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ASIAN AMERICAN BAR ASSOCIATION
of the Greater Bay Area

AABA Newsletter - February 2017

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President's Message

By Hung Chang

When I was sworn in last March, I encouraged everyone to take Smart Risks. As lawyers, we are often our own obstacle to progress because of our desire to be "perfect." I wanted us to be nimble and be adaptive to the change of time. I was thinking about fixing broken processes that slow us down, and addressing problems like membership engagement rate with different approaches than we have done in the past. With the help of a highly competent team ready and willing to tackle these problems, we did address some of these problems. We increased the membership by 50%. We increased the frequency of newsletter publication and overall membership engagement, as evident from the quantity and quality of attendance in our events. We've even got over 100 followers to our Instagram account!

What I didn't envision was a Trump presidency and a reawakening of our community to activism. Since November, I saw our community coming together in a way that I haven't seen in the last 10 years. We stood together with our brothers and sisters across different communities and bar organizations against a proto-fascist whose careless rhetorics undermined the core of American values and things we hold dear - things like liberty and justice for all. We've issued and co-signed many letters of condemnation. We've organized clinics and forums. We've become mobilized.

I encouraged all of us to be nimble and take smart risks. In this past year, and especially after November, you've shown me the integrity and courage to stand up against injustice and you have done so with agility and preserverance. Even though we have a long fight ahead, I am confident that AABA will continue to lead the community and safeguard liberty and justice for all of us. Thank you again for a great year.

Sincerely,
Hung

"National Security" Can Be a Bogus Excuse for Essentially Racist Laws

By Dale Minami

President Donald Trump's recent flood of executive orders are unnerving reminders of Executive Order 9066, issued 75 years ago by President Franklin Roosevelt, which resulted in the imprisonment of 110,000 Americans of Japanese ancestry. Two-thirds of those exiled from their homes — including my parents, family and their friends — were American citizens. They were denied the basic due process rights of notice of charges, the rights to an attorney and the rights to trials. Women, children, the infirm and the elderly — all were sent to indefinite confinement in the most inhospitable nether reaches of the United States in brazen defiance of the U.S. Constitution.

Gordon Hirabayashi, Minoru Yasui and Fred Korematsu challenged these military orders and lost their cases in the United States Supreme Court in 1943 and 1944 when the Supreme Court abdicated its responsibility to independently evaluate the bases for Executive Order 9066 and meekly accepted the military's unsupported assertion that Japanese Americans constituted a potential danger to the country's security. Without any examination of the underlying facts supporting the executive order, the Supreme Court essentially assented to the very dangerous proposition that military judgments are unreviewable by the courts during times of war.

This fallacy and the peril of this frightening proposition was exposed in 1983 when Gordon, Minoru and Fred challenged the government again, arguing that their convictions in 1943 and 1944 were affirmed as a result of monumental government misconduct, including the alteration, suppression and destruction of evidence by government officials who sought to win the government's cases at all costs. The evidence contradicted the assertions that Japanese Americans posed a danger and that there was a need to exclude them from the West Coast states or detain them en masse.

Specifically, the 1983 cases proved that no such military necessity existed to justify mass incarceration; that not one Japanese American was arrested for espionage or sabotage; that official investigative reports at the time recommended against imprisonment; that the allegations of espionage advanced in the Supreme Court

were totally false and manufactured; that the official reports were altered to influence the Supreme Court; and that the officials and lawyers in charge of the cases, with full knowledge of the falsehoods, chose to suppress, alter and destroy significant information and lie to the Supreme Court to affirm these men's convictions, thus validating the curfew, exclusion and detention of Japanese Americans.

As Judge Marilyn Hall Patel wrote in her decision overturning Fred Korematsu's conviction:

"Moreover, there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination. . . ."

"Facts for the military justification were unsubstantiated facts, distortions and representations of at least one military commander whose views were seriously infected by racism."

The misconduct perpetrated by the government and the failure of the court to scrutinize the military arguments affirmed one of the greatest miscarriages of justice and one of the greatest civil rights disasters in our country's history.

The echo of history resounds today with President Trump's arguments on Feb. 7, 2017, that his executive order barring immigrants from Muslim majority countries was unreviewable by the courts and was justified on the basis of national security. On Feb. 9, the Ninth Circuit Court of Appeals rejected Trump's claims that his decisions were unreviewable by the court:

"There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy."

The Ninth Circuit Court of Appeals further added: "Courts are not powerless to review the political branches' actions" with respect to matters of national security. To the contrary, while counseling deference to the national security determinations of the political branches, the Supreme Court has made clear that the government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of war.

These statements offer some reassurance that the courts will not blindly adopt the same arguments accepted in the Korematsu, Hirabayashi and Yasui cases that courts could not evaluate the judgments of the military during times of war.

Without judicial review of governmental actions, our democratic system, installed with a system of checks and balances, fails, as one person — the president of the United States — can issue an order that can commit virtually any human and civil rights violation and enjoy immunity from judicial review. In other words, he can act like a dictator with impunity.

Further, from our lens of history as Japanese Americans, Trump's justification of "national security" for the ban on immigration is eerily similar to the justification of "military necessity," its rhetorical cousin that was used to rationalize the incarceration of Japanese Americans. It is the same rationale propounded by the government in the Korematsu, Hirabayashi and Yasui cases in 1943 and 1944 and the same claim the government is advancing today to discriminate against another marginalized group. It was wrong then, and it is wrong today.

As was proven in court and declared explicitly or impliedly by five American presidents and the acting solicitor general, as well as commentators, historians and those who were incarcerated, there was simply was no "military necessity" then, which means a popular and appealing catchphrase can be absolutely misleading and disingenuous. Not a single act of espionage or sabotage was committed by a Japanese American during World War II, and no act of terrorism has been committed by immigrants from the blacklisted countries to date. The conclusion is simple: "National security" can be a bogus excuse for essentially racist laws flowing from a long history of discrimination in this country. Asian Pacific Americans were the targets then; Muslims and Arabs are the targets today.

We were the Muslims of today for other reasons; we were not only the objects of an "unreviewable" racial profiling executive order, but were also the targets of the first immigration laws banning immigrants from a specific country — the 1882 Chinese Exclusion Act, and the 1924 act barring Japanese Americans. Coincidentally, one year after the 1882 act, poet Emma Lazarus composed her eloquent poem etched on our Statue of Liberty in New York Harbor: "Give me your tired, your poor, your huddled masses yearning to breathe free. . . ." Those words were a hollow invitation to Chinese and Japanese immigrants and are words of hypocrisy today.

I have come to realize that people don't simply fail to learn history. They choose to ignore it. They choose to distort it. They choose to act in the face of those lessons because political expedience outweighs principles and lessons of history or their own prejudices and lack of empathy overwhelms any intellectual application of a "lesson."

I have also come to appreciate and applaud the great courage of Fred, Gordon and Min, and Mitsuye Endo, all of whom challenged with courage and conviction the sinister program of incarceration of Japanese Americans. If Fred, Gordon and Min were alive now, they would be appalled at these executive orders. They would invoke their own experiences to fight against these injustices and they would stand up, speak out and fight, just like they did in 1942 and 1983. And they would exhort us to do the same.

Dale Minami is a lawyer and activist and a partner in the San Francisco firm of Minami Tamaki. Minami and his longtime law partner, Don Tamaki, led a team of primarily Sansei attorneys in bringing the 1983 coram nobis case that resulted in the overturning of San Leandro draftsman Fred Korematsu's conviction for violating the World War II exclusion order. Minami has been involved in significant litigation involving the civil rights of Asian Pacific Americans and other minorities, including United Pilipinos for Affirmative Action v. California Blue Shield, the first class action employment lawsuit brought by Asian Pacific Americans on behalf of APAs; and Spokane JACL v. Washington State University, a class action on behalf of APAs that led to the establishment of the Asian American Studies Program at Washington State University. Minami received his law degree from the University of California at Berkeley and helped found the Asian Law Caucus and the Asian American Bar Association.

A Time Remembrance: 75th Anniversary of the Signing of Executive Order 9066

By Kathy Aoki

Co-Chair of AABA's Newsletter Committee

February 19, 2017 was the 75th Anniversary of the signing of Executive Order 9066 by President Franklin D. Roosevelt which uprooted 120,000 men, women and children of Japanese ancestry on the West Coast into internment camps across the country. Almost 70,000 of the internees were American citizens who committed no crimes to justify their incarceration and suddenly had their civil liberties stripped away from them.

This story is dedicated to my parents and relatives, friends, acquaintances and everyone who lived through this terrible incident in American history. The worst part of is what happened to Japanese Americans was never ruled unconstitutional and could happen again. This should never happen again to any group of people living in the United States but under President Donald Trump's administration I can only hope what happened before will not repeat itself.

Many years ago, Phillip Morris gave away free copies of the Bill of Rights. I was born on Bill of Rights Day, December 15, which used to be recognized on calendars but not anymore.

When I received my copy of the Bill of Rights, I was pleased because it came in a tube and was printed on very nice quality paper. But, my father took one look at it and told me in a loud voice "to tear it up!" When I asked, why, my father looked at me and said the Bill of Rights was worthless when he and my mother were incarcerated in an internment camp in Rohwer, Arkansas.

Although my parents grew up in different parts of California, it is interesting how their families both were sent to live in Rohwer but lived in different blocks and did not know each other. My father's family also spent time in a camp in Jerome, Arkansas before moving to Rohwer. At the time, my parents were both in what would be called middle school today.

Luckily, for my older sister and myself, my parents always spoke about their wartime experiences in the camps compared to my many of my Japanese American friends who told me their parents hardly said anything. Maybe because both my parents were educators they always encouraged their children to learn more about Japanese American history and the internment.

When I was in high school in the 70's, my history teacher only spoke one sentence about Japanese American history and nothing was taught about the internment. I was upset because my father was part of group of teachers in the school district who worked on curriculum to teach students about Japanese American history including the internment. My father encouraged me to take Asian American Studies classes and a class on the internment in college, which I did. It was not until the mid 80's that I heard students were learning more about Japanese American history and the internment.

Although I have been told to say "internment camp," I think concentration camp is more accurate. Yes, I agree that what happened to Japanese Americans is not comparable to what many Jewish people had to endure in their lives. There was no Adolf Hitler, who wanted to eliminate a certain race off this earth, and no gas chambers. But, saying "internment camp" to me lessens the severity of what happened.

It's hard to imagine but all of the sudden your life is turned upside down and you are told you have to leave your homes, businesses, and friends and you could only take what you could carry. My mother recalled not having a chance to say goodbye to her friends at school who must have thought it was strange not to see her

again for another three years. She also remembered riding a train with the shades covering the windows not knowing where they were being taken.

My father's family lived on a farm in Madera, California and was lucky to have someone watch their farm until they returned. But, my mother's family lost most of what they had and when they returned back to California had to live in hostel run by a Christian church. I can understand why many former internees did not want to speak much about this horrific experience to their children until the movement for redress and reparations began.

Over the years, I have heard countless stories of my parent's lives during their camps days including their living conditions, food, work my grandparents did and other remembrances they both have. My parents have spoken about their camp experiences to school children and adults. Each living internee has his/her own interesting story to tell.

President Ronald Reagan signed the Civil Liberties Act of 1988 on August 10, 1988, my parent's 31st wedding anniversary. Although an apology signed by President Reagan and reparations of $20,000 was given to each living internee, many internees had already died, including both of my grandfathers. The $20,000 the internees received would never cover their enormous losses they suffered personally and professionally.

Trump's executive order on his travel ban which barred citizens of seven Muslim-majority countries – Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen – from entering the U.S. for 90 days, all refugees for 120 days and refugees from Syria indefinitely, has already been temporarily halted in multiple federal courts in the country.

On February 21, 2017, CNN reported a story about Trump's new travel ban that will be announced this week. Five questions the CNN story asked which could determine the new ban's legality are:

> 1. What's the length of the phase-in period?
> 2. Is there any new evidence on those seven Muslim-majority countries?
> 3. Is there any preference for religious minorities?
> 4. What happens to student visa-holders?
> 5. Will existing visas be revoked again?

Hopefully, Trump moves slower, works with both Republicans and Democrats in Congress and listens to people who know the issues better than he does and works hard to make a positive impact for people living in the United States and in the world.

AABA Membership Spotlight: Donald Tamaki

For more than 40 years, Donald Tamaki has specialized in providing legal counsel to entrepreneurs, privately-held companies, and nonprofits – with extensive experience in commercial leasing, personnel and employment law, corporate governance and other internal practices, licensing, acquisition, and other business transactions.

Don has also negotiated numerous talent agreements and endorsement deals, representing Olympic ice skating gold medalist Kristi Yamaguchi, and journalists, including Carolyn Johnson, Kristen Sze, Mike Nicco, Carolyn Tyler, Lyanne Melendez, David Louie, Matt Keller, and Jonathan Bloom.

He is the past recipient of the State Bar of California Loren Miller Award and the National Asian Pacific Bar Association Trailblazer Award. From 2004-2016, Don has been on the Northern California Super Lawyers list. He is also rated AV® Preeminent™ from the Martindale-Hubble.

Don is a co-founder and board president of the San Francisco Japantown Foundation, which just celebrated its 10th anniversary. He is also a past member of the Glide Foundation board.

First job: I was a bus boy and dishwasher at a senior living facility. Turned out to be a very useful experience to interact with old people since I am now becoming one of them.

What annoys you the most: Besides Kellyanne Conway and "alternative facts"? Traffic and rude people.

Describe yourself: I can be overly serious, but I blame that on genetics. I started my career as a poverty law and civil rights litigator (I co-founded the Asian Law Alliance and served as an executive director of the Asian Law Caucus), and morphed into a transactional lawyer representing small businesses and nonprofits for Minami Tamaki LLP. I'm looking to be inspired every day.

Hidden talent: I have some skills at Japanese garden design. My friends call me "Mr. Miyagi" – without the karate skills.

Favorite food: Any Japanese cuisine.

Why did you enter the law: Well, it definitely wasn't for the money. For years, the running joke among my partners was that we went from a "nonprofit public practice" to a "nonprofit private practice". I grew up after the closing of American-style concentration camps where Japanese Americans (including my parents) were incarcerated merely because they looked like the enemy, so it's fair to say that anger was one reason motivating me to become a lawyer. Also, I was deeply influenced by the Civil Rights Movement, which spawned a whole generation of activists who believed that if there was a wrong, we could right it.

Career Highlights:

Most meaningful case: Served on the legal team which reopened the landmark U.S. Supreme Court case of Fred Korematsu, overturning his criminal conviction for refusing to be incarcerated. The reopening was based on newly discovered evidence from the Justice Department, War Department, Navy, FBI, and FCC which had been suppressed from the Court, admitting that Japanese Americans had committed no wrong and posed no threat.

Most ridiculous case; ("Go to a ball game, but bring your lawyer"): Represented Patrick Hayashi, the lucky fan who ended up with Barry Bonds' record-setting 73rd home run ball, only to be sued by Alex Popov. After a two-

week trial citing cases of how one achieves ownership of property that has to be “captured”, including disputes over foxes, sunken treasure, whales, and abandoned manure, the court exonerated Mr. Hayashi of any wrongdoing and affirmed his interest in the ball.

Most relevant case to today’s news: Served on the legal team representing the State Bar in its ground-breaking and successful recommendation to the California Supreme Court that Sergio Garcia, an undocumented immigrant who met all of the requirements to be a lawyer, should be admitted to the bar.

Dream job if you could do anything you wanted in this world: I’m living the dream as Managing Partner of a minority-owned law firm known for excellent work and for advancing civil rights and contributing to the public interest. I’m proud that my partners and I started a charitable foundation, the MTYKL Foundation, which has awarded more than $200,000 in grants to immigrant rights groups, and funded the Garrick Lew Scholarship administered by AABA to support law students aspiring to follow Garrick’s footsteps as criminal defense attorneys.

AABA is: Crucial, not only because of its networking function, but because it connects us to our collective history which regrettably, has become so relevant today. As Asian Americans, we know something about hatred against immigrants. Most of us are only a generation or two removed from our immigrant ancestors. The common denominator is that our families arrived here with nothing more than a belief in this country. We are the result. When AABA addresses these issues, its voice resonates with credibility and a moral authority which is undeniable. More than that, when we open doors for others, we become part of that rising tide that opens doors for ourselves.

Judge Neil Gorsuch and the Administrative State

By Philip J. Tacason

On January 31, President Donald J. Trump nominated Judge Neil Gorsuch to fill the vacancy on the Supreme Court left by the death of Justice Antonin Scalia last February. President Trump promised numerous times on the campaign trail to nominate a judge with similar conservative credentials to that of the late Justice Scalia.

To the dismay of Democrats, Judge Gorsuch is ideologically similar to Justice Scalia. Both prescribe to the ideology of constitutional originalism, which requires an interpretation based on the original intent of the Framers of the Constitution. Judge Gorsuch, like Justice Scalia, is also an ardent textualist. This method of statutory interpretation favors a strict adherence to the plain text of a piece of a legislation. The result is a rejection of many progressive values because they do not appear in the 228-year-old text of the Constitution. Judge Gorsuch would likely continue the long line of anti-progressive jurisprudence that Justice Scalia vehemently endorsed.

To add to the Democrats' chagrin, the nomination of Judge Gorsuch comes after Senate Republicans refused to hold a hearing on President Barack Obama's nomination to the Supreme Court, Judge Merrick Garland of the Court of Appeals for the D.C. Circuit. Judge Garland, if nominated, would have been a part of the first liberal majority on the Supreme Court in thirty years.

The ideologies of Judge Gorsuch and Justice Scalia differ in one regard – administrative deference. In a time where unpredictable executive actions threaten political stability, this subtle difference may end up playing a key role through the course of the Trump presidency.

In 1984, the landmark Supreme Court case, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.**[i]** articulated the standard of review that courts should use in evaluating an administrative agency's interpretation of a statute it administers. The standard – known as Chevron deference – stated that where Congress passes an ambiguous statute, any reasonable interpretation by an administrative agency is permissible. So long as the agency's reading was not arbitrary and unreasonable, a court should not reverse the agency's decision.

In effect, agencies are able to "legislate" by virtue of its interpretation of ambiguous statutes. Additionally, the broad flexibility afforded by the Chevron standard allows agencies to generally steer clear of intervention by the courts. This has led some commentators**[ii]** to refer to administrative agencies as the "fourth branch of government," an additional arm of the Executive branch that thwarts the system of checks and balances. Chevron deference has led directly to the increased influence of bureaucracy and the administrative state since the 1980s.

While Justice Scalia had a rather complicated relationship with the Chevron standard, he generally supported the basic system of agency deference with regard to ambiguous statutes. In a 1989 speech at Duke Law School, he recognized that, "[Chevron] more accurately reflects the reality of government, and thus more accurately serves its needs."

Judge Gorsuch, on the other hand, is a staunch critic of administrative deference. In a scathing 2010 concurring opinion in the Court of Appeals for the Tenth Circuit, Judge Gorsuch referred to Chevron deference as a reflection that "courts are not fulfilling their duty to interpret the law." Further, he wrote that the Chevron standard is "a problem for the people whose liberties may now be impaired . . . by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day."**[iii]**

Recent Supreme Court jurisprudence has done little to disturb the Chevron standard. The only current Supreme Court justice who has called for a reversal of the standard is Justice Clarence Thomas**[iv]**. However, Justice Samuel Alito**[v]** has also balked at the doctrine of administrative deference. Adding Judge Gorsuch's voice to the chorus, therefore, could help lead to the eventual demise of the Chevron standard.

Admittedly, administrative deference is a seemingly arcane issue when compared to more hot-button topics such as abortion, immigration, and same-sex marriage. However, the elimination of the Chevron doctrine could potentially spell wide and systematic changes to the power of federal administrative agencies. Overturning Chevron would curb the power of agencies such as the EPA, the SEC, and the FCC. As Congress increases its focus on issues such as environmental regulation and network neutrality, the elimination of administrative deference could cause a significant power shift away from the Executive Branch and back to the courts.

An undeniable effect of eliminating Chevron deference would be the reining in of the Executive Branch. The heads of federal agencies are nominated by the President, and are confirmed by a Senate vote. As a result, the actions of an agency are often influenced by the political party that the President and the Senate belong to. Eliminating the Chevron deference would decrease agencies' flexibility to interpret ambiguous statutes. This would effectively curb the power of both the Executive Branch and the administrative state.

In his first remarks after receiving the Supreme Court nomination, Judge Gorsuch pledged to be a “faithful servant of the Constitution and laws of this great country.” If these remarks and his past record are any indication, Judge Gorsuch would maintain his commitment to the rule of law and to the preservation of checks and balances.

In these times where the actions of the Executive are unpredictable, this may be exactly what America needs.

i. 467 U.S. 837 (1984)
ii. https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.c10c4f27c125
iii. 834 F.3d 1142 (2016)
iv. Michigan et al. v. Environmental Protection Agency et al, 576 U.S. __ (2015)
v. http://www.eenews.net/stories/1060045952/

Event Photo Galleries

February 4 - Pathways to Law: Pre-Law Diversity Conference

February 16 - Annual In-House Mixer

February 22 - Networking Mixer with KABANC

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