California Western Law Review

Volume 24
Number 2 *Bicentennial Constitutional and Legal History Symposium*

Article 7

1988

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The Constitutional Bicentennial has provided the legal and historical professions with one of those periodic, and largely fortuitous, times of confluence that give rise to discussion and debate about the relations of each profession to the other, and the relation of both to the continuing need to educate the larger public in the lessons of law and history. This past year of 1987 in particular, in which televised celebrations of the Constitutional Convention of 1787 were followed by televised hearings on the nomination of Judge Robert Bork to the Supreme Court, brought conflicting visions of the judicial function before the public. Law and history came together during this year, and lawyers and historians came together at gatherings such as this Bicentennial Constitutional and Legal History Symposium. Because the practitioners of each profession so rarely meet in public, only good can come from meetings like this.

My own contribution to this symposium is based on two aspects of my professional work: first, that I have been trained in both history and law; second, that I have practiced both professions in relation to an important episode in American legal history, the mass evacuation and internment of Japanese Americans during World War II. As we all know, the Supreme Court upheld in 1943 and 1944 the constitutionality of the military curfew and exclusion orders that paved the legal roads to the concentration camps into which more than 120,000 Americans of Japanese ancestry had been herded in 1942.[1] More recently, federal district and appellate judges have vacated the original criminal convictions in these wartime cases, basing their decisions on evidence of governmental misconduct during the original proceedings that was uncovered in recent years by historical researchers, of whom I was one.[2] Since I participated in these reopened cases as a lawyer for

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1. Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

2. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986); 828 F.2d 591 (9th Cir. 1987). The

the Japanese Americans who sought review of their convictions, and testified in one as a historian, I have a somewhat unique perspective from which to view the relations of law and history in these cases. Using this episode as a case study, I propose to address the role of historians in an adversary system.

Two other recent cases, involving challenges to school prayer and charges of sex discrimination in employment, provide alternative models of the presentation of historical data in trial courts and disparate outcomes of these efforts. The question of whether historians have a proper or useful role in court is not the same question, I should note, as the use and abuse of historical "evidence" by judges, particularly by the justices of the U.S. Supreme Court. Nor does it relate directly to the continuing controversy over "historians' law" as opposed to "lawyers' history." Each of these questions has generated much heat and a dim glimmer of light in the debates of the past generation. These distinct issues deserve a brief review as they relate to the role of historians in an adversary system.

I. HISTORIANS' LAW AND LAWYERS' HISTORY

Historians have generally been the aggressors in conflicts with lawyers and judges, accusing their adversaries of twisting and distorting history for partisan ends. In the book, *The Supreme Court and the Uses of History*, Charles A. Miller placed the Court on trial and convicted it of historical assault and battery in five important constitutional cases, including the Minnesota mortgage moratorium case of the 1930s and the legislative reapportionment cases of the 1960s. Miller lamented that, although lawyers can lose poorly prepared and argued cases, judges "win them all" and can commit "historical fabrication" with impunity.[3] Other historian have denounced "law office history" and have urged their colleagues to "reclaim" the writing of legal history from lawyers.[4] It seems significant that the authors of these indictments generally reflect a conservative, or revisionist, animus toward the jurisprudence of the Warren Court. Historian Alfred Kelly, in his attack on the Warren Court's use of history to bolster its decisions, made clear his distaste for the "libertarian idealism" that animated these decisions.[5] My assumption is that conservative historians,

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Yasui decision of Judge Belloni in federal district court in Oregon is unreported.

3. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

4. Murphy, *Time to Reclaim; The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

5. Kelly, *supra* note 4, at 157.

who venerate the icon of "objectivity," can easily discern flaws in the opinions of justices who cannot root their decisions in the shallow soil of precedent and who turn instead to the deep humus of historical evidence.

Although my present concern lies in the use of historical evidence in trial courts, I should note the reliance by the Supreme Court on such evidence in three cases, perhaps the most important decisions of the past half-century. In *Brown v. Board of Education*, the Court not only took a close look at the Congressional debates that led to adoption and ratification of the fourteenth amendment, but it invited the submission of historical briefs on the intent of those who drafted and debated the amendment and listened to reargument on this question.[6] The justices concluded that, "although these sources cast some light" on the intent of the drafters in regard to school segregation, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."[7] Although this exercise in "intent history" did not provide a definitive answer to the Court's question, similar inquiries have been conducted in many cases. The "jurisprudence of original intent" that Attorney General Edwin Meese III has proclaimed as the Court's primary function, if adopted by the justices, would make "intent history" a flourishing industry.

The Supreme Court plunged into the "political thicket" of reapportionment in 1962, holding in *Baker v. Carr* that judicial review was not barred by the "political question" doctrine. Writing for the majority, Justice William J. Brennan undertook to "analyze representative cases and to infer from them the analytical threads that make up the political question doctrine."[8] Brennan pored over dozens of prior decisions in his opinion, finding that "none of those threads catches this case."[9] Dissenting in his acerbic fashion, Justice Felix Frankfurter accused the majority of casting aside the "uniform course of our political history" regarding the apportionment issue.[10] Jousting with "precedential history" as weapons, Brennan and Frankfurter used the Court's own decisions as historical ammunition.

Perhaps the most controversial judicial use of history came in *Roe v. Wade*, in which Justice Harry Blackmun examined "the history of abortion" in the opinion that struck down state laws

6. Brown v. Board of Educ., 345 U.S. 972 (1953) (order for reargument); 347 U.S. 483 (1954); *see* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 59 (1955).
7. 347 U.S. at 489,
8. Baker v. Carr, 369 U.S. 186, 211 (1962).
9. *Id.*
10. *Id.* at 267 (Frankfurter, J., dissenting).

that criminalized abortion. Justice Blackmun looked back to the practices of the ancient Greeks and Romans for historical evidence to support his conclusion that laws against abortion "are of relatively recent vintage."[11] Blackmun's use of "social history" was certainly not without precedent, but it provoked a barrage of criticism that his evidence was selectively chosen to support a "result-oriented" outcome.[12]

My point in recounting these cases and their differing uses of historical evidence is to drive home the fact that constitutional adjudication is inescapably linked to history. No significant decision of the Supreme Court can ignore or evade the historical context of the case and of the conflict from which it stemmed, whether it be an issue of intent, of precedent, or of social history. Given this fact, how can we assess the process of historical review in cases the Supreme Court has decided without access to the full historical record? The Japanese American internment cases provide a good contemporary basis for such an assessment.

II. MILITARY NECESSITY OR RACISM?

Two dates place temporal brackets around the single event that has most powerfully affected the community of Americans of Japanese ancestry. The first is December 7, 1941, the day on which Japan attacked the American naval base at Pearl Harbor. When President Franklin D. Roosevelt asked Congress the following day for a declaration of war against Japan, he characterized the attack as a "day of infamy." The second date is February 19, 1942, the day on which President Roosevelt signed Executive Order 9066, which authorized the Secretary of War or designated military officials to exclude "any or all persons" from specified military zones.[13] Over the next several months, Lt. General John L. DeWitt, who headed the Western Defense Command on the West Coast, promulgated military curfew and exclusion orders that preceded the mass evacuation and internment of Japanese Americans who resided in the states of California, Oregon, Washington, and Arizona.[14] Confined in concentration camps that the government called "relocation centers," members of this ethnic minority spent an average of 900 days behind barbed wire fences. The camp at Tule Lake, California did not close its gates until June 1946, al-

11. 410 U.S. 113, 129 (1973).

12. *See e.g.*, Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

13. 7 FED. REG. 1407 (1942); *see* P. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983).

14. P. IRONS, *supra* note 13, at 68-74.

most a year after Japan surrendered.

Among the entire Japanese American population, only three young men faced the risk of imprisonment and took their challenges to the military curfew and exclusion orders to the Supreme Court. Each of these test-case defendants—Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu—was convicted under Public Law 503, enacted by Congress in March 1942 to enforce the orders issued by General DeWitt under authority of Executive Order 9066.[15]

Ruling on the curfew order in *Hirabayashi v. United States* in June 1943, the Supreme Court held that the government's claim of "military necessity" overrode the defendant's argument that the order violated the due process clause of the fifth amendment as a form of racial discrimination. Writing for a unanimous Court in *Hirabayashi*, Chief Justice Harlan F. Stone bowed to the military judgment that the Japanese American population included "disloyal members" whose "number and strength could not be precisely and quickly ascertained."[16] Chief Justice Stone also accepted the government's claim that the "racial characteristics" of this ethnic group, two-thirds of whom were native-born American citizens, and the lack of "social intercourse between them and the white population" cast doubt on their loyalty.[17] "We cannot close our eyes to the fact, demonstrated by experience," Stone wrote, "that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."[18] Stone provided no citation to the ethnic groups he had in mind or the "experience" to which he referred. The only invading enemy in American history had been the British, during the War of 1812, but the government had not interned those of British ancestry, who then constituted the vast majority of the American population.

The Supreme Court ruled only on the curfew order in *Hirabayashi*, but the exclusion order returned to the Court in *Korematsu v. United States*, which was decided in December 1944.[19] Significantly, by that time, the Allies seemed confident of ultimate victory over Germany and Japan and the Court seemed less confident that the internment of Japanese Americans had been a necessary policy. Nonetheless, the Court upheld Korematsu's conviction in a six-three decision. Justice Hugo L. Black, writing for the majority,

15. Act of Mar. 21, 1942, 56 Stat. 173.
16. 320 U.S. 81, 99.
17. *Id.* at 98.
18. *Id.* at 101.
19. 323 U.S. 214 (1944).

accepted the government's claims that "the presence of an unascertained number of disloyal members" of the Japanese American population and the impossibility of separating "the disloyal from the loyal" had justified the mass evacuation of Japanese Americans from the West Coast. Faced with bitter dissents from three colleagues, Black responded defensively to charges that nothing but racism had motivated General DeWitt. The exclusion order would be clearly unconstitutional, Black confessed, "were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice." However, Black denied that Korematsu had been "excluded from the Military Area because of hostility to him or his race."[20]

Among the dissenters in *Korematsu*, Justices Frank Murphy and Robert Jackson pointed to blatantly racist statements by General DeWitt and to the absence of any evidence of disloyal acts by Japanese Americans. Murphy quoted DeWitt's claim to a congressional committee in 1943 that there was "no way to determine their loyalty." The official report of General DeWitt on the internment program, Murphy noted, included assertions that Japanese Americans belonged to "an enemy race" whose "racial strains are undiluted" even among those born and raised in the United States.[21] Justice Jackson case doubt on the claims in DeWitt's official report that the exclusion orders had been prompted by evidence of espionage on the part of Japanese Americans. "No evidence whatever on that subject has been taken by this or any other court," Jackson wrote. Despite "sharp controversy as to the credibility of the DeWitt report," he continued, the Court "has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.[22]

A. Rescuing the Courts From a Judicial Disaster

The controversy over General DeWitt's official report, which was withheld from the Supreme Court in the *Hirabayashi* case and later submitted by the government in the *Korematsu* case, assumed new relevance forty years after the Court's decisions. However, it is significant that these decisions were almost immediately attacked by legal scholars as deficient in both law and fact. As early as 1945, Eugene V. Rostow of Yale Law School denounced the decisions as a judicial "disaster" and urged that "the

20. *Id.* at 223.
21. *Id.* at 236.
22. *Id.* at 245.

basic issues should be presented to the supreme Court again, in an effort to obtain a reversal of these war-time cases."[23] Over the next three decades, a stream of books and articles eroded the legitimacy of the Supreme Court decisions with the acid drip of scholarship.[24]

Of equal importance to the effort that Rostow urged in 1945 was the emergence in the 1970s of the "redress" movement among Japanese Americans. Conscious of the struggle of black Americans to demolish the legal barriers of American apartheid, survivors of the internment camps and their children launched a campaign to secure monetary compensation from Congress and the courts for the violation of their constitutional rights. Responding to a concerted lobbying effort, in 1980 Congress established a blue-ribbon panel called the Commission on Wartime Relocation and Internment of Civilians, charged with reviewing the "facts and circumstances" that led to Executive Order 9066 and recommending "appropriate remedies" for any wrongs imposed on the Japanese Americans.[25]

During public hearings that were held in cities across the country in 1981, the Commission heard testimony, often tearful and touching, from more than 750 witnesses. Most witnesses were camp survivors, but the Commission also listened to several of the governmental officials who had recommended and directed the internment program. One such witness, former Assistant Secretary of War John J. McCloy, defended the internment as "retribution" for the Japanese attack on Pearl Harbor. Another witness, former Lt. Colonel Karl R. Bendetsen, had drafted General DeWitt's official internment report and had directed the mass evacuation. Restating his wartime belief that the loyalty of Japanese Americans was suspect, Bendetsen offered a succinct explanation: "Human nature."[26]

Reporting to Congress in December 1982, the Commission unanimously concluded that the internment had imposed a "grave injustice" on Japanese Americans. The Commission also found that "Executive Order 9066 was not justified by military neces-

23. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); *see also*, Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945).

24. *See e.g.* M. GRODZINS, AMERICANS BETRAYED (1949); M. WEGLYN, YEARS OF INFAMY (1976); R. DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975).

25. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1 (1983). The Commission's members included former Senator Edward W. Brooke, former Representative Robert F. Drinan, and former Justice Arthur J. Goldberg.

26. P. IRONS. *supra* note 13, at 353, 355.

sity" but had resulted instead from "race prejudice, war hysteria and a failure of political leadership."[27] The Commission based this finding not only on oral testimony but on the review by its research staff, of thousands of pages, of government files, secured from the War Department, FBI, Office of Naval Intelligence, and other agencies. This review convinced the Commission that General DeWitt's racism had affected the Supreme Court's decisions in the wartime internment cases, particularly in *Korematsu*. The Commission wrote in its report to Congress "[T]oday the decision in *Korematsu* lies overruled in the court of history."[28]

Even before the Commission filed its report, members of its research staff and independent historians had uncovered documents from government files that revealed a pattern of misconduct by the government's lawyers in the internment cases. My own research, begun in August 1981 for preparing a scholarly book on the cases, led to Justice Department files that included charges by government lawyers that Charles Fahy, the Solicitor General who argued both the *Hirabayashi* and *Korematsu* cases to the Supreme Court, had condoned the "suppression of evidence" in the former case and had foisted "lies" on the Court in the latter.[29] Additional research in the National Archives by Aiko Herzig-Yoshinaga, the Commission's chief researcher, unearthed an earlier version of General DeWitt's official report on the internment program that had been ordered by John McCloy and Karl Bendetsen to be burned and excised from government files. This initial version included General DeWitt's claim that it was "impossible to establish the identity of the loyal and disloyal" among the Japanese Americans, regardless of whether time had been available to investigate the loyalty of individuals among this group.[30] The government's position in the wartime cases, accepted without question by the Supreme Court in both the *Hirabayashi* and *Korematsu* cases, had been that loyalty hearings were not held because the identity of "disloyal" Japanese Americans "could not be precisely and quickly ascertained."[31] The "lack of time" excuse, of course, was far different from the "impossibility" argument that General DeWitt first offered and that the Supreme Court adopted.

Armed with the Justice Department files I had uncovered in 1981, I talked with Gordon Hirabayashi, Minoru Yasui, and Fred

27. *See* PERSONAL JUSTICE DENIED, *supra* note 25, at 18.
28. *Id.* at 238.
29. P. IRONS, *supra* note 13, at 202-06, 278-92.
30. Hirabayashi v. United States, 627 F. Supp. 1445, 1453 (W.D. Wash. 1986).
31. 320 U.S. at 99; 323 U.S. at 218.

Korematsu, and broached with them the possibility of seeking judicial review of their cases. Despite the judicial principle of "finality," federal law provided the vehicle of *coram nobis*, one of the "ancient writs" that had been revived to allow the reopening of criminal cases in which final judicial review had been exhausted.[32] The *coram nobis* writ was available only to defendants whose trials had been contaminated by governmental misconduct that produced a "fundamental error" in procedure or a "manifest injustice" in outcome.[33] All three men agreed to my proposal, and I then contacted lawyers—most of them Japanese American—in San Francisco, Portland, and Seattle, the cities in which the cases had been tried in 1942. Most of these lawyers were the children of internment survivors, and they were eager to help in erasing the stigma of shame their parents and grandparents had endured for decades.

The legal teams we established in the three West Coast cities spent months in reviewing documents, drafting pleadings, and organizing community support for the *coram nobis* effort. In January and February of 1983 we filed identical petitions in the original trial courts, seeking vacation of the criminal convictions and judicial findings that the curfew and exclusion orders had been unconstitutional. Based entirely on government documents, the petitions argued that the "suppression of evidence" and presentation of "lies" to the Supreme Court in the *Hirabayashi* and *Korematsu* cases constituted "fundamental error" that warranted vacation of those convictions, and of the *United States v. Yasui*[34] conviction as well. The petitions each included a lengthy historical account of the factors that led to the internment decision, designed to educate the judges and provide the necessary context for cases that were four decades old.

The first petition to be decided was *Korematsu*, which came before U.S. District Judge Marilyn Hall Patel in San Francisco. The government filed a two-page response to the 150 page petition, characterizing the internment as an "unfortunate episode in our nation's history" but also refusing to "disparage those persons who made the decisions in question" or to admit any of the misconduct charges in the petition. Although the government agreed to vacation of Korematsu's conviction, it asked Judge Patel to dismiss his petition.[35] Because the government offered no substantive

32. 28 U.S.C. § 1651(a) (1982).
33. United States v. Morgan, 346 U.S. 502 (1954).
34. 320 U.S. 115 (1943), *see infra* note 39 and accompanying text.
35. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), (Government's Response and Motion, Oct. 4, 1983).

defense, Judge Patel decided the case on the basis of the petition and oral argument at a hearing in October 1983, attended by more than 300 persons, many of them internment survivors. Her written opinion, issued in April 1984, cast scorn on the government's response as "tantamount to a confession of error."[36] On the basis of the documentary record in the petition, Judge Patel found that "there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information" to the courts, including the Supreme Court, during trial and appeal of the case in the 1940s.[37] She concluded with a stern admonition that the "judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court."[38] Stung by this rebuke to their past colleagues, government lawyers filed a notice of appeal but withdrew it at the last moment, allowing the decision to stand.

The government changed its tactics in the *Yasui* case, filing a lengthy brief that attacked the petition on several jurisdictional grounds: Yasui had waited too long to ask for relief and was barred by the "laches" doctrine; no "cast or controversy" existed because the government joined in asking for vacation of the conviction; and Yasui faced no continuing legal disabilities from his conviction, required of *coram nobis* relief. District Judge Robert Belloni, who conducted a brief hearing in January 1984, accepted the government's arguments and displayed an obvious lack of interest in historical review. In a two-page order, issued ten days after the hearing, Judge Belloni noted that Yasui had sought a judicial finding that the "the government knew about and withheld evidence refuting military necessity" when his case was tried in 1942. The judge wrote: "I decline to make such findings forty years after the events took place . . . . Courts should not engage in that kind of activity."[39]

Encouraged by this outcome, the government decided in the *Hirabayashi* case to defend the wartime internment as a "rational" response by General DeWitt to fears of Japanese invasion of the West Coast. At a pre-trial hearing in May 1984, before district judge Donald S. Voorhees in Seattle, government lawyers restated the jurisdictional arguments that Judge Belloni had accepted, to no avail. Judge Voorhees set the case for an evidentiary hearing in June 1985, and both sides prepared for an exhaustive historical review of the internment decision and the government's

36. *Id.* at 1413.
37. *Id.* at 1420.
38. *Id.*
39. Yasui v. United States, (D. Ore.), (unreported order, Jan. 26, 1984).

wartime behavior in the *Hirabayashi* case. During the two-week hearing, governmental lawyers called a parade of former FBI and military intelligence agents who testified that they had feared Japanese attacks on the West Coast in the months after Pearl Harbor. William Hammond, a former Army officer, testified that "the most likely friends of the enemy" were Japanese Americans, although on cross-examination he could not identify a single act of espionage or sabotage by members of this group.[40] Over the strenuous objections of government lawyers, I testified as a historian, about my discovery in 1981 of the Justice Department documents that formed the basis of the petition.

The government's star witness at the hearing was David D. Lowman, a retired National Security Agency official and historian of the so-called "Magic" cables, the Japanese diplomatic messages that American intelligence had intercepted and decoded before and during World War Two. During congressional testimony in 1984, Lowman claimed that the "Magic" cables "will clearly show that President Roosevelt did have legitimate cause for concern about the loyalty of ethnic Japanese on the West Coast in 1942."[41] On the witness stand in Seattle, Lowman testified that these cables showed "espionage nets involving Japanese Americans." One "espionage nugget" from the cables, he claimed, was a report that gave numbers and dates of aircraft production in Los Angeles, which he linked with another cable suggesting "second generations" among the Japanese Americans in the aircraft factories as espionage agents. Confronted by Hirabayashi's lawyer with a Los Angeles Times article that included the same data, Lowman expanded his definition of espionage sources to include the "open press."[42]

Judge Voorhees allowed Lowman's testimony over the objections of Hirabayashi's lawyers, who claimed the "Magic" cables had no relevance to the petition's misconduct charges. He also permitted rebuttal testimony from a former Army intelligence officer, Col. John Herzig, who dismissed the cables as "raw" intelligence that proved nothing more than unrealized Japanese hopes to gain information from sympathetic Japanese Americans. In the end, Judge Voorhees ignored the conflicting historical views of the "Magic" cables, about which he admitted considerable prior knowledge as a military history buff and World War Two naval

40. PERSONAL JUSTICE DENIED, *supra* note 25, at 45.

41. JAPANESE-AMERICAN AND ALEUTIAN WARTIME RELOCATION, U.S. House of Representatives, Commission on the Judiciary, Subcomm. on Administrative Law and Governmental Relations, Serial No. 90 (1984) 445.

42. Quoted from Hirabayashi trial transcript in Irons, *Justice Delayed*, 45, 46 (unpublished manuscript on file in offices of CAL. W.L. REV.)

officer.

The crucial historical evidence in the case, Judge Voorhees concluded, was the War Department's suppression of the initial version of General DeWitt's official internment report. In this report General DeWitt stated flatly that it was "impossible" to establish the loyalty of Japanese Americans, "not that there was insufficient time" to conduct loyalty hearings.[43] The statement flatly contradicted the government's representations to the Supreme Court that "lack of time" to conduct loyalty hearings had required the mass evacuation and internment of Japanese Americans. In his written opinion, Judge Voorhees found that the government's failure to disclose this version of General DeWitt's report to the Supreme Court in 1943 "was an error of the most fundamental character" and required vacating Hirabayashi's conviction for violating the exclusion order.[44] Judge Voorhees also concluded that the curfew order Hirabayashi had violated was a "relatively mild" burden on his rights, and sustained the conviction on that count.[45]

Both sides filed appeals from Judge Voorhees' decision with the U.S. Court of Appeals for the Ninth Circuit. Circuit Judge Mary M. Schroeder, writing for a unanimous panel in September 1987, began with a broad historical review of the wartime internment and the Supreme Court decision that upheld the military orders. "The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history," she wrote. "In the ensuing four and a half decades, journalists and researchers have stocked library shelves with studies of the cases and surrounding events. These materials document historical judgments that the convictions were unjust."[46] Among the historical accounts cited by Judge Schroeder were my book on the internment cases and earlier works by Roger Daniels, Morton Grodzins, and Michi Weglyn.[47] Significantly, Judge Schroeder noted that Hirabayashi had filed his petition "to make the judgments of the courts conform to the judgments of history."

Ruling on the substance of Hirabayashi's misconduct charges, the Court of Appeals concluded from the documentary record that "General DeWitt was a racist" and that the government had withheld "the true basis for General DeWitt's orders" from the Supreme Court in 1943.[48] This misconduct meant that "the Su-

43. 627 F. Supp., 1452.
44. *Id.* at 1457.
45. *Id.* at 1457-58.
46. Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987).
47. *Id.* at 593, n.1.
48. *Id.* at 601-02.

preme Court would probably have been profoundly and materially affected if the Justice Department had advised it of the suppression of evidence" that established the racist basis of the wartime orders.[49] Because Hirabayashi's two convictions had been "tried together, briefed together, and decided together" by the Supreme Court, and because the government's misconduct affected both, Judge Schroeder concluded Judge Voorhees had "erred in distinguishing between the validity of the curfew and exclusion convictions." The appellate panel thus reversed the curfew conviction and cleared the last record in the wartime cases.[50]

From my perspective as a lawyer for the defendants in the Japanese American internment cases, the "misconduct" charges, backed by solid documentary evidence from the government's own files, were obviously powerful. The government, although it moved from contrition in *Korematsu* to truculence in *Hirabayashi*, never disputed the authenticity of this historical evidence. Judge Patel and Judge Voorhees, and the Ninth Circuit judges who heard the *Hirabayashi* appeals, accepted the evidence without question. As a historian, however, I doubt that all the historical argument in the petitions was necessary to win these verdicts. The cases were won, I think, because the verdict of the "Court of Public Opinion" had already been rendered decades earlier. The devastating critique of the Supreme Court opinions by Eugene Rostow in 1945, and the Supreme Court's rulings on civil rights cases in the 1950s and 1960s, combined to make the vacation of the wartime convictions virtually a foregone conclusion. This is not to say that the historical excavation of the cases was unnecessary, because it provided essential evidence of governmental misconduct. This evidence then gave sympathetic judges a plausible rationale for vacating convictions they had already decided were unjustified.

III. Schoolrooms and Stores: Historians on the Stand

A brief discussion of two recent cases in which historians took the stand as expert witnesses will illuminate some of the problems of advocacy versus objectivity. The first case arose from a suit filed in 1981 by Ishmael Jaffree, a black lawyer and a parent in Mobile, Alabama, against the governor and various state and local officials. Jaffree sought to end the recitation of prayers in the public schools his children attended. After Jaffree filed his suit, more than 600 Mobile residents, many of them members of the city's

49. *Id.* at 603-04.

50. *Id.* at 608. The government filed a motion for an *en banc* rehearing of this decision on Nov. 12, 1987. The motion was denied on Dec. 24, 1987.

largest Baptist church, asked District Judge W. Brevard Hand to add them as interveners. Judge Hand granted their request and allowed lawyers for the interveners to launch an attack on "secular humanism," which they claimed was a religion. If the courts barred prayer in the schools, the interveners argued, textbooks that promoted "secular humanism" should be barred as well. During the trial, in November 1982, the interveners called as an expert witness Dr. James P. McClellan, who earned both a doctorate in political science and a law degree from the University of Virginia. The author of a book on Justice Joseph Story, McClellan then served as Chief Counsel to the Subcommittee on Separation of Powers of the Senate Judiciary Committee.[51]

McClellan's role as an expert witness was to provide historical ammunition for a frontal attack on two bastions of constitutional law; first, the intent of the Framers of the first amendment to construct a "wall of separation" between church and state; and second, the intent of the Framers of the fourteenth amendment to protect "liberty" against state encroachment. McClellan spent most of a day on the stand, digging into historical documents from the Constitutional Convention and the ratification debates. In his opinion, "those who participated in the framing and adoption of the Bill of Rights clearly recognized that government could promote religion and not violate the establishment clause."[52]

McClellan claimed that "the fourteenth amendment was not intended by its composers to apply the establishment clause to the states" and accused the Supreme Court of "distortion" of the historical record in applying the Bill of Rights to the states.[53] Stating that "I do not accept the doctrine of judicial supremacy," McClellan challenged Judge Hand to defy the Supreme Court on the incorporation issue. Federal judges are "not required by oath to uphold the supremacy of the Supreme Court's interpretation of the Constitution," McClellan argued.[54]

Judge Hand accepted McClellan's challenge in his opinion, holding that Alabama was free to establish a state religion under the Constitution. Citing McClellan's testimony and writings as "invaluable to the Court in this opinion," Judge Hand wrote that McClellan's "mass of historical documentation" showed that "the first amendment was never intended to be incorporated through

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51. J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971). That McClellan is an advisor to and ally of Senator Jesse Helms (R.-N.C.) is worth mention in this context.

52. Jaffree v. Board of School Commr's, 554 F. Supp. 1104 (S.D. Ala. 1983), trial transcript at 541 (on file at Cal. W.L. Rev.).

53. *Id.* at 545, 550.

54. *Id.* at 589, 556.

the fourteenth amendment to apply against the states."[55] Judge Hand reviewed McClellan's historical claims, devoting some five thousand words to this task, and placed his judicial imprimatur on them: "This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history."[56]

Not surprisingly, Judge Hand was firmly slapped by the Supreme Court, which rejected his "remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion."[57] Perhaps in response to McClellan's prominent role in Judge Hand's opinion, Justice Stevens took pains in writing for the Court to quote at length from Joseph Story's writings on the meaning of the first amendment. Stevens dismissed Story's views as archaic and pointedly cited the Court's opinion in *Everson v. Board of Education*,[58] which McClellan had denounced in his trial testimony as having "no historical or legal foundation."[59] McClellan did find a Supreme Court ally, however, in Justice Rehnquist, whose lengthy dissent in *Jaffree* quoted at length from documents McClellan introduced into the trial record. Denouncing the *Everson* decision as "unprincipled," Rehnquist wrote that the "wall of separation" doctrine "has no basis in the history of the amendment it seeks to interpret" and that states should be able to pursue "secular ends" through "sectarian means."[60]

McClellan provided Judge Hand with highly partisan and ideological "intent history," and expressed views far from the historical mainstream. Nonetheless, his testimony and writings formed the basis of Judge Hand's opinion and, more important, found a champion on the Supreme Court in Justice Rehnquist. McClellan's role as historical advocate may in time win more converts to the "Church of Original Intent."

The second recent example of historians on the witness stand illustrates the bitterness that can result when members of the same scholarly community are cast into adversary roles, not only in court but against each other. In 1979, the United States Equal Employment Opportunity Commission (EEOC) filed suit against the Sears, Roebuck company, charging a pattern of discrimination against women in promotions to higher-paying commission sales

55. 554 F. Supp. at 1113.
56. *Id.* at 1128.
57. Wallace v. Jaffree, 472 U.S. 38, 48 (1985).
58. 330 U.S. 1 (1947).
59. *See* trial transcript, *supra* note 52, at 582.
60. 472 U.S. at 112-13 (Rehnquist, J., dissenting).

jobs. Each side presented numerous expert witnesses at a trial in June 1985 before U.S. District Judge John Nordberg in Chicago. Among the witnesses were two leading women historians, Rosalind Rosenberg of Barnard College and Alice Kessler-Harris of Hofstra University.

Rosenberg agreed to testify for Sears after several historians, including Carl Degler of Stanford, president of the American Historical Association, declined to appear. Although Rosenberg's published work centered on feminist intellectual history, she cited in her testimony more than fifty studies of women's work force participation to buttress her claim that the substantial statistical disparity between women and men employed by Sears in commission sales resulted not from discrimination but reflected differing cultural values. "Women have goals and values other than realizing maximum economic gain," Rosenberg testified.[61]

Kessler-Harris, whose scholarly work examines the history of wage-earning women in the United States, responded for the EEOC that women seek better and higher-paid jobs when choices are available and not limited by discrimination. She provided examples from periods that ranged from 1850 to "Rosie the Riveter" during World War Two.[62] Even on the stand, the dispute between the two historians took on a personal tone. Kessler-Harris described Rosenberg as "ignorant of American history" and Rosenberg responded by charging serious discrepancies between Kessler-Harris's published works and her testimony.[63]

Ruling for Sears in January 1986, Judge Nordberg issued a lengthy opinion that praised Rosenberg's testimony and deprecated Kessler-Harris'. Characterizing Rosenberg as "a well-informed witness who offered reasonable, well-supported opinions," the judge summarized her testimony as showing that, although cultural differences "between men and women have diminished in the past two decades, these differences still exist and may account for different proportions of men and women in various jobs." Rosenberg "offered the more reasonable conclusion" that job disparities "could exist without discrimination by an employer," Judge Nordberg concluded.[64] The judge summarized Kessler-Harris's testimony as describing "the general history of women in the work force" and as offering "isolated examples of women who have

61. Weine, *Women's History on Trial*, THE NATION, Sept. 7, 1985, at 178. *See also*, Jellison, *History in the Courtroom: The Sears Case in Perspective*, 9 PUBLIC HISTORIAN 9 (1987).

62. *Id.*

63. N.Y. Times, June 6, 1986, at B4.

64. Equal Employment Opportunity Comm'n. v. Sears Roebuck Co., 628 F. Supp. 1264, 1308, 1314-15 (N.D. Ill. 1986).

seized opportunities for greater income in nontraditional jobs when they have arisen." Judge Nordberg wrote that "Dr. Kessler-Harris insisted that numerical differences between men and women in the work force can only be explained by sex discrimination by employers," but that she "offered no evidence to support this bold assertion."[65]

More important to this discussion than Judge Nordberg's choice of historian is the public acrimony the trial provoked within the historical profession. The New York Times, reporting a "Bitter Feminist Debate," quoted one feminist as accusing Rosenberg of "an immoral act" in testifying for Sears. Rosenberg conceded that many fellow historians considered her "a kind of traitor to the cause." A committee of female historians passed a resolution that "as feminist scholars we have a responsibility not to allow our scholarship to be used against the interests of women struggling for equity in our society." Some historians rallied to Rosenberg's defense. Carl Degler, who called himself "cowardly" for declining to appear for Sears, said that Rosenberg "agreed to look into an issue, she examined it and she testified. History is a discipline in which we try to uncover the truth as we understand it." Rosenberg "did the right thing" in testifying for Sears, Degler concluded.[66] But the profession remains polarized over the issues raised by historians who take sides in court.

IV. Scholarship and Advocacy: Can They Coexist?

My own experience as historian and lawyer leaves me troubled about the fuzzy line between scholarship as myth and scholarship as advocacy. I firmly believe that the concept of "value-free" scholarship is a myth and that historical "neutrality" is a chimera. Historians bring their values, politics, and prejudices to their work, particulary in areas of scholarship that are inherently conflictual. We do not demand neutrality of those who study the Holocaust or the history of slavery. All that historians can demand of each other is that all the available evidence be examined and dealt with openly and fairly.

Lawyers, however, are bound by the dictates of the adversary system to a different set of values. The interests of the client are paramount, and evidence is weighed for partisan advantage. The lawyer searching for historical evidence to bolster a brief, Paul Murphy noted, "knows that his job is to find those materials which will best serve to persuade the judges to rule favorably in

65. *Id.* at 1314.
66. *See* N.Y. Times, *supra* note 63, at B1 and B4.

the immediate case. That he may choose his evidence from only one side, or in such a way to partially distort the record, will neither cause him qualms nor greatly distress the judge."[67]

What we need to recognize and acknowledge, is that scholarship is a form of advocacy. The best history aims not only to educate but to engage the reader in issues of importance and concern. History has its code of professional responsibility, just as law does, and the "Court of Public Opinion" is a tribunal that is as powerful as a court of law. Historians should not fear to take the witness stand, as long as they understand the limitations of historical review.

67. Murphy, *supra* note 4, at 77.