

January 13, 2014

Hon. Donald B. Verrilli, Jr.
Solicitor General of the United States
Office of the Solicitor General
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Hedges v. Obama
Supreme Court of the United States
Docket No. 13-758

Dear General Verrilli:

The undersigned were honored to serve as counsel to Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui in the successful coram nobis actions that resulted in the vacation of their convictions in 1942 for violation of military curfew and exclusion orders that led to the incarceration and indefinite detention of more than 110,000 Americans of Japanese ancestry. As you know, those wartime convictions were upheld by the Supreme Court in 1943 and 1944 in decisions that were promptly excoriated by Professor Eugene V. Rostow of Yale Law School as a constitutional “disaster,” and that have been condemned by virtually every legal scholar since the decisions were issued.

It is worth reminding ourselves of the prescient words of Professor Rostow, written in 1945: “[T]he basic issues [in the internment cases] should be presented to the Supreme Court again, in an effort to obtain a reversal of these wartime cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. . . . Similar public expiation in the case of the internment of Japanese Americans from the West Coast would be good for the Court, and for the country.”

The Supreme Court now has an opportunity to correct and formally overrule its decisions in the internment cases, through its review of the *Hedges v. Obama* case, currently pending before the Court on a Petition for a Writ of Certiorari by appellants, who challenge the provisions of the National Defense Authorization Act (NDAA) that provide for the indefinite detention of persons, including American citizens, charged with providing “substantial support” to various terrorist organizations.

The decision of the Court of Appeals in the *Hedges* case was based on an asserted lack of standing by the plaintiffs, and expressly disclaimed any ruling on the merits of the challenges to the indefinite detention provisions on the NDAA. We understand that your Office is preparing a response to the petition, and we express no view on the standing issue. We write to urge that, in your response, your Office address the issue raised in the petition regarding Sec. 1021(e) of the NDAA, which provides that “[n]othing in this section shall be construed to affect existing laws and authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” Under the heading of “Questions Presented” in the petition, Number 4 reads: “To the extent that the Second Circuit opinion holds that *Korematsu* is among the ‘existing law and authorities’ under Section 1021(e) that relate to military detention of citizens and legal residents, should *Korematsu* be overruled?”

Because the decision in *Korematsu*, and the decisions in *Hirabayashi* and *Yasui*, could be read as among the “authorities” to which Sec. 1021(e) refers, we urge that you join petitioners in asking the Supreme Court to take the requested step, and formally overrule those decisions. The argument for doing so was powerfully made by your predecessor, Acting Solicitor General Neal Katyal, in his statement, “Confession of Error: The Solicitor General’s Mistakes During the Japanese American Internment Cases,” which he issued in May 2011, shortly before your accession to that office. General Katyal’s statement, and its description of crucial documents withheld from the Supreme Court during the proceedings before it in 1943 and 1944, by itself constitutes sufficient ground for your Office to ask the Court to overrule the internment decisions.

General Katyal’s confession of error was not formally presented to the Court, given the lack of any current proceedings before the Court that presented the issue of indefinite detention of American citizens and lawful residents. In our view, the *Hedges* case now offers the occasion for overruling the internment decisions. As General Katyal noted in his statement, “the ‘special credence’ the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court.”

A request by your Office that the Court formally overrule the internment decisions would fulfill the duty of absolute candor that was sadly lacking in the government’s briefs and arguments in 1943 and 1944. Should you decide not to make such a request, however, we urge that your Office make clear in its response to the *Hedges* petition that the government does not consider the internment decisions as valid precedent for governmental or military detention of individuals or groups without due process of law, and as not among any “authorities” to which Sec. 1021(e) refers.

We also make this request in light of the prophetic warning, in the *Korematsu* dissent of Justice Robert Jackson, that the Court’s approval of the indefinite detention of American citizens established a “principle [that] lies about like a loaded weapon, ready for the hand of any authority that can bring a claim of an urgent

need.” Disarming that weapon through overruling the internment cases would prevent any subsequent administration from relying on them as “authority” in any future case, however remote that possibility may seem today.

We would also draw your attention to the brief amicus curiae that was submitted to the Second Circuit on behalf of the children of the coram nobis petitioners, in which the dangers of using the Supreme Court decisions in their fathers’ cases were presented in compelling and personal terms.

We look forward to your response to our letter.

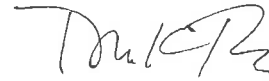
Respectfully,



Dale Minami



Lorraine Bannai



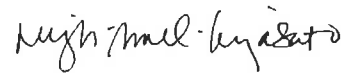
Donald Tamaki



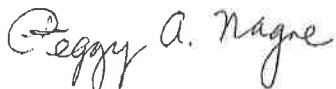
Peter Irons



Eric Yamamoto



Leigh Ann Miyasato



Peggy Nagae



Rod Kawakami



Karen Kai



Kathryn A. Bannai



Robert Rusky

cc: Attorney General Eric H. Holder, Jr.