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The Solicitor General and Confession of Error

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THE PHILIP D. REED LECTURE SERIES

THE SOLICITOR GENERAL AND CONFESSION OF ERROR

*Neal Kumar Katyal**

PROF. CAPRA: Good evening and thanks for coming. I am Dan Capra, and I am the Philip Reed Chair at Fordham Law School. The Reed Chair is devoted to a discussion on problems and issues involving litigation in federal and state courts. Every year we have one of these and, as always, I want to thank the late Phil Reed Jr., who founded this Chair in 1996 to honor his father, Phil Reed, one of Fordham's most distinguished graduates. It was designated as a rotating chair when I got it in 1996, and I am very happy not to have rotated out of it. I thank the *Law Review* for all of its wonderful work and support of the Reed Chair programs throughout the years, and this year especially. Tonight's Reed Chair presentation is an address by Professor Neal Katyal of Georgetown Law School, who will speak about "The Solicitor General and Confession of Error."

Before I get to the proper introduction, I want to provide some personal background. Neal's connection with Fordham actually precedes that of his outstanding sister, my colleague Sonia Katyal. Fordham met Neal at the "meat market" when he was still at Yale, and we tried to catch him there. I read Neal's piece discussing the use of heroin in New Haven.¹ It was a fantastic piece for a young person. The way I think about it now is that one should always make use of their surroundings while at law school. But there you have it. It was a great piece. We tried our best to get him. First he went to Judge Calabresi, then he went to Justice Breyer, and then he went on to other things.

We crossed paths again when Neal worked for the Justice Department and had the temerity to intrude into the rulemaking process—in which I work—and oppose an amendment to Evidence Rule 701, which I had drafted. I am proud to say that the amendment was approved, that it works

* Paul & Patricia Saunders Professor of National Security Law, Georgetown University. Professor Katyal served as Acting Solicitor General of the United States from May 2010 until June 2011. These remarks were made during a lecture at Fordham University School of Law on March 8, 2012. The text of his remarks have been lightly edited. The views expressed herein are his alone.

1. Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997).

fine, that none of the doomsday prophecies that Neal presented to the Judicial Conference have come to pass—as far as I know—and that I think it is the only national rule ever enacted over the opposition of the Justice Department, which one can attribute to a number of things.

Neal is a man of many and varied accomplishments. While we did not get him to teach here, he has been here to present a number of Reed programs. This is his third time. I am personally honored that we have established this professional connection.

Neal Katyal is the Paul and Patricia Saunders Professor of Law at Georgetown University and a partner at Hogan Lovells. From 2010 to 2011, Neal served as Acting Solicitor General of the United States, where he argued several major Supreme Court cases involving a variety of issues, such as his successful defense of the constitutionality of the Voting Rights Act of 1965, his victorious defense of former Attorney General John Ashcroft in the *al-Kidd* case² for alleged abuses in the War on Terror, his unanimous victory against eight states who sued the nation's leading power plants for contributing to global warming, and a variety of other matters.

As Acting Solicitor General, Neal was responsible for representing the federal government of the United States in all appellate matters before the U.S. Supreme Court and the Courts of Appeals throughout the United States. He served as counsel of record hundreds of times, orally argued fifteen U.S. Supreme Court cases, as well as numerous cases in the lower courts. He was also the only head of the Solicitor General's Office to argue a case in the U.S. Court of Appeals for the Federal Circuit on the question of whether certain aspects of the human genome are patentable.

Neal has served as a law professor for fifteen years at Georgetown University Law Center, where he was one of the youngest professors in the history of the university to receive tenure and a chaired professorship. He was also Director of the Georgetown Center on National Security and the Law until his appointment as Principal Deputy Solicitor General at the Justice Department. And he served as Visiting Professor at both Harvard and Yale.

After graduating from Yale, he clerked for Guido Calabresi in the Second Circuit and then for Justice Breyer in the Supreme Court. He has also served in the Deputy Attorney General's Office at the Justice Department. He has published dozens of articles in scholarly law journals, many op-ed articles in such publications as *The New York Times* and *The Washington Post*. He has testified numerous times before various committees of both the U.S. House of Representatives and the U.S. Senate. He represented Mr. Hamdan, bin Laden's driver who was detained at Guantanamo, and successfully argued the landmark case of *Hamdan v. Rumsfeld*,³ which established important limitations on the President's power and judicial

2. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

3. 548 U.S. 557 (2006).

review over the Guantanamo detentions. He is the recipient of the very highest award given to a civilian by the U.S. Department of Justice, the Edmund Randolph Award, which the Attorney General presented to him last year. The Chief Justice of the United States appointed him to the Rules Committees in 2011—the Advisory Committee on Federal Appellate Rules, chaired by Judge Sutton. Additionally, he was named as one of the best lawyers in the world in so many places, I am not even going to tell you. I would also add that he essentially owns C-SPAN. You just tune in and you will see Neal Katyal talking about something. And he rocked the house on *The Colbert Report*.

I leave it now to Neal.

PROF. KATYAL: Thank you, Dan, for that really warm introduction. It is funny, because we did not script this, but literally I have as the first lines of my lecture that “I fell in love with Fordham fifteen years ago this year at the AALS meat market when I met Dan Capra.” I was giving a paper on criminal law. I had just interviewed with the fancy schools—Harvard, Yale, etc.—and Dan showed them all up with the questions he asked me about my paper.

It is a real honor to be here at Fordham. When I decided that my life was going to be in D.C., and so I did not come to teach here, I did the next best thing, which, when Katyal II, my sister, was on the meat market, I said, “this is the place for you.” It was perhaps the only time she has ever listened to me.

Fordham is a place with an unparalleled combination of a world-class faculty, totally bright, interesting, engaged students, and students and faculty who think, not just about the theoretical complexities of law, but the real actual problems that all of us face as a country and as citizens. So I love this place, and it is always a delight to be back here.

When I last year confessed error⁴ in the *Hirabayashi*⁵ and *Korematsu*⁶ cases—and I’ll explain what I mean in a minute—I thought about a forum in which to memorialize what I had done and why I had done it. When Dan had suggested the auspices of the Reed Professorship and having the honor of publishing something in the *Fordham Law Review*, given my connection to the school, I jumped at the chance. So that is what today’s lecture is—what I did, why I did it.

In order to do that, I thought I would first explain a little bit about what true confession of error is. It is actually one of the most remarkable things in our legal system. I know that a component of the Reed Professorship is legal ethics. To me there is no greater institution that shows really what true legal ethics is about than the confession-of-error practice by the

4. Neal Katyal, *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>.

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

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

Solicitor General. Here is what it is: It is the Solicitor General telling a court—typically the Supreme Court, but sometimes a lower court—“You know that case we won, Court? We shouldn’t have won that case. We should have actually lost that case. So please take this case, Supreme Court, on certiorari, agree to hear the case, and rule against the government.” That is a remarkable thing for an advocate to do—an advocate who, as we all know from our first class in legal ethics, is charged to “zealously” advocate for her or his client.⁷ And yet, you have the lawyer saying, “Actually the client, at least on the paper, the United States government, should have lost the case that it had won.”

Confessions of error have a long history. From the very beginning of the Solicitor General’s position, we have had confessions of error. For example, in 1891, Solicitor General and later President and Chief Justice William Howard Taft admitted to an error in a case in Texas.⁸ It was a murder case that was prosecuted in the Eastern District of Texas and, according to Taft, certain hearsay evidence had come into the trial that shouldn’t have come in. So he told the Court to reverse the conviction. That led the Court, in an opinion by the first Justice Harlan, to state that: “The representatives of government, in this court, frankly concede, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal.”⁹

Since Taft, all Solicitors General—it doesn’t matter whether they are appointed by a Republican or a Democrat—have confessed error, roughly at the pace of two to three times per Supreme Court term. It spans, as I say, politics. Solicitor General Bork, for example, identified as a prominent conservative, confessed error—as did Charles Fried, Kenneth Starr, and so on, and as well did the Solicitors General appointed by Democratic presidents.

Confessing error does not always win popularity points. For instance, imagine you are the lower-court judge to whom the government said, “We should win this case,” and the lower court listens to the government. And then the Solicitor General later on turns around and says, “Actually, we should *not* have won that case. You are wrong.” This is what Learned Hand, one of our most distinguished judges ever to serve on the court of appeals, said: “It’s bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General.”¹⁰ And of course, the decision to confess may be unpopular with the prosecutors at the Justice Department, or others, who worked really hard to try and secure that conviction, to defend it in the court of appeals, and then you have this

7. MODEL RULES OF PROF’L CONDUCT pmb1. (2012).

8. See *Cook v. United States*, 138 U.S. 157 (1891).

9. *Id.* at 185.

10. Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 225 (1963) (quoting Judge Learned Hand).

bureaucrat in Washington saying, “No, we’ve got to do this the other way,” and it is flipped.

Despite those kinds of institutional reluctances to confess error, it has been an enduring and endearing practice. I think it stems from the Solicitor General’s obligation to the court, which is much broader than the immediate case at hand. It is really, truly, an interest in doing justice. It is said that when Frederick Lehmann—one of the Solicitors General, roughly eighty years ago—when he confessed error for the first time, he was heard muttering the words that are carved on top of the Attorney General’s conference room, which is: “The United States wins its point whenever justice is done its citizens in the courts.”¹¹

The practice of confessing error is also crucial to highlighting the responsibility of candor that the Solicitor General has with the court system. That is, the courts can’t be experts in everything, and they of course depend upon the government to be absolutely straight with them. Obviously, as a government lawyer, you are always an advocate for a client. But that client is the United States, and that includes all of its citizens and all of its various interests. It is not as if the interest is always 100 percent in favor of conviction. There are other ideals and interests that are at work. That is what I think underlies the practice of the Solicitor General’s confession of error.

Today, I want to talk about something different. It is a different mistake. It is not a confession of error in the sense that the Solicitor General came into the court and said, “We should not have won this.” Because, after all, the series of events I am going to discuss occurred a long time ago. It occurred in the aftermath of the attacks at Pearl Harbor in 1941. So there isn’t really a mechanism to confess error in the way that I was just talking about. But I do think some of the same institutional principles apply; namely, that it is of utmost importance that we correct mistakes when we make them.

I do not mean in this lecture to judge Charles Fahy, the Solicitor General at the time, during this World War II episode. I have made mistakes and so too have all of us as humans. I believe that good people can do bad things and bad people can do good things. And I do not mean to attack him. But I do mean to say that the genius of the American system, from its checks and balances laced into Articles I to III, to the First Amendment, is all about the idea that good people can make mistakes, and it is up to all of us to remind each other of those mistakes and to learn from them. As Emerson said, “Bad times have a scientific value. These are occasions a good learner would not miss.”¹²

11. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’”).

12. RALPH WALDO EMERSON, *THE CONDUCT OF LIFE* 230 (1860).

So with that, let me talk about what Charles Fahy as Solicitor General did. As I say, he had a remarkable career. After his service as Solicitor General, he served on the D.C. Circuit for thirty years. But in these two cases that I want to highlight, in the case of Gordon Hirabayashi and Fred Korematsu, I do think that errors were made. The Japanese internment had its origins with the bombing of Pearl Harbor on December 7, 1941. In February of 1942, President Roosevelt authorized military commanders to declare areas of the United States as military areas from which many or all people may be excluded.¹³ The next month, in March of 1942, Lieutenant General John DeWitt of the Army issued a public proclamation that stated that the Pacific Coast was "subject to attack, to attempted invasion," and he imposed restrictions on "all persons of Japanese ancestry, whether they were American citizens or not."¹⁴ By that I mean people who were simply of Japanese ancestry. They may have never set foot in Japan, they may have been born in the United States, their parents may have been born in the United States; but if they had Japanese ancestry there were special restrictions placed upon them.

A few brave citizens thought to challenge this scheme. One was Gordon Hirabayashi, a Seattle native and University of Washington student, who voluntarily turned himself in to the FBI—so he violated a curfew order on purpose and then went to the FBI and said, "Here is what I did." Hirabayashi was a remarkable individual. He, sadly, just died a month ago. His story is, I think, instructive for all of us. He had a religious upbringing that was very similar to the Quaker tradition. As part of that tradition, he felt that he should resist unjust laws. But he also felt bound to obey edicts under those laws. So he challenged the system. He said: "I have violated the curfew."

When the Hirabayashi appeal reached the Solicitor General's Office, it attracted the attention of Edward Ennis, a man who had previously served in the Solicitor General's Office as a line attorney. He had moved to the Justice Department's Alien Enemy Control Unit. But he nonetheless wrote to Fahy and urged him to dismiss these cases. Fahy, though, rejected Ennis's suggestion and instructed him to oppose the appeal.¹⁵ And so the government began drafting its legal brief. Perhaps the most noteworthy characteristic of the brief filed by Solicitor General Fahy defending the curfew and exclusion policy is what Fahy did not tell the Court. The Solicitor General, in particular, did not present evidence that cast doubt on the military's assessment of the situation. When the Office was drafting the

13. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

14. There are a number of military proclamations and orders implicated here—Military Proclamation No. 1 was March 2, 1942. The Civilian Exclusion Order No. 34 regarding relocation centers was issued on May 3, 1942.

15. PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 167 (1983) (citing Memorandum from Edward J. Ennis, Dir., Alien Enemy Control Unit, Dep't of Justice, to Charles Fahy, Solicitor Gen. (Jan. 8, 1943) (on file with the Records of the Department of Justice)).

brief in the *Hirabayashi* case, Ennis found out about a report written by Kenneth Ringle, a report that represented the Office of Naval Intelligence's views on the Japanese-American situation.¹⁶ The Ringle Report said that the Navy did not believe that mass internment of Japanese-Americans was justifiable. It stated that only a tiny percentage, at most, of Japanese-Americans were potentially disloyal; that the ones who were disloyal were almost all known to the government; and any other problems could be handled on an individual basis. The report concluded: "[T]he entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people."¹⁷ I should say that J. Edgar Hoover, not known as some civil libertarian, agreed that the mass internment was problematic.

In light of the Ringle Report, Ennis wrote a memo to Solicitor General Fahy saying that the Justice Department had to "consider most carefully what our obligation to the Court is."¹⁸ The Ringle Report, after all, contradicted what the government was saying in its draft brief to the Supreme Court—that the individualized screening of Japanese-Americans couldn't work.

Ennis continued in his memo to the Solicitor General:

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.¹⁹

What does Fahy do? He does not alert the Court. Instead he argues in the brief, contrary to the Ringle Report, that mass internment was necessary and that individual hearings are impossible. The brief stated: "If those Japanese who might aid the enemy were either known or readily identifiable, the task of segregating them would probably have been comparatively simple."²⁰ And the brief noted the "virtually impossible task of promptly segregating the potentially disloyal from the loyal."²¹

The brief made no mention of the Ringle Report. Instead, the brief had a whole bunch of pages about the "racial characteristics of Japanese-Americans," and it had pages arguing that the Japanese-Americans lacked in assimilation, that

16. KENNETH RINGLE, RINGLE REPORT ON JAPANESE INTERNMENT (1941), available at <http://www.history.navy.mil/library/online/jap%20intern.htm>.

17. *Id.* § I.h.

18. Memorandum from Edward J. Ennis, Dir., Alien Enemy Control Unit, Dep't of Justice, to Charles H. Fahy, Solicitor Gen. (Apr. 30, 1943), available at <http://research.archives.gov/description/296058>.

19. *Id.*

20. Brief for the United States at 61, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870).

21. *Id.* at 63.

it is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment, and may feel a consequent tie to Japan, a heightened sense of racial solidarity, and a compensatory feeling of racial pride or pride in Japan's achievements.²²

The brief went on to say that the schools that were on the West Coast that Japanese citizens had set up to teach the Japanese language were "a convenient medium for indoctrinating the pupils with Japanese nationalistic philosophy."²³

Well, this got the Court to ask a couple questions about the brief. So former Solicitor General Robert Jackson asked Fahy at the oral argument whether it would be permissible to criminalize, in peacetime, conduct committed by an Irishman but not another person. Fahy responded: "Certainly this could not be done in peacetime. What makes it reasonable now is the war power and the circumstances of war. We do not admit, however, that there is any discrimination involved."²⁴ Fahy's reason for there being no discrimination was the Japanese schools and all these other things that the brief had pointed to. And the fear of Japanese-Americans "was not based on race but on these other facts," as Fahy put it in his argument. In June of 1943, the Court unanimously upheld *Hirabayashi's* conviction, finding that the military had "reasonable ground for believing the threat is real."²⁵ Of course, the Supreme Court was never told about the Ringle memo.

Even more famous than the *Hirabayashi* case is the *Korematsu* case,²⁶ which I know every law student knows. *Korematsu* tested whether or not the exclusion of Japanese-Americans from the West was constitutional. As with *Hirabayashi*, I think the most notable characteristic of the brief the government filed is what it did not tell the Court. Here, the story involves a bit of Edward Ennis, this man I told you about before, but also another man, John Burling. Burling was also serving in the Alien Enemy Control Unit. The government had been arguing in these Japanese internment cases, based on General DeWitt's report, that Japanese-Americans were signaling to people offshore, perhaps via submarines, intelligence data about what the United States was doing—troop movements and the like.

Now, the problem with this is that the FBI and the FCC had both studied this and found no evidence supporting this allegation. So Burling tells Fahy that the Justice Department had "substantially incontrovertible evidence" that General DeWitt's justification for internment was wrong and that "in all probability" General DeWitt knew that when he wrote his report

22. *Id.* at 21.

23. *Id.* at 30.

24. *Arguments Before the Court: Military Control of Civilians*, 11 U.S.L.W. 3347 (May 18, 1943).

25. *Hirabayashi*, 320 U.S. at 95.

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

justifying the internment.²⁷ At that time, Burling had been writing a draft of the brief in *Korematsu* to be filed in the Supreme Court by the Solicitor General, and he openly repudiates in his draft brief the final report when it comes to this language.

When—and this is true today—whenever a draft brief is written, it is circulated to all the client agencies for their review so they make sure that they are okay with it, and they often have different suggestions of one form or another. At that point, the War Department, now called the Pentagon, raised serious objections to the footnote that Burling had put in that was repudiating General DeWitt. Fahy then says that he is inclined to go with the War Department—after all, they are the lead agency when it comes to fighting a war, and they are objecting to this footnote.

Well, Ennis now gets involved with Burling and they do something very unusual. They actually wrote a memo to someone lower in the Justice Department than the Solicitor General. They write a memo to the Assistant Attorney General in charge of the Criminal Division, Herbert Wechsler. Wechsler is a legendary figure. Wechsler is the guy who wrote the Model Penal Code, for example. He was a professor at Columbia, a man of enormous distinction. But nonetheless it is a lower-ranking person. It is a very unusual thing to go down instead of up. But they did know that Wechsler was a man of serious principle.

So they write to Wechsler. The memo says that the Justice Department had “an ethical obligation to the Court to refrain from citing” the final report.²⁸ They said that it was “highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected,” and “[t]he Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight.”²⁹ Ennis and Burling even said that they would not sign their names to the brief unless the final report was repudiated in some way.³⁰ Wechsler then drafts a footnote—footnote two—and this is what ultimately appears in the brief. There is some more story behind this but I will condense it for this point. Here is what the brief says: “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

27. IRONS, *supra* note 15, at 285 (quoting Letter from John L. Burling, Asst. Dir., Alien Enemy Control Unit, Dep’t of Justice, to Charles Fahy, Solicitor Gen. (April 13, 1944) (on file with the Fahy Papers, Franklin D. Roosevelt Library)).

28. *Id.* at 288 (quoting Letter from Edward J. Ennis, Dir., Alien Enemy Control Unit, Dep’t of Justice, to Herbert Wechsler, Asst. Att’y Gen., War Div. (Sept. 30, 1944) (on file with the Fahy Papers, Franklin D. Roosevelt Library)).

29. *Id.*

30. *Id.* at 290 (citing Letter from John L. Burling, Asst. Dir., Alien Enemy Control Unit, Dep’t of Justice, to Edward J. Ennis, Dir., Alien Enemy Control Unit, Dep’t of Justice (October 2, 1944) (on file with the Records of the Department of Justice)).

ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.”³¹

This is a very common thing. It happens today in the government. You have this dispute between different agencies—the State Department wants one thing, the Pentagon wants another; or HHS wants one thing, Treasury wants another. The general counsels often come back to you and they say, “Well, let’s finesse the issue. Let’s just write something that kind of genuflects to both sides.” They think it solves the problem, because if you are writing a memo or something like that, it is a pretty good solution. You just paper over a disagreement.

The problem is that, in the Supreme Court, there is this little thing called an oral argument that follows any sort of compromise or finessing footnote. That is precisely what happened here. I sure hope I never wrote a footnote like that, because—I read it to you—I do not know what it means. I have read this footnote perhaps thirty times, and I still do not know what it means.

The Court did not know what it meant either. So they essentially asked Fahy at the argument: “What does this mean? Are you repudiating the General DeWitt final report?” Here is what Fahy says, and this is the part I find most problematic:

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 be validly used to the contrary.³²

That is what he tells the Supreme Court of the United States at oral argument. After he knew about the FCC, after he knew about the FBI, after he knew about the Ringle memo, after Ennis, after Burling, that is what he does. And the Supreme Court, by 6–3, rules in favor of the government against *Korematsu*, relying once again on the *Hirabayashi* rationale of military necessity.

I do think the Court shares some blame in this as well. But the Court is a generalist institution, and particularly in times of war they have to rely on the government’s submissions to be absolutely straight and reflect all the facts. They are not experts in reading intelligence reports and assessing counterintelligence operations; they necessarily depend on the executive branch to play it straight with them.

There is a brighter end to this story. In the 1980s a historian named Peter Irons started through the Freedom of Information Act requesting

31. Brief for the United States at 11 n.2, *Korematsu*, 323 U.S. 214 (No. 22).

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

information, and he is the one who uncovered much of this information,³³ and then others uncovered more of it. Gordon Hirabayashi and Fred Korematsu filed petitions for writs of *coram nobis* in district court. These are writs that say that there was an error committed and reverse a conviction on the basis of that. You can only do so when other remedies are unavailable, and here of course these convictions were almost a half-century before, and so that was a mechanism for the courts to try and deal with the situation.

In 1984, a federal district judge in San Francisco granted Korematsu's petition after finding that the government had not released critical information possessed by the Navy and the FCC.³⁴ And, in 1987, the Ninth Circuit ruled in favor of Hirabayashi's petition for similar reasons.³⁵ The Ninth Circuit emphasized "the traditionally special relationship between the Supreme Court and the Solicitor General which permits the Solicitor General to make broad use of judicial notice and commands special credence from the Court,"³⁶ and the court said they thought it unlikely that the Supreme Court would have "reached the same result even if the Solicitor General had advised . . . the Court of the true basis for General DeWitt's orders."³⁷

But the Supreme Court's decisions in *Hirabayashi* and *Korematsu* still stand as laws of the case. These are, of course, arguments that were products of their time. But I think the most remarkable thing about this story is that at the time, even in the midst of crisis—when we were fighting a war on two fronts, when we had been so horribly attacked at Pearl Harbor—there were people within the government saying: "Wait a minute. We can't say that. That's wrong."

Churchill once said, "Criticism may not be agreeable but it is necessary. It fulfills the same function as pain in the human body: it calls attention to an unhealthy state of things."³⁸ In the Japanese-American internment cases, the Solicitor General got that criticism at the time, and I think it is worth remembering those voices today, those voices of Edward Ennis and John Burling, who vigorously advocated that the Solicitor General provide a true, complete, accurate picture to the Court about what really led to the internment.

In my judgment, those voices of dissent within the Office were right and the Solicitor General was wrong.

Thank you.

33. See generally IRONS, *supra* note 15.

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

35. See *Hirabayashi*, 828 F.2d at 608.

36. *Id.* at 602.

37. *Id.*

38. See, e.g., Michelle M. Harner, *The Value of "Thinking Like a Lawyer,"* 70 MD. L. REV. 390, 399–400 (2011).