

The Evolving Legacy of Japanese American Internment Redress: Next Steps We Can (and Should) Take¹

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The Fred T. Korematsu Center for Law and Equality's conference on Gordon Hirabayashi's life and contributions to civil liberties is both timely and significant. It is timely because Gordon recently passed on, and he was a man of extraordinary conviction and quiet courage. In challenging the United States government and its mass racial internment, he stood tall not only for Japanese Americans but for all Americans. It is significant because the issues his challenge raised—the role of the judiciary in protecting civil liberties during times of national distress and, later, the importance of redress for deep injustice—live on today in the United States and in countries throughout the world. Those issues and their linkage to the original World War II and more recent coram nobis internment legal cases are the focus of this presentation. We all have gained immeasurably from the conviction and courage of Gordon and of fellow internment challengers Fred Korematsu, Minoru “Min” Yasui, and Mitsuye Endo.³ Our deepest respect and fond aloha to them all.

¹ This article originates in Eric K. Yamamoto'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 Lorraine Bannai, *Taking a Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1 (2005) (describing the setting for the legal challenges to the internment by Hirabayashi, Korematsu, and Yasui, and later by Endo).

I. A KEY PIECE OF THE LEGACY OF THE INTERNMENT CASES: THE COURT'S ROLE IN NATIONAL SECURITY AND CIVIL LIBERTIES CONTROVERSIES

A. "Hands-Off" or "Watchful Care"

Let us start with a brief story that illuminates a part of the conference's theme of the "internment cases looking forward." This theme focuses on what the role of judges and justices will be in reviewing future legal challenges to government national security restrictions of civil liberties. This is a crucial question eleven years into post-9/11 America. Will the courts take a "hands-off" role, deferring to the government's proffered justification of "national security necessity," even when unproven? (That is what the United States Supreme Court did in upholding the World War II Japanese American exclusion in *Korematsu* and curfew in *Hirabayashi*.⁴) Or will the courts exercise "watchful care" over our constitutional liberties by carefully scrutinizing the government's national security justification and requiring the government to prove bona fide necessity, as Judge Mary Schroeder did in reviewing the *Hirabayashi* coram nobis claims?⁵ (The internment may well have been invalidated in 1944 in *Korematsu* if the high court had embraced that role of watchful care.)

B. Justice Sotomayor and the Future Role of Judges.

I posed these very questions to Supreme Court Justice Sonia Sotomayor during her recent "Jurist-in-Residence" week at my law school. She was

⁴ See generally ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001) (second edition forthcoming 2013) [hereinafter YAMAMOTO, RACE].

⁵ See Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) (analyzing competing approaches to judicial review of national security restrictions of civil liberties).

insightful and inspiring. I asked her, “What role will American courts likely embrace in ruling on future national security restrictions that curtail civil liberties—hands-off or watchful care?” Much is at stake.

Speaking generally without reference to any cases, she first observed that there is still substantial disagreement about the role of the courts and that judges and scholars take both views.⁶ But, she said, there has been a “modicum of progress” in the role of judges in reviewing these disputes and in assuring that civil liberties are appropriately protected in the face of government claims of necessity. And that is in part because of what the World War II cases revealed.

Indeed, the original internment and curfew challenges, illuminated by the later *coram nobis* re-openings, showed the grave injustice of hands-off judging (which enables the government security apparatus to mislead the country about “necessity”). Courts do need to demand some level of government accountability—a “modicum of progress,” but important progress nonetheless. And that is a key part of the living legacy of Gordon, Fred, and Min.

II. ANOTHER KEY PIECE OF THE EVOLVING LEGACY: ON-GOING REDRESS INITIATIVES FOR HISTORIC INJUSTICE IN THE UNITED STATES AND INTERNATIONALLY

Next, let us explore insights and raise questions about another key aspect of the evolving legacy of the internment litigation by examining not so much its impact on the law’s treatment of national security and civil liberties—which remain important—but rather the redress available to those Japanese Americans interned, and the profound impact it has had on

⁶ Conversation with Supreme Court Justice Sonia Sotomayor, Jurist in Residence Program, William S. Richardson School of Law, University of Hawai‘i, in Honolulu, HI. (Feb. 1, 2012).

reparations claims and reconciliation initiatives in the United States and around the world.

A. Far-reaching Impacts of Internment Redress

First, visualize these dimensions of internment redress: the first major publicly visible “truth commission” recording poignant personal testimonies of injustice, investigating responsibility, and issuing a powerful fact-finding and assessment report; the courts re-entering the fray and reversing course after forty years, pronouncing government wrongdoing and the need for accountability; and Congress stepping up and passing the monumental Civil Liberties Act of 1988, mandating a presidential apology to each survivor and authorizing substantial symbolic reparations and creation of a major public education fund.⁷

Next, recognize the goals: truth-telling, government accountability, and social healing by doing justice—healing the persisting wounds of those wrongfully incarcerated *and* the wounds of American society for its failure of democracy.⁸

Finally, consider since 1988 the global explosion of truth commissions and redress, reconciliation, and reparations initiatives (with demands for apologies and claims for reparations). Reparatory justice claims in the United States have been advanced by African Americans (slavery, lynching, and segregation); Native Hawaiians (restoration of land and self-governance); Native Americans (treaty violations and land confiscation); Latino farm workers (back pay); Mexican Americans (forcible removal from California during the depression); and Filipino war veterans (promised benefits).

⁷ See YAMAMOTO, RACE, *supra* note 4 (describing the multifaceted dimensions of internment redress).

⁸ Eric K. Yamamoto & Ashley Kaio Obrey, *Reframing Redress: A “Social Healing Through Justice Approach” to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L. J. 5 (2009).

And globally, note that redress, reconciliation, and reparations initiatives for past government-inflicted injustice have swept across Canada, New Zealand, South Africa, Sierra Leone, Rwanda, Peru, Argentina, Columbia, Chile, East Timor, Nepal, Sri Lanka, Cambodia, Japan, and Korea. This list is just a beginning. Some groups have been more genuine in motivation and approach than others, yet all are a part of the global reparatory justice phenomenon. Most of these groups have links to, or even direct roots in, the US redress for Japanese Americans.

Looking broadly, redressing the deep wounds of injustice has become a matter central to the future of civil societies that claim legitimacy as democracies in part through a commitment to civil and human rights. Whether a country heals persisting wounds is increasingly viewed now as integral to its stature and prosperity both domestically and globally. First, healing is integral domestically to enable communities to deal with pain, guilt, and division linked to its past in order to live peaceably and work productively together in the present. Second, healing is integral globally to legitimize a country as a democracy truly committed to civil and human rights (which affects a country's standing on international security and responsible economic development). People, communities, and governments—especially democracies claiming allegiance to human rights principles—all have a stake in justice that repairs. That is another piece of the legacy of Gordon Hirabayashi, Fred Korematsu, Min Yasui, and Mitsuye Endo, as well as Judge Mary Schroeder and Judge Marilyn Hall Patel.

But the story is also more complicated than this—more multifaceted, with brighter and darker sides. It is likely that the full legacy of internment redress and its long-term impacts beyond the Japanese American community are still being determined—and we all have a role to play. To illuminate this point I will offer three related stories.

1. Back to the Future: Three Redress Stories

The first story is an account of silence and rebirth. In 1984, in a public forum after the coram nobis court victory nullifying the forty-year-old conviction of internment resistor Fred Korematsu, a sixty-five-year-old Japanese American woman (who looked like my mother) told me that she always felt the internment was wrong: “They imprisoned us without charges or trial because of our race. Destroyed our homes, businesses, and families; and we were all innocent.”⁹ But after being told by the military, the President, Congress, and then the Supreme Court that it was a national security necessity, after feeling the hatred of so many, she said, “I seriously came to doubt myself. I couldn’t even speak of it for forty years.” Now, the court rulings and the prospects of redress, she said, “have freed my soul.”¹⁰ A salutary human impact of redress.

The second story is more complicated. In 1991, I witnessed the US Office of Redress present the first \$20,000 reparations check to the oldest Hawai’i Japanese American internment survivor. Tears of relief mixed with sighs of joy. Many Japanese Americans worked hard for redress. Throughout this process, African Americans and others lent crucial support. Yet some of that support bred internal dissonance. One African American scholar forthrightly observed: “The apology to Japanese Americans was so appropriate and the payment so justified . . . that the source of my ambivalent reaction was at first difficult to identify. I guiltily discovered . . . a very dark brooding feeling that I had fought hard to conquer: ‘Why them and not me?’”¹¹

⁹ Interview with anonymous Nisei woman, Stanford University, in Palo Alto, CA. (May 1984).

¹⁰ *Id.*

¹¹ Vincenne Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TULSA L. REV. 597, 647 (1993).

In a similar vein, the third story emerges from a Native Hawaiian sovereignty advocate's daunting redress question. He asked, Why the Japanese Americans before the indigenous Hawaiians? We had our country taken illegally by the United States one hundred years ago?¹² Indeed, in 1993 the US Congress and President Bill Clinton apologized to Native Hawaiians for the 1893 US-aided illegal overthrow of the internationally recognized Hawaiian nation and committed America to "reconciliation."¹³ After halting steps forward, however, without land repatriation or reparations, the United States largely abandoned its reconciliation promise.

The Native Hawaiian sovereignty advocate's redress question leads to others. What about Native Americans still seeking restoration of land and compensation for water taken? And why not full redress for the Japanese-Latin American Ogura family who were torn apart by the United States' World War II internment incarceration of its patriarch?¹⁴ And, more far reaching, what about the Asian (mostly Korean) women, who were among the two hundred thousand women forced into sexual slavery by Japan's military, and who have continually been denied redress by the Japanese government?¹⁵ Or the women, the mothers, of East Timor who were raped—or in one woman's words "used like horses"—for twenty years by occupying Indonesian soldiers and who gave birth to soldiers' children and

¹² Ho'oiipo Pa, Native Hawaiian Sovereignty, Panel Presentation in Honolulu, HI (Jan. 1997).

¹³ See Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). The joint congressional resolution signed by President Bill Clinton apologizes for the overthrow of the sovereign Hawaiian nation and the resulting devastation and commits to providing "a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.*

¹⁴ See generally Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 B.C. L. REV. 275 (1998) (describing Japanese Latin Americans kidnapped and incarcerated by the United States in American internment prisons and seeking redress).

¹⁵ See Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y L. J. 2 (2002).

who now seek little for themselves but reparations for their children's education?¹⁶

2. The Queries About Other Redress Initiatives

These questions are haunting: "Why them and not me?" from the African American scholar, comparing Japanese American redress with the unredressed legacy of slavery (which must be central to any discussion of reparations); and "Why the Japanese Americans before the Native Hawaiians?" from the Hawaiian sovereignty advocate, highlighting reparations not so much as a civil right but as a human rights response to the lasting ravages of American colonialism. And what about the Japanese Latin Americans, or Korean Comfort Women, or East Timor Women who are still waiting after all these years? In a supposed global age of reparations, why some but not others? And if others, when and how?

And then consider conservatives' attacks that are often taunting: "Aren't reparations just legal blackmail of innocent taxpayers?"; "You folks are just creating greater divisions in society"; or "These people are just seeking special privileges." The attacks on redress are generally accompanied by specific efforts to diminish the significance of the *coram nobis* case revelations and internment redress.

III. WHAT'S NEXT: THE CHALLENGE

With all of this in mind, I will make an observation and then pose a question. The observation is this: The long-term legacy of internment redress, beyond catharsis and vindication for Japanese Americans, is still evolving; it is still to be determined. And how it evolves is in part

¹⁶ See Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims*, in *WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 284, 290, 307 (Ruth Rubio-Marín ed., 2006).

dependent on how we—those who have benefitted directly or indirectly from internment redress—carry forth the lessons of the redress struggle and contribute our time and energy to the reparatory justice struggles of others. Running the Fred T. Korematsu Center for Law and Equality and the Densho Project—sponsoring research, clinical teaching fellows, and conferences, as well as handling community cases and filing amicus briefs, is truly significant. Also significant is giving time and money, lending political contacts, and providing words of support for post-9/11 struggles and for the justice claims of others—all aspects of the evolving legacy of internment redress.

But there is something more to the evolution of this legacy, something more specific and equally valuable. Here is the question (it is really more of a challenge), for scholars and advocates (or combined scholar-advocates), and for all those engaged in justice-thinking as well as justice-practice. Drawing from redress experiences and insights, and with an eye on others' on-going and future redress struggles, *how do we help generate cutting-edge ideas and practical approaches that resonate in policy halls, courts, and public minds and that work for on-the-ground organizers and advocates?*

How do we participate in and contribute to the redress struggles of others? More specifically, how do we further refine “practical theory” about what engenders the kind of “social healing through justice” that: (1) speaks to the hearts and minds of governments and people with a history of injustice, and (2) both guides on-going redress efforts and assesses their efficacy? This indeed is what, in my experience, scholars and advocates around the world are asking for in greater depth and sophistication to help drive forward their on-the-ground present-day redress and reconciliation initiatives.

Recently, Professor Lori Bannai responded to Senator Diane Feinstein's request to testify in Congress on proposed legislation that disallows the military from detaining American civilians deemed enemy combatants

indefinitely without charges or trial. Drawing upon Fred Korematsu's and Gordon Hirabayashi's words and deeds, Professor Bannai presented a compelling template for preventing the kind of deep, broad-scale injustice that later requires reparation.¹⁷ This past spring, I was in South Korea speaking at Seoul National University about strategic next steps for Comfort Women redress, and then at Jeju National University about halting prospects for social healing of the persisting wounds from the April 3, 1948, massacre of thousands of civilians by the Korean military and police during the American "peacetime" occupation of South Korea. I was there as the newly appointed Fred T. Korematsu Professor of Law and Social Justice to present a requested strategic "perspective from the United States" that drew insights in part from Japanese American internment redress.

Responding to these kinds of calls by others may indeed be an integral part of an enduring legacy of internment redress. There is more to say on this, but I will end by suggesting that understandings of what it takes to heal the wounds of injustice have taken major steps forward, yet they offer no comprehensive approaches—they are still works in progress. But the empowering dynamics of victim testimonies, documentary revelations of government wrongdoing, commission or court pronouncements of responsibility, presidential apologies, legislative reparations payments, and sustained public education—all dimensions of Japanese American internment redress—have pointed social psychologists, theologians, political theorists, and legal scholars toward the kind of "social healing through justice" that genuinely begins to repair the damage of historic injustice.

¹⁷ See *The Due Process Guarantee Act: Banning Indefinite Detention of Americans: Hearing Before the S. Judiciary Comm.*, 112th Cong. (2012) (testimony of Lorraine Bannai), available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8b30fa475a5089d793576cd9470701bd>; see also Carrie Johnson, *White House Issues New Rules on Al-Qaida Suspects*, NPR (Feb. 29, 2012), <http://www.npr.org/2012/02/29/147666419/white-house-issues-new-rules-on-al-qaida-suspects>.

Legal scholars and community advocates are increasingly harnessing the power of international human rights tenets of reparatory justice—restitution, rehabilitation, restructuring, and reparation—for major government transgressions. This work links the very foundations of past Japanese American internment redress to on-going and future struggles for redress for the persisting harms of government injustice—both within and without the United States. Our response to this continuing challenge—in words and ideas, and in outreach and actions—may well be key to the evolving “social healing through justice” legacy of Gordon, Fred, and Min.

