. The next day, the secretary of war designated DeWitt as the commanding general of the Western Defense Command, which included the Pacific coast states of Washington, Oregon, and California. In the ensuing weeks, under intense public

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and political pressure, DeWitt issued a series of orders under Executive Order 9066: (i) defining the "military areas"; (ii) imposing curfews; (iii) imposing a "freeze in place" order; (iv) specifying a series of geographic exclusions; and, ultimately, (v) ordering the evacuation and incarceration of all persons of Japanese ancestry. Hirabayashi was convicted of violating the curfew and exclusion orders, and Korematsu was convicted of violating the exclusion order. It is worth reiterating that those orders indiscriminately applied to all persons of Japanese *ancestry*—two-thirds of whom were citizens of the United States of America.

Hirabayashi

The *Hirabayashi* case laid the factual (so-called military necessity) and constitutional framework that later drove the outcome in the companion *Yasui* case and, a year and a half later, the *Korematsu* case. The Court's decision in *Hirabayashi* also laid the foundation for treating all persons of an ethnic group the same without ascertaining, on a case-by-case basis, whether a particular individual within that group posed a risk to military assets.

The U.S. Supreme Court heard the first case, *Hirabayashi*, in May 1943. The primary author of the government's brief was Edward Ennis, then director of the Alien Enemy Control Unit of the DOJ. Prior to the filing of the government's brief, Ennis drafted a memorandum to Charles Fahy, then solicitor general of the United States. The memorandum concerned the key constitutional question in the case—whether the curfew and exclusion orders unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment. Ennis wrote in his memo that "one of the most difficult questions in the whole case is raised by the fact that the Army did not evacuate people after any hearing or on any individual determination of dangerousness, but evacuated the entire racial group." He added that "in one of the crucial points of the case the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient *when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.*" Memorandum from Edward J. Ennis, Director, Alien Enemy Control Unit, U.S. Dep't of Justice, to the Solicitor General (Apr. 30, 1943), at 3.

The intelligence agency Ennis referred to was the Office of Naval Intelligence, and the "positive knowledge" of "advice directly to the contrary" referred to a report commissioned by the chief of naval operations (the Ringle Report). The Office of Naval Intelligence was, pursuant to the Delimitation Agreement of June 4, 1940, the primary military agency tasked with Japanese intelligence. In December 1941, the chief of naval operations directed the creation of a "Report on Japanese Question" by Lieutenant Commander Kenneth Ringle, who was viewed "without fear or favor" as having "the most intelligent views on the Japanese in the mainland." In his report, Lieutenant Commander Ringle stated that "[t]he alien menace is no longer paramount, and is becoming of less importance almost daily, as the original alien immigrants grow older and die, and as more and more of their American-born children reach maturity"—the vast majority of whom were loyal to the United States. He identified specific individuals, members of specific organizations, and a subgroup of the population (the Kibei) who should be placed in custodial detention, and he noted that the "membership of these groups is already fairly well known to the Naval Intelligence service or the Federal Bureau of Investigation." Lieutenant Ringle concluded that, "in short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious that [sic] the problems of the German, Italian, and Communistic portions of the

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United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis."

Based on his review of the Ringle Report, Ennis outlined his concern to Fahy: "[I]n view of the fact that the Department of Justice is now representing the Army in the Supreme Court of the United States and is arguing that a partial, selective evacuation was impracticable, we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable." Ennis 1943 Memorandum, *supra*, at 3. He then concluded: "In view of this fact [advice directly to the contrary given to General DeWitt], I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. *It occurs to me that any other course of conduct might approximate the suppression of evidence*." *Id*. at 4 (emphasis added).

It is precisely when the tide of popular opinion driven by insecurity and fear rises that lawyers are most pressed to set aside our professional obligations.

Despite this admonition about the government's ethical duties, neither the government's brief to the Supreme Court nor any of its statements during oral argument made reference to the Ringle Report or the conclusions of the Office of Naval Intelligence. To the contrary, Fahy argued that because time was of the essence and there was insufficient time and no reliable method to make a determination between loyal persons and disloyal persons, the evacuation of all persons of Japanese ancestry was necessary. The Supreme Court, in ruling for the government, accepted Fahy's argument on face value:

> 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 a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Hirabayashi, 320 U.S. at 99 (emphasis added).

Accordingly, the suppression of the Ringle Report from the Supreme Court had a profound effect on the outcome of the case.

Neal Katyal, former acting solicitor general of the United States, posted a powerful "confession of error" on the DOJ's website in which he noted (citing a *coram nobis* case) that "the Supreme Court gave 'special credence' to the Solicitor General's representations" and that, had the Solicitor General been candid with the Court, it would likely not have ruled the same way. Neal Katyal, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases. *See also* Neal K. Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027 (2012–2013).

Korematsu

The majority opinion in the *Korematsu* case spends little time discussing the law. Rather, as noted above, it relies almost entirely on its findings in the *Hirabayashi* case to extend its ruling from "curfews" (challenged in *Hirabayashi*) to the exclusion order challenged in *Korematsu*:

> It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order [in *Hirabayashi*] as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.

Korematsu, 323 U.S. at 219.

What is noteworthy about the *Korematsu* case is not what is written in the opinion but, rather, a footnote contained in the government's brief—the footnote's origin, what the footnote did not say, and what the solicitor general represented to the Court when questioned about it.

Prior to the submission of the government's brief in *Korematsu*, prompted by Edward Ennis and John Burling (another lawyer in the Alien Enemy Control Unit at the DOJ), the attorney general of the United States requested formal reports from the Federal Bureau of Investigation (FBI) and the Federal Communications Commission (FCC) about whether there was, in fact, any evidence of Japanese persons committing espionage prior to the exclusion orders. On February 7, 1944, J. Edgar Hoover submitted a detailed report to the attorney general confirming that "every complaint in this regard has been investigated" and there was "no evidence" in the possession of the FBI supporting espionage. Similarly, on April 4, 1944, the FCC reported that there were no radio signals or transmission "which could not

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be identified, or which were unlawful" and that the "Commission knows of no evidence of any illicit radio signaling in this area during the period in question."

Because they now possessed information that (again) flatly rejected DeWitt's assertion of espionage or sabotage, some lawyers at the DOJ again sought to inform the Court of this contradictory information. Burling drafted a footnote in the government's brief stating that DeWitt's final report should be relied on only for statistics and other details concerning the actual evacuation and relocation. The footnote stated unambiguously that DeWitt's report should *not be relied on* to support alleged espionage as those allegations are "in conflict with information in possession of the Department of Justice."

The brief was submitted to the War Department for its review and approval. Shortly thereafter, Fahy issued an instruction to stop the printing of the brief. This prompted Ennis to draft another memorandum, this time to Assistant Attorney General Herbert Wechsler (who directed the War Division at the DOJ), requesting that the footnote remain in its current form. He argued that the "general tenor of [DeWitt's] report is not only that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. *Since this is not so, it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected*. This is the only opportunity which this Department has to correct them." Memorandum from Edward J. Ennis to Herbert Wechsler, Assistant Attorney General (Sept. 30, 1944). Wechsler was not unsympathetic and advocated Ennis's and Burling's views to both Fahy and the War Department. He was not successful. Ultimately, the solicitor general instructed Wechsler to propose new language for the footnote—which the War Department accepted—that excluded reference to the existence of facts contrary to DeWitt's assertions of espionage. The critical language in the revised footnote read: "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 Final Report only to the extent that it relates to such facts."

At oral argument, this ambiguous footnote did not go unnoticed. During oral argument, Fahy addressed directly whether the footnote undermined DeWitt's final report:

> There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case—that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contrary.

Hirabayashi v. United States, 828 F.2d 591, 603 n.13 (9th Cir. 1987).

A majority of the Court accepted Fahy's statement and accepted as true DeWitt's representations on disloyalty and espionage.

Some 40 years after the Supreme Court's decisions in *Hirabayashi*, *Yasui*, and *Korematsu*, these three men prevailed in having their convictions overturned. The spark for that litigation was the discovery, by Professor Peter Irons, of the Ennis Memo to Fahy and other documents. A lawyer by training, Professor Irons understood that these documents, along with other evidence that had been uncovered by Aiko Herzig-Yoshinaga, a researcher for the Commission on Wartime Relocation and Internment of Civilians, could form the basis for an extraordinary writ. Teams of lawyers in San Francisco, Oregon, and Seattle prosecuted successfully the extraordinary writs (*writs of coram nobis*) at the federal district and circuit court levels. The briefing and opinions in those cases are fascinating, and I recommend them to you.

Conclusion

It is tempting, but much too easy, to reduce the participants in this litigation to people who are "ethical and good" or "unethical and bad." The truth is that the country was in a time of crisis and these lawyers were under tremendous pressure from elements within the government, the military, and the public. It is precisely in those moments, however, when the tide of popular opinion driven by insecurity and fear rises, that lawyers are most pressed to set aside our professional obligations.

Feeling intense pressure in litigation is not limited to lawyers for the government in national security cases.

Feeling intense pressure in litigation is not limited to lawyers for the government in national security cases. We all, from time to time, feel an intense pressure to "win," and certainly the anxiety of losing. An anchor client. A multimillion-dollar contingency fee. A case "in the news." Litigators as a profession live in pressure cookers. But making the wrong ethical choices will not only harm the targets of the wrongdoing and leave lasting stains on personal reputations but also, ironically, may significantly harm the very clients we were trying to help. Accordingly, it is imperative that we, every day, focus on our ethical and professional obligations, and on seeking justice. ■

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