

**06-3745-cv(L), 06-3785-cv(CON),
06-3789-cv(CON), 06-3800-cv(CON), 06-4187-cv(XAP)**

United States Court of Appeals
for the
Second Circuit

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI
JAFFRI, AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM,
YASSER EBRAHIM, ASHRAF IBRAHIM,

Plaintiffs-Appellees-Cross-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF KAREN KOREMATSU-HAIGH,
JAY HIRABAYASHI, AND HOLLY YASUI AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-
APPELLANTS AND SUPPORTING REVERSAL OF PARTIAL
DISMISSAL OF CLAIM FIVE OF THE THIRD
AMENDED COMPLAINT**

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Defendant-Cross-Appellee,

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Defendants.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

Amici are children of three Japanese Americans who challenged the government's racial curfew and detention programs in the United States Supreme Court during World War II. Karen Korematsu-Haigh is the daughter of Fred Korematsu (Korematsu v. United States, 323 U.S. 214 (1944)). Jay Hirabayashi is the son of Gordon Hirabayashi (Hirabayashi v. United States, 320 U.S. 81 (1943)). Holly Yasui is the daughter of Minoru Yasui (Yasui v. United States, 320 U.S. 115 (1943)).

Their interest is in avoiding the repetition of a tragic episode in American history that is also, for them, painful family history. That history is not the ordeal suffered by their famous fathers and other American citizens of Japanese ancestry, but rather that suffered by their *grandparents* – Japanese aliens in the United States at the outbreak of war in December 1941. Their grandparents were all aliens because American law forbade them, as Asians, from naturalizing as U.S. citizens. See Morrison v. California, 291 U.S. 82, 85-86 (1934). Like the Plaintiffs in the matter now before the Court, amici's grandparents were wrongfully subjected to prolonged and lawless detention during a national security crisis on account of their race and national origin. It took over forty years for the Congress and the President to acknowledge and apologize for this error and to offer them compensation. Amici file this amicus brief in the hope that the Plaintiffs will not

have to wait four decades for the justice that amici's grandparents' generation so belatedly received.

Karen Korematsu-Haigh's paternal grandmother, Kotsui Aoki, was born in Japan, and before emigrating to San Francisco in 1914, she married by proxy Korematsu-Haigh's paternal grandfather, Kakusaburo Korematsu, who had earlier come to the United States from his native Japan. Korematsu-Haigh's grandparents were living in East Oakland, California, on December 7, 1941, when the Japanese navy attacked Pearl Harbor. On May 4, 1942, they were forced into detention at the Wartime Civilian Control Administration's Tanforan Assembly Center just south of San Francisco. After nearly five months at Tanforan, the federal government transferred them to the Topaz Relocation Center in central Utah. They remained behind barbed wire at Topaz until the camp closed in 1945.

Holly Yasui's paternal grandparents were born in Japan in 1886. Her grandfather, Masuo Yasui, came to the United States shortly after the turn of the century in order to work on the railroads. Her grandmother, Shidzuyo Miyake Yasui, came to this country in 1912 in order to marry her grandfather. They were living in Hood River, Oregon, on December 7, 1941. On December 12, 1941, the FBI arrested Holly Yasui's grandfather and, after a hearing, held him in Justice Department captivity for the duration of the war. Yasui's grandmother was taken in the spring of 1942 to the Pinedale Assembly Center outside Fresno, California, and from there to the Tule Lake Relocation Center in northwestern California in

the fall of 1942. She remained incarcerated at Tule Lake until 1943, when the government allowed her to leave camp to work on a sugar-beet farm in Montana.

Jay Hirabayashi's paternal grandfather, Shungo Hirabayashi, was born in Japan and came to the United States in 1907. Seven years later, he married Mitsu Suzawa, a recent Japanese immigrant. Hirabayashi's grandparents were living in Auburn, Washington, at the time of the Pearl Harbor attack. In the spring of 1942, they were forced from their home and into the Pinedale Assembly Center. That fall, the government moved the couple to indefinite incarceration at the Tule Lake Relocation Center. They remained at Tule Lake until the spring of 1943, when they were permitted to leave camp to join one of their sons who was working on a farm in Idaho.

None of amici's grandparents lived long enough to accept either the apology for their wartime ordeal that the Congress and President of the United States offered in the late 1980s or the token redress payments of \$20,000 that the government offered to surviving internees.

PRELIMINARY STATEMENT

In Claim 5 of the Third Amended Complaint, Plaintiff-Appellees/Cross-Appellants (hereinafter "Plaintiffs") alleged, in part, that the Defendant-Appellants/Cross-Appellees (hereinafter "Defendants") violated their right to equal protection under the Fifth Amendment by detaining them, solely on account of

their race, religion, and national origin, for longer than was necessary to secure their removal from the United States.

In its June 14, 2006, Memorandum and Order (the “Memorandum and Order”), the district court dismissed this part of Claim 5.¹ The court separately analyzed the allegation of national-origin discrimination and the allegation of racial and religious discrimination. Insofar as Count 5 alleged discriminatory detention based on national origin, the district court analogized it to a claim of discriminatory deportation on account of national origin, which is generally permissible under Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). (Special Appendix (“SA”) 47-48.) The district court saw “nothing outrageous about [Plaintiffs’] claim of national-origin discrimination in this context; the executive is free to single out ‘nationals of a particular country’ and ‘focus[]’ enforcement efforts on them.” (SA 48 (quoting Reno, 525 U.S. at 491.))

The district court reasoned similarly in dismissing that part of the Plaintiffs’ claim that alleged racial and religious discrimination. The court held that while the tool of singling out Arab Muslims for detention in order to investigate possible ties to terrorism was “crude,” it was not “so irrational or outrageous as to warrant

¹ The district court did not dismiss Claim 5 insofar as that claim alleged harsh conditions of confinement. See Special Appendix (“SA”) 47.

judicial intrusion into an area in which courts have little experience and less expertise.” (SA 48.)

The district court’s rationale for dismissing Claim 5 painfully resurrects the long-discredited legal theory that the federal government deployed to hold amici’s grandparents and the rest of the West Coast’s alien Japanese population behind barbed wire on account of their race and national origin during World War II. The district court’s ruling also overlooks the nearly twenty-year-old declaration by the United States Congress and the President of the United States that the racially selective detention of Japanese aliens during World War II was a “fundamental injustice” warranting an apology and the payment of reparations. And the district court’s posture of near-total deference to the political branches ignores the tragic consequences of such deference for amici’s grandparents, parents, and 120,000 other people of Japanese ancestry in World War II. For these reasons, this Court should reverse the district court’s Memorandum and Order insofar as it partially dismissed Claim 5 of the Third Amended Complaint.

ARGUMENT

I. The District Court’s Rationale for Partially Dismissing Claim 5 Revives the Rationale that the Government Used to Detain the Japanese Alien Population of the West Coast in World War II.

The district court’s Memorandum and Order is, for amici, an instance of both wrongful legal history and painful family history repeating itself. In partially

dismissing Claim 5, the district court invoked a broad theory of executive power to detain aliens on the basis of race, religion, and national origin that cannot meaningfully be distinguished from the federal government's theory for singling out Japanese aliens for wartime detention during World War II. Amici are saddened to witness the resurrection of a legal theory that brought their grandparents so much suffering six decades ago. Amici therefore urge this Court to reverse the district court's partial dismissal of Claim 5 and to return the theory on which it rests to the dustbin of legal history.

A. Japanese Aliens in the United States Before World War II

The stories of amici's grandparents are typical of the experiences of the generation of Japanese who left their native land for the United States at the end of the nineteenth and the beginning of the twentieth centuries. Most of these Japanese emigrants, called the "Issei," were farmers and laborers displaced by rapid economic and political change in Japan. See Yuji Ichioka, The Issei: The World of the First Generation Japanese Immigrants 42-56 (1988). By 1940, some 47,000 Issei lived in the continental United States, nearly ninety percent of them along the West Coast. See Roger Daniels, Asian America: Chinese and Japanese in the United States Since 1850 115, 156 (1989).

The Issei in the United States had no choice but to remain aliens. American law at the time forbade naturalization of any person of Asian ancestry. See In re Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104); Ozawa v. United States, 260

U.S. 178 (1922). Moreover, after 1924, American law also forbade all new Japanese immigration. See Immigration Act of 1924, ch. 190, § 13, 43 Stat. 153, 161-62 (1942). As a consequence, nearly all Japanese aliens in the United States on December 7, 1941, had called the United States home for at least seventeen years.

B. The Detentions of Japanese Aliens After Pearl Harbor

Japanese aliens' lengthy affiliation with the United States did not protect them from race and national-origin discrimination when the country went to war with Japan, Germany, and Italy between December 8 and December 11, 1941. An initial wave of FBI arrests of Japanese, German, and Italian aliens netted 3,849 people by February 16, 1942, nearly fifty-seven percent of whom were Japanese.² See United States Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied 284 (1997). These initial arrestees were apprehended under the Alien Enemies Act, 50 U.S.C. § 21 (2000), and under Justice Department policy were afforded hearings on whether they should be interned as enemy aliens. See Charles W. Harris, Note, The Alien Enemy Hearing Board as a Judicial Device in the United States During World War II, 14 Int'l & Comp. L.Q. 1360, 1362 (1965).

² Among the arrestees was *amica curiae* Holly Yasui's paternal grandfather, Masuo Yasui.

