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WITHDRAWAL SHEET

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
letter case			
1. memo	David B. Waller to Fred F. Fielding, re recommended approach of the President regarding wartime relocation and internment of Japanese-Americans (partial of page 4)	3/28/84	P-5
2. decision memo	from Fred F. Fielding, re recommended approach of the President (partial of page 4)	3/28/84	P-5
3. memo	Claudia McMurray to David B. Waller, re Department of Justice analysis of S. 2116 (partial)	n.d.	P-5
4. memo	David C. Stephenson to Richard K. Willard, re S. 2116 (partial of page 1)	4/4/84	P-5
5. memo	pages 2-5 of item #4	4/4/84	P-5
6. memo	Lawrence Lippe to D. Lowell Jensen, re legal questions arising from the June 1983 recommendation of the Commission on Wartimes Relocation and Internment of Civilians (12 pp)	7/19/83	P-5 CB 1/3/01
COLLECTION:			
WALLER, DAVID: Files			smf
FILE FOLDER:			
Japanese-Americans - WWII Internment (1 of 3) Box ^{CA} 12686			10/20/94

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
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- C. Closed in accordance with restrictions contained in donor's deed of gift.

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March 28, 1984

FOR: FRED F. FIELDING

FROM: DAVID B. WALLER

SUBJECT: Recommended Approach of the President
Regarding Wartime Relocation and Internment
of Japanese-Americans

This memorandum presents a number of alternatives for remedying the situation of those Japanese-Americans who were convicted of violating restrictions imposed during World War II.

Background

In December of 1982, the Commission on Wartime Relocation and Internment of Civilians issued a report which recommended, among other things, that: (1) the United States pay more than \$1 billion to Japanese-Americans as reparations for their internment, (2) a joint resolution of apology to those individuals be enacted; and (3) a presidential pardon be issued for persons convicted of violating internment restrictions. Last year, Senator Cranston introduced S. 1520, a bill which adopts most of the recommendations of the Commission and authorizes a payment to the surviving individuals, in an amount to be decided by the appropriate congressional committees.

Three Japanese-Americans have brought actions in federal district court challenging their misdemeanor convictions for violating the internment restrictions. These three men, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, sought to overturn their convictions, which were ultimately upheld by the Supreme Court, on the ground that the government had knowingly presented false evidence of a military necessity for evacuation and internment orders. The convictions and underlying indictments of Messrs. Korematsu and Yasui have been dismissed. The court has not yet ruled on the government's motion to dismiss the convictions and indictment of Mr. Hirabayashi. Finally, a class action suit, Hohri v. United States, is pending in the federal district court for the District of Columbia. In that case, plaintiffs seek billions of dollars in damages for the alleged wrongful actions taken by the government officials against Japanese Americans during World War II.

The Justice Department estimates that there are perhaps 39 or 40 Americans now living who were convicted of misdemeanor violations of wartime restrictions. Apparently, none of this group other than Korematsu, Yasui, and Hirabayashi have contested their convictions.

Options

1. General: Presidential Pardon.

Article II, Section 2 Clause 1 of the Constitution gives the President the "Power to grant Reprieves and Pardons for Offenses against the United States,..." In the present situation, two types of pardons could be issued for those convicted of violating internment regulations. The standard "full, complete and unconditional pardon" is not based on the innocence of the person convicted, but rather, assumes guilt and a grant of forgiveness by the President. Therefore, this pardon does not expunge the record of conviction, although it may remove the stigma generally attached to convictions.

A second distinct type of pardon is one which specifically states that it is based on innocence. If properly worded, it allows the recipient to sue the United States for up to \$5,000 if the recipient has been sentenced to and served a term of imprisonment.

Typically, pardons are considered after an individual applicant submits a petition. There is, however, a second type of pardon-granting procedure whereby the President issues a blanket pardon of an entire group of persons convicted of a particular crime. This method was utilized by President Carter on January 21, 1977, when he issued a blanket pardon (on grounds of forgiveness) to all persons who committed nonviolent violations of the Selective Service Act between August 4, 1964 and March 28, 1973. Generally these blanket pardons have been based on forgiveness, rather than innocence. In fact, the Department of Justice has been unable to find any blanket pardon proclamation issued on grounds of innocence.

1(a). Blanket Pardon Based on Forgiveness.

The most appropriate vehicle for a presidential pardon in this situation is a blanket pardon based on forgiveness of all those living Japanese-Americans who were convicted of violating wartime restrictions. The pardon could come in the form of a proclamation which would acknowledge the hardships suffered by Japanese Americans, but which would stop short of confessing guilt or wrongdoing by government officials. The terms and wording of the pardon must first be coordinated with the Office of Legal Counsel and the Pardon Attorney of the Department of Justice. The pardon would be self-executing upon the issuance of a presidential proclamation; therefore, no warrants or certificates would be necessary. The Justice Department would simultaneously move to vacate the convictions and dismiss the underlying indictments.

1(b). Blanket Pardon Based on Innocence.

Even though the Justice Department has found no precedent for a blanket pardon based on innocence, it is an available option. It may be a preferred option, since the Department of Justice has indicated that some Japanese-Americans will not accept a pardon based on forgiveness rather than innocence. However, there are drawbacks to this approach. Specifically, the recipients of this pardon would be entitled to an award of \$5,000 under 28 U.S.C. §2513. More importantly, a pardon based on innocence would necessarily entail recitals of wrongdoing by the government that could undermine its defense in the civil suits for damages. Moreover, it appears that most Americans will accept a Presidential pardon based on forgiveness as a largely ceremonial but appropriate gesture by the United States government.

2. Establishment of a special foundation.

The Commission on Wartime Relocation and Internment of Civilians recommended that the President propose to Congress the establishment of a special foundation on Japanese-American relations. The foundation would maintain a permanent library housing papers relating to the wartime relocation and internment of Japanese-Americans. The foundation would also encourage the study and research of outstanding interracial or interreligious problems in the United States and around the world, with an emphasis on practical solutions to resolve such intergroup conflicts. The trustees of this foundation would be appointed by the President.

3. Wartime Reparation.

The Commission also recommended that a \$20,000 lump sum payment be made to each of 60,000 individuals still living who were interned during World War II. Such an award would require an expenditure of approximately \$1.2 billion. Members of the Commission made this recommendation because they considered the compensation made under the American-Japanese Claims Act of 1948 inadequate. However, Congress considered broadening the scope of the statute in the 1950's and declined to do so. There appears to be no good reason to question the judgment of the Congress in this matter.

Moreover, an award of this nature forty years after the fact would properly be understood to constitute war reparations, implying an admission of guilt by the United States, which goes well beyond what this government and its officials have previously conceded.

Based on the foregoing analysis, the attached Decision Memorandum to the President makes the following recommendations:

- (1) A blanket presidential pardon based on forgiveness of those living Japanese-American citizens who were convicted of violating wartime restrictions should be issued.
- (2) It should be recommended to Congress that a special foundation be created for study and research of the wartime internment of Japanese Americans and the assimilation of the Japanese into American society.

David —

This is the
exact same memo,
but in Decision
Memo format.

Claudia

DECISION MEMORANDUM

I. SUBJECT: Recommended Approach of the President
Regarding Wartime Relocation and Internment
of Japanese-Americans

II. ORIGINATOR: Fred F. Fielding DATE: March 28, 1984

III. ACTION FORCING EVENT: Presidential request

IV. ANALYSIS: This memorandum presents a number of alternatives for remedying the situation of those Japanese-Americans who were convicted of violating restrictions imposed during World War II.

Background

In December of 1982, the Commission on Wartime Relocation and Internment of Civilians issued a report which recommended, among other things, that: (1) the United States pay more than \$1 billion to Japanese-Americans as reparations for their internment, (2) a joint resolution of apology to those individuals be enacted; and (3) a presidential pardon be issued for persons convicted of violating internment restrictions. Last year, Senator Cranston introduced S. 1520, a bill which adopts most of the recommendations of the Commission and authorizes a payment to the surviving individuals, in an amount to be decided by the appropriate congressional committees.

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Moreover, an award of this nature forty years after the fact would properly be understood to constitute war reparations, implying an admission of guilt by the United States, which goes well beyond what this government and its officials have previously conceded.

V. RECOMMENDATION: It is recommended that:

- (1) A blanket presidential pardon based on forgiveness of those living Japanese-American citizens who were convicted of violating wartime restrictions should be issued; and
- (2) It should be recommended to Congress that a special foundation be created for study and research of the wartime internment of Japanese Americans and the assimilation of the Japanese

to equitable relief in the federal courts. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123; *Porter v. Investors Syndicate*, 286 U. S. 461, 471; 287 U. S. 346; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309; *Atlas Ins. Co. v. Southern, Inc.*, 306 U. S. 563.

We hold, as in the *Steele* case, that the bill of complaint states a cause of action entitling plaintiff to relief. As other jurisdictional questions were raised in the courts below which have not been considered by the Court of Appeals, the case will be remanded to that court for further proceedings.

Reversed.

MR. JUSTICE MURPHY concurs in the result for the reasons expressed in his concurring opinion in *Steele v. Louisville & Nashville R. Co.*, *ante*, p. 208.

KOREMATSU v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 22. Argued October 11, 12, 1944.—Decided December 18, 1944.

1. Civilian Exclusion Order No. 34 which, during a state of war with Japan and as a protection against espionage and sabotage, was promulgated by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942, and which directed the exclusion after May 9, 1942 from a described West Coast military area of all persons of Japanese ancestry, *held* constitutional as of the time it was made and when the petitioner—an American citizen of Japanese descent whose home was in the described area—violated it. P. 219.
2. The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding. P. 222.

3. Even though evacuation and detention in the assembly center were inseparable, the order under which the petitioner was convicted was nevertheless valid. P. 223.
140 F. 2d 289, affirmed.

CERTIORARI, 321 U. S. 760, to review the affirmance of a judgment of conviction.

Messrs. Wayne M. Collins and Charles A. Horsky argued the cause, and *Mr. Collins* was on the brief, for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Wechsler* and *Messrs. Edward J. Ennis, Ralph F. Fuchs, and John L. Burling* were on the brief, for the United States.

Messrs. Saburo Kido and A. L. Wirin filed a brief on behalf of the Japanese American Citizens League; and *Messrs. Edwin Borchard, Charles A. Horsky, George Rublee, Arthur DeHon Hill, Winthrop Wadleigh, Osmond K. Fraenkel, Harold Evans, William Draper Lewis, and Thomas Raeburn White* on behalf of the American Civil Liberties Union, as *amici curiae*, in support of petitioner.

Messrs. Robert W. Kenney, Attorney General of California, *George Neuner*, Attorney General of Oregon, *Smith Troy*, Attorney General of Washington, and *Fred E. Lewis*, Acting Attorney General of Washington, filed a brief on behalf of the States of California, Oregon and Washington, as *amici curiae*, in support of the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding Gen-

eral of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,¹ and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

" . . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were sub-

¹ 140 F. 2d 289.

stantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude

those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of

whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.²

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation v. Sinclair*, 264 U. S. 543, 547; *Block v. Hirsh*, 256 U. S. 135, 154-5. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U. S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory

² Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, Part II, 608-726; Final Report, Japanese Evacuation from the West Coast, 1942, 309-327; Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d Sess., on H. R. 2701 and other bills to expatriate certain nationals of the United States, pp. 37-42, 49-58.

exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed. Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had

already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear

when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger v. United States*, 284 U. S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case, *post*, p. 283, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion

Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for

action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i. e.*, by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Hirabayashi v. United States*, 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully." *Hirabayashi v. United States*, *supra* at 93; and see *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an

unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations", *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156. To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; 155 U. S. 3, and *Monongahela Bridge Co. v. United States*, 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

MR. JUSTICE ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Hirabayashi v. United States*, 320 U. S. 81,

nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066,¹ which, after stating the reason for issuing the

¹ 7 Fed. Reg. 1407.

order as "protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities," provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent, "from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,² which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion . . . and, in connection therewith, is subject to espionage and acts of sabotage." It states that "as a matter of military necessity" certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that "Such persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

² 7 Fed. Reg. 2320.

On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at some time in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted³ that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander" shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi v. United States*, *supra*.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4,⁴ the General recited that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1, to restrict and regulate such migration"; and ordered that, as of March 29, 1942, "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby

³ 56 Stat. 173.

⁴ 7 Fed. Reg. 2601.

prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct." ⁶

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34 ⁶ providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

⁶ The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

⁷ Fed. Reg. 3967.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102⁷ establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has

⁷ 7 Fed. Reg. 2165.

been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Endo* (post, p. 283) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case.⁸ The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it.

⁸ My agreement would depend on the definition and application of the terms "temporary" and "emergency." No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose. Cf. *Chastleton Corp. v. Sinclair*, 264 U. S. 543.

But the facts above recited, and those set forth in *Ex parte Endo, supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the *Endo* case, *supra*. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact, he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

MR. JUSTICE MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and con-

sideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U. S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell*, 13 Wall. 623, 627-8; *Mitchell v. Harmony*, 13 How. 115, 134-5; *Raymond v. Thomas*, 91 U. S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the

order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than

bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.¹ In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast.² In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,³ or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not

¹ Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. DeWitt. This report is dated June 5, 1943, but was not made public until January, 1944.

² Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739-40 (78th Cong., 1st Sess.):

"I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

³ The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."⁴ They are claimed to be given to "emperor worshipping ceremonies"⁵ and to "dual citizenship."⁶ Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,⁷ together with facts as to

⁴Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, *The Second-Generation Japanese Problem* (1934); Smith, *Americans in Process* (1937); Mears, *Resident Orientals on the American Pacific Coast* (1928); Millis, *The Japanese Problem in the United States* (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

⁵Final Report, pp. 10-11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

⁶Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L. Q. 414, 447-8, and authorities there cited; McWilliams, *Prejudice*, 123-4 (1944).

⁷Final Report, pp. 12-13. We have had various foreign language schools in this country for generations without considering their ex-

certain persons being educated and residing at length in Japan.⁸ It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."⁹ The need for protective custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands."¹⁰ Finally, it is intimated, though not directly

istence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, *Prejudice*, 121-3 (1944).

⁸ Final Report, pp. 13-15. Such persons constitute a very small part of the entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.

⁹ Final Report, p. 10; see also pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, *Prejudice*, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

¹⁰ Final Report, pp. 8-9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1-2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145-7. In this

charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,¹¹ as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.¹² A military judg-

instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, *What About Our Japanese-Americans?* Public Affairs Pamphlets, No. 91, p. 8 (1944).

¹¹ Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See *New York Times*, Sept. 15, 1942, p. 1, col. 3.

¹² Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, *Prejudice*, 126-8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 *Sat. Eve. Post* 24, 66 (May 9, 1942).

ment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.¹⁸

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

¹⁸ See notes 4-12, *supra*.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence."¹⁴ Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,¹⁵ a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It

¹⁴ Final Report, p. vii; see also p. 18.

¹⁵ The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

JACKSON, J., dissenting.

323 U. S.

seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.¹⁶ Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

MR. JUSTICE JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by

¹⁶ During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 *Amer. Journ. of Int. Law* 443, 444-46; House Report No. 2124 (77th Cong., 2d Sess.), 280-1.

residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should

enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is

what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, 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. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more

subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."¹ A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States*, 320 U. S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain *Hirabayashi's* conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language

¹ Nature of the Judicial Process, p. 51.

will do. He said: "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew.*" 320 U. S. at 101. "We decide only the issue as we have defined it—we decide only that the *curfew order* as applied, and at the time it was applied, was within the boundaries of the war power." 320 U. S. at 102. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order.*" 320 U. S. at 105. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

WALLACE CORPORATION *v.* NATIONAL LABOR
RELATIONS BOARD.

NO. 66. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.*

Argued November 15, 16, 1944.—Decided December 18, 1944.

1. The findings of the National Labor Relations Board in an unfair labor practice proceeding that labor organization "A", which the Board had previously certified as collective bargaining representative, had been set up, maintained and used by the employer to frustrate the threatened unionization of its plant by labor organiza-

*Together with No. 67, *Richwood Clothespin & Dish Workers' Union v. National Labor Relations Board*, also on certiorari to the Circuit Court of Appeals for the Fourth Circuit.

12TH STORY of Level 1 printed in FULL format.

The Associated Press

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November 10, 1983, Thursday, AM cycle

SECTION: Domestic News

LENGTH: 760 words

BYLINE: By LISA LEVITT, Associated Press Writer

DATELINE: SAN FRANCISCO

KEYWORD: Japanese Internment

BODY:

A federal judge Thursday vacated the conviction of a Japanese-American who evaded internment during World War II, saying the government used unsubstantiated material, distortions and the racist views of a military commander to justify the detentions.

"This is a day we've waited for for 40 years," said Dale Minami, attorney for defendant Fred Korematsu, one of 120,000 Japanese-Americans ordered interned during World War II.

"Up until now, there has not been a judicial declaration that what was done to Japanese-Americans was wrong and unconstitutional," he said.

U.S. District Judge Marilyn Hall Patel vacated Korematsu's 40-year-old conviction, dismissed the indictment it was based upon and went a step further by accepting his petition.

The petition said the military fabricated evidence of Japanese-American espionage and sabotage and kept that knowledge from the U.S. Supreme Court, which subsequently upheld the convictions of Korematsu and two other men for resisting the wartime order.

"What happened 40 years ago involved my family and my personal life, and I had to do some real deep thinking in order to reopen this case again,"

Korematsu said. "I am very happy I did, because this is important not only for Japanese-American citizens but for all Americans who might get involved in similar conditions."

Last month, the U.S. Justice Department asked that the conviction be vacated, saying, "It is time to put behind us the controversy which led to the mass evacuation" However, it admitted no wrongdoing on the government's part and opposed Korematsu's petition.

The judge told a packed courtroom that the government's "meek" response to the petition "amounted to an admission of error."

The Associated Press, November 10, 1983

The government based the internment on "military necessity," a determination supported by "unsubstantiated facts, distortions and the (opinions) of one military commander whose views were seriously tainted by racism," she said.

The internments, ordered by President Franklin D. Roosevelt, later were defended in a report by Gen. John L. DeWitt, who argued that Japanese aliens and Japanese-Americans were involved in sabotage and espionage.

The Supreme Court upheld the convictions of Korematsu and two other men in 1944, citing "military necessity."

Peter Irons, a constitutional law expert and political science professor at the University of California-San Diego whose research helped revive the case, said Ms. Patel's decision undermines the Supreme Court's ruling.

"I think the significance ... is that (the judge) based her decision on the grounds we raised in our petition; that is, that the government had suppressed, altered and destroyed evidence that if it had been presented to the Supreme Court ... that the court in 1944 would have made a different ruling in Mr. Korematsu's case," said Irons, who used archives and the Freedom of Information Act to unearth proof of the fabricated evidence.

Korematsu, then a 23-year-old welder for a defense contractor in Berkeley, was arrested in May 1942 for failing to report for internment. He was jailed for three months, convicted of a misdemeanor violation of Roosevelt's emergency internment order and later sent to camps in San Francisco and Utah.

"Being an American citizen was not enough," said Korematsu, a slight man with thinning silver-gray hair. "You have to look like one, otherwise you can't tell the difference between loyal and disloyal."

Ms. Patel said the Korematsu case "stands as a caution that in times of war, our institutions should be even more vigilant in protecting the constitutional rights of individuals."

"(The ruling) goes beyond the government's motion, simply saying that we should walk away from this case, that we should let bygones be bygones, and put the court firmly behind the proposition that the government has an ethical duty to present to the court only evidence that is truthful," Irons said.

Ms. Patel said she based much of her decision on the 1982 findings of the Commission on Wartime Relocation and Internment of Civilians, which has recommended the federal government apologize to the internees and pay \$20,000 to each of the approximately 60,000 who are still alive.

The identical cases of two other internees, Gordon K. Hirabayashi in Seattle and Minoru Yasui in Portland, Ore., still are pending, but Minami said Thursday's ruling could have a positive impact on those.

"We see this as a total victory," he said. "We needed this to clear away 40 years of guilt and shame in order to set the historical record straight."

10TH STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1983

November 11, 1983, Friday, PM cycle

SECTION: Domestic News

LENGTH: 309 words

HEADLINE: Judge rules Japanese internment camps illegal

BYLINE: By SUSAN GOLDFARB

DATELINE: SAN FRANCISCO

KEYWORD: Internment

BODY:

A federal judge has ruled the internment of more than 100,000 Japanese-Americans during World War II was illegal, throwing out the 40-year-old conviction of a man who refused to report to a camp.

"I still remember 40 years ago when I was handcuffed and convicted as a criminal here in San Francisco," Fred Korematsu, 64, San Leandro, Calif., told the packed courtroom Thursday.

"As an American citizen being put through this shame and embarrassment, as for all those Japanese-Americans who were interned and suffered the same embarrassment, we can never forget this incident as long as we live."

U.S. District Judge Marilyn Hall Patel ruled the internment of Japanese-Americans was illegal and dropped charges against Korematsu.

"The Korematsu conviction stands for very little, if anything, in the way of precedent," the judge said in removing the conviction. "Let it stand instead, as a caution that unyielding vigilance be taken in protecting all U.S. citizens in times of war."

"In times of distress, the shield of military protection should not be used as a vehicle for abuse of our citizens."

On Oct. 4, the government agreed to overturn Korematsu's conviction and dismiss the indictment against him without confessing any wrongdoing. But Korematsu demanded his right to have his day in court.

Shortly after Japan attacked Pearl Harbor in 1941, the government rounded up Japanese-Americans and held them in internment camps.

"The government said being an American citizen was not enough. You had to look like an American citizen," attorney Dale Minami argued for Korematsu. "I would like to see the government correct this wrong so that this never can happen again."

Similar suits brought in Seattle by University of Alberta professor Gordon Hirabayashi and Minoru Yasui in Portland, Ore., are pending in federal courts.

8TH STORY of Level 1 printed in FULL format.

The Associated Press

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November 11, 1983, Friday, PM cycle

SECTION: Domestic News

LENGTH: 615 words

HEADLINE: Government Based Internment on Distortions, Judge Says

BYLINE: By LISA LEVITT, Associated Press Writer

DATELINE: SAN FRANCISCO

KEYWORD: Japanese Internment

BODY:

World War II ended in 1945, but it took almost 40 years for Fred T. Korematsu to be cleared of a misdemeanor that led the U.S. Supreme Court to approve the legality of locking up 120,000 Japanese-Americans during that war.

Korematsu, 64, puffed on a pipe and quietly accepted congratulations Thursday after U.S. District Judge Marilyn Patel not only vacated his misdemeanor conviction, but accepted his petition charging the government had falsified evidence to gain the high court ruling.

The ruling was hailed as the first judicial finding that the internment of Japanese-Americans was both unjust and illegal.

Korematsu, now a draftsman and welder in San Leandro, recalled the "shame and embarrassment" of the internment ordered by President Franklin D. Roosevelt 2 1/2 months after the bombing of Pearl Harbor on Dec. 7, 1941.

"Being American was not enough," said Korematsu, who was 23 when he refused to report for internment, thus violating a military order made possible by Roosevelt's directive. "You have to look like one, otherwise you can't tell the difference between loyal and disloyal."

Ms. Patel said she drew heavily on the 1982 findings of the Commission on Wartime Relocation and Internment of Civilians. The panel recommended a federal apology and a \$20,000 payment to each of an estimated 60,000 surviving internees.

But "up until now, there has not been a judicial declaration that what was done to Japanese-Americans was wrong and unconstitutional," said Dale Minami, Korematsu's lawyer.

The Justice Department in October urged vacating the petition, saying, "It is time to put behind us the controversy." But it admitted no government wrongdoing and opposed Korematsu's petition.

The Associated Press, November 11, 1983

That "meek" response "amounted to an admission of error," Ms. Patel said.

Korematsu charged that the military fabricated evidence of Japanese-American espionage and sabotage. Further, he said, the military kept that knowledge from the Supreme Court, which in 1944 cited "military necessity" in upholding the convictions of Korematsu and two other men for resisting the order.

Ms. Patel said the "military necessity" was supported by "unsubstantiated facts, distortions and the (opinions) of one military commander whose views were seriously tainted by racism."

Gen. John L. DeWitt had justified the order in a report saying Japanese aliens and Japanese-Americans were involved in sabotage and espionage.

Korematsu, who was then working as a welder for a defense contractor in Berkeley, Calif., was arrested in May 1942 for failing to report for internment. He was jailed for three months, convicted of a misdemeanor and later sent to camps in San Francisco and Utah.

The identical cases of two other internees, Gordon K. Hirabayashi in Seattle and Minoru Yasui in Portland, Ore., still are pending, but Minami said Thursday's ruling could have a positive impact on those.

Peter Irons, a constitutional law expert and political science professor at the University of California-San Diego, whose research breathed new life into the case, said the decision undermines the Supreme Court's ruling.

Irons said the significance was that Ms. Patel "based her decision on the grounds we raised in our petition; that is, that the government had suppressed, altered and destroyed evidence that if it had been presented to the Supreme Court ... that the court in 1944 would have made a different ruling in Mr. Korematsu's case."

Korematsu said he "had to do some real deep thinking in order to reopen this case again. I am very happy I did, because this is important not only for Japanese-American citizens but for all Americans who might get involved in similar conditions."

14TH STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1983

November 10, 1983, Thursday, BC cycle

SECTION: Regional News

DISTRIBUTION: Washington, Oregon, California

LENGTH: 560 words

BYLINE: By SUSAN GOLDFARB

DATELINE: SAN FRANCISCO

KEYWORD: Internment

BODY:

A federal judge Thursday wiped out the conviction of a San Leandro man who refused to report to internment camp during World War II, ruling the lockup of more than 100,000 Japanese Americans was illegal.

"I still remember 40 years ago when I was handcuffed and convicted as a criminal here in San Francisco," 64-year-old Fred Korematsu told U.S. District Judge Marilyn Hall Patel and a courtroom jammed with more than 200 spectators. "As an American citizen being put through this shame and embarrassment, as for all those Japanese Americans who were interned and suffered the same embarrassment, we can never forget this incident as long as we live."

"This incident deeply affected me and my family," Korematsu said. "It took deep thinking in order to reopen the case and today I am very happy I did. This victory is not just for Japanese Americans, but for all Americans who may find themselves in a similar condition."

Similar suits brought in Seattle by University of Alberta professor Gordon Hirabayashi and Minoru Yasui in Portland, Ore., were pending in federal courts.

On Oct. 4, the government agreed to wipe out Korematsu's conviction and dismiss the indictment against him without confessing any wrongdoing, but he insisted he wanted his day in court.

"The reason there was no confession of wrongdoing is that the case is 40 years old," said Chief Assistant U.S. Attorney William T. McGivern. "It's just too hard to go back and put the whole package back together again."

But the judge considered the government's willingness to erase the conviction and dismiss the indictment against Korematsu as a non-specific confession. Korematsu specifically argued against the government's mistaken belief that ethnicity determined loyalty and said there was no military necessity to hold hundreds of thousands of Japanese Americans in concentration camps since they had committed no threat.

The government herded up Japanese Americans and held them in internment camps during World War II because the United States was at war with Japan, an enemy that had bombed Hawaii's Pearl Harbor.

Proprietary to the United Press International, November 10, 1983

"The government said being an American citizen was not enough; you had to look like an American citizen," attorney Dale Minami argued for Korematsu. "I would like to see the government correct this wrong so that this never can happen again."

"This is not merely a 40-year-old misdemeanor case as the government characterizes it," Minami said in a passionate plea for a judgment of government wrongdoing. "It is a monumental precedent which affected deeply and irrevocably the lives of hundreds of thousands of Japanese Americans and their friends."

"This was not an unfortunate accident," he said. "This was not a mistake. This was a preconceived and calculated effort to curfew, exclude and imprison people on the basis of race."

"We want to expose the real and substantial reasons so this tragedy will never be repeated."

The judge agreed.

"The Korematsu conviction stands for very little, if anything, in the way of precedent," Judge Patel said in erasing the conviction from the books. "Let it stand instead, as a caution that unyielding vigilance be taken in protecting all U.S. citizens in times of war. In times of distress, the shield of military protection should not be used as a vehicle for abuse of our citizens."

MEMORANDUM TO DAVID B. WALLER

FROM: CLAUDIA McMURRAY

SUBJECT: Department of Justice Analysis of S. 2116, A Bill "To Accept and to Implement the Recommendations of the Commission on Wartime Relocation and Internment of Civilians."

You have received a copy of a Department of Justice memorandum which analyzes S. 2116, legislation introduced by Senator Matsunaga ^{to adopt and implement} ~~adapting~~ the findings of the Commission on Wartime Relocation and Internment of Civilians. The DOJ memorandum limits its analysis to subsections (a), (b) and (c) of section 202 of the legislation which provide that:

- (a) the Attorney General shall review all cases in which United States citizens and permanent resident aliens of Japanese ancestry were convicted of violations of laws of the United States, including convictions for violations of military orders, where such convictions resulted from charges filed against such individuals during the evacuation, relocation and internment period;
- (b) based on his review, the Attorney General shall recommend individuals for pardon consideration by the President; and
- (c) the President is requested to offer pardons to those individuals recommended by the Attorney General pursuant to subsection (b).

The Department of Justice memorandum raises a number of ^{objections to} ~~problems with~~ the legislation. The objections of interest to this office are summarized below:

- (1) Section 202(a) should be redrawn to ensure that only the cases of those living ~~should~~ be reviewed.
- (2) Only convictions for misdemeanors should be reviewed.
- (3) Section 202(a) should be amended so that it contemplates a blanket presidential pardon by proclamation, rather than a case-by-case review of all those convicted.
- ^{Sub} (4) ^{And} ~~Sections~~ 202(b) and ~~section 202~~ (c) should expressly state that any pardon which may be recommended and offered would be based on forgiveness, rather than innocence. Any language making reference to the pardon should avoid a confession of guilt by the United States Government.

These recommendations are identical to those set forth in ^{previous} ~~the~~ Department of Justice memoranda ~~sent to this office, as the subject.~~

↳ ~~which were~~ sent to this office, concerning a presidential pardon of those convicted of violating wartime restrictions.

98TH CONGRESS
1ST SESSION

S. 2116

**To accept the findings and to implement the recommendations of the Commission
on Wartime Relocation and Internment of Civilians.**

IN THE SENATE OF THE UNITED STATES

NOVEMBER 17 (legislative day, NOVEMBER 14), 1983

Mr. MATSUNAGA (for himself, Mr. INOUE, Mr. STEVENS, Mr. MURKOWSKI, Mr. CRANSTON, Mr. MELCHER, Mr. METZENBAUM, Mr. RIEGLE, Mr. TSONGAS, Mr. MOYNIHAN, Mr. LEVIN, Mr. PROXMIRE, Mr. DENTON, and Mr. D'AMATO) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To accept the findings and to implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

FINDINGS AND PURPOSE

4 SECTION 1. (a) FINDINGS.—The Congress finds that—

5 (1) the findings of the Commission on Wartime
6 Relocation and Internment of Civilians, established by
7 the Commission on Wartime Relocation and Intern-
8 ment of Civilians Act, accurately and completely de-

1 (b) RECOMMENDATIONS.—Based upon the review re-
2 quired by subsection (a), the Attorney General shall recom-
3 mend to the President for pardon consideration those convic-
4 tions which the Attorney General finds were based on a re-
5 fusals by such individuals to accept treatment that discrimi-
6 nated against them on the basis of race or ethnicity.

7 (c) PARDONS.—In consideration of the findings con-
8 tained in this Act, the President is requested to offer pardons
9 to those individuals recommended by the Attorney General
10 pursuant to subsection (b).

11 CONSIDERATION OF COMMISSION FINDINGS

12 SEC. 203. Departments and agencies of the United
13 States Government to which eligible individuals may apply
14 for the restitution of positions, status or entitlements lost in
15 whole or in part because of discriminatory acts of the United
16 States Government against such individuals based upon their
17 race or ethnicity and which occurred during the evacuation,
18 relocation, and internment period shall review such applica-
19 tions for restitution of positions, status or entitlements with
20 liberality, giving full consideration to the historical findings of
21 the Commission and the findings contained in this Act.

22 TRUST FUND

23 SEC. 204. (a) ESTABLISHMENT.—There is hereby es-
24 tablished in the Treasury of the United States the Civil Lib-
25 erties Public Education Fund, to be administered by the Sec-

1 United States, or other action made by or on
2 behalf of the United States or its agents,
3 representatives, officers, or employees re-
4 specting the exclusion, relocation, or deten-
5 tion of individuals on the basis of race;

6 (2) the term "Fund" means the Civil Liberties
7 Public Education Fund established in section 204;

8 (3) the term "Board" means the Civil Liberties
9 Public Education Fund Board of Directors established
10 in section 206;

11 (4) the term "evacuation, relocation, and intern-
12 ment period" means that period beginning on Decem-
13 ber 7, 1941, and ending on June 30, 1946; and

14 (5) the term "Commission" means the Commis-
15 sion on Wartime Relocation and Internment of Civil-
16 ians, established by the Commission on Wartime Relo-
17 cation and Internment of Civilians Act.

18 CRIMINAL CONVICTIONS

19 SEC. 202. (a) REVIEW.—The Attorney General shall
20 review all cases in which United States citizens and perma-
21 nent resident aliens of Japanese ancestry were convicted of
22 violations of laws of the United States, including convictions
23 for violations of military orders, where such convictions re-
24 sulted from charges filed against such individuals during the
25 evacuation, relocation, and internment period.

S.2116: "To accept the findings and to
implement the recommendations of the
Commission on Wartime Relocation and
Internment of Civilians"

April 4, 1984

Richard K. Willard
Acting Assistant Attorney
General, Civil Division

David C. Stephenson
Acting Pardon Attorney

Att'n: Karen Hendrick

This is in response to a legislative report referral from the Office of Legislative Affairs dated February 29, 1984, requesting that the Pardon Attorney advise the Civil Division concerning S.2116, a bill "to accept the findings and to implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians". Senator Roth, as Chairman of the Senate Committee on Governmental Affairs, has requested the Department's views to assist the Committee in its study of the measure.

Recommendations: 1. It is strongly recommended that the Department oppose sections 202(a) and 202(b), which require the Attorney General to review certain criminal convictions with a view toward pardon and to submit pardon recommendations to the President in certain cases. First, such action would constitute an impermissible intrusion by the Congress into the pardon process, a function committed to the exclusive responsibility of the Chief Executive by Article II, Section 2, Clause 1 of the Constitution. Secondly, sections 202(a) and 202(b) are ambiguous and/or silent as to the type of pardons contemplated (i.e., whether based on forgiveness or innocence), the specific classes of individuals and convictions affected, whether the recipients must be living to receive consideration, and the nature of the pardon proceedings to be employed (e.g., formal petitions with background investigations or a Presidential proclamation).

2. If the Committee insists on retaining section 202, we strongly recommend that the Constitutional defects be removed and the ambiguities resolved as indicated in the Discussion section below.

Summary: S.2116 finds that the evacuation, relocation and internment of U.S. citizens and permanent resident aliens of Japanese ancestry, as well as individuals of Aleut ancestry who were removed from the Aleutian and the Pribilof Islands during World War II, was fundamentally unjust. It extends an apology on behalf of the Nation and provides for restitution. With regard to pardon, section 202(a) commands the Attorney General to review all cases of United States citizens of Japanese ancestry and resident Japanese aliens who were convicted of violations of laws of the United States during their evacuation, relocation and internment. Secondly, based upon a review of these cases, section 202(b) commands the Attorney General to recommend that the President pardon any of the individuals whose convictions were based on a refusal by them to accept discriminatory treatment. Finally, in section 202(c), the President is requested to offer pardons to those individuals recommended by the Attorney General.

Effect on Existing Law: Not applicable.

Discussion: Sections 202(a) and 202(b) as presently worded raise a substantial Separation of Powers issue. Article II, Section 2, Clause 1 of the Constitution grants to the President a virtually absolute pardoning authority, which extends to all offenses against the United States. Generally, the President exercises the power based upon formal application and the recommendation of the Attorney General, now the Associate Attorney General by assignment. The Office of the Pardon Attorney receives and reviews all petitions for Executive clemency, initiates the necessary investigations and prepares the recommendation of the Associate Attorney General to the President. Although not required to do so, the President has directed the promulgation of Rules Governing the Consideration of Petitions for Executive Clemency. The current rules were approved by the President on May 5, 1983, are published in 28 Code of Federal Regulations 1.1 et seq. and serve as internal advisory guidelines for officials concerned with the consideration of clemency petitions.

The Associate Attorney General's advisory function (28 CFR 0.36) in connection with the consideration of all forms of Executive clemency, including pardon, commutation (reduction) of sentence, remission of fine and reprieve, and the President's ultimate decision to grant or deny Executive clemency, are wholly discretionary. Department of Justice officials involved in discharging this function act solely as confidential advisors to the President in the exercise of the pardoning power, and not in fulfillment of any statutory mandate to conduct the kind of proceedings contemplated in the interdependent provisions of section 202 of S.2116. It should be noted generally that the granting of a pardon is an act of grace of the President, and the Constitution does not invest the legislature with any authority in the pardoning process. Moreover, it is well settled that the President's authority to grant pardons may not be limited by legislative restriction. Schick v. Reed, 419 U.S. 256 (1974).

In view of the foregoing, if enactment of sections 202(a) and 202(b) is deemed necessary and desirable, at a minimum they should be redrafted to supplant the verb "shall" on line 19, page 7, and line 2, page 8, with the phrase "is requested to". Section 202(c) merely requests the President to exercise his pardon power and therefore does not possess the Constitutional defects of subsections (a) and (b).

Apart from the Separation of Powers issue, the language of section 202 is ambiguous in four important respects. Section 202(a) directs the review of "all cases in which United States citizens and permanent aliens of Japanese [eq.] ancestry were convicted of violations of laws of the United States, including convictions for violations of military orders, ... during the evacuation, relocation and internment". First, the class of individuals whose cases are to be reviewed is too vaguely defined. The present wording of section 202(a) could be interpreted to require the review of not only the cases of those living but also the cases of those who are deceased. Secondly, provision for the review of "all cases" involving violations of "laws of the United States ... [and] military orders" is overly broad. This language may be interpreted as requiring the review of both felony and misdemeanor offenses, as well as requiring the review of any crime committed during the evacuation, relocation and internment period, such as murder, extortion, kidnapping, theft, counterfeiting and other offenses which may have been committed by members of the class on a Government reservation. Third, the language of section 202(a) fails to specify the nature of the pardon proceedings to be employed for case review and appears to disregard the President's intention that pardon proceedings be conducted in accordance with the rules he has

approved. Fourth, the use of the word "pardon" on line 3, page 8, and "pardons" on line 8, page 8, is ambiguous in that any Presidential relief extended pursuant to the Act could be interpreted as being based on either forgiveness or innocence.

First, we recommend that section 202(a) be redrawn to ensure that only the cases of those persons convicted of the offenses specified therein who are presently living will be reviewed. For both legal and policy reasons, it has been a long established practice not to accept or process petitions for the granting of posthumous pardons. The legal basis of the practice is in large part the concept that a pardon, like a deed, must be accepted by the person to whom it is directed. Acceptance, of course, is impossible when the recipient is deceased. See U.S. v. Wilson, 7 Pet. 160 (1833); Burdick v. U.S., 236 U.S. 79 (1915); Waldrim v. U.S., 7 Ct. Cl. 595 (1871); Sierra v. U.S., 9 Ct. Cl. 224 (1873); 11 Op. A.G. 35 (1864). The policy basis of the practice stems in part from the legal doubt as to the power of the President to grant posthumous pardons, and also reflects the difficulties inherent in processing posthumous applications as well as the view that the processing of such applications would impose an additional burden upon the Government not justified in terms of the benefit conferred upon the deceased individual's family or friends.

Second, we recommend that the type and specific nature of the convictions requiring review should be clearly defined consistent with the purposes of the Act. A fair reading of S.2116 indicates that the convictions should be identified solely as those resulting from violations of the wartime restrictions of Executive Order 9066. Accordingly, we recommend that the language affirmatively exclude all violations of United States laws and military orders except the still effective misdemeanor convictions for violations of Executive Order 9066, which was formally rescinded by President Ford in 1976. (It appears that about 39 misdemeanor violators of Executive Order 9066 are still living.)

Third, pardon proceedings usually are initiated by the submission of a formal petition addressed to the President (28 CFR 1.1) which is investigated and considered by the Department of Justice (28 CFR 1.6). Submission of an individual petition not only facilitates review of the case but also indicates a willingness on the part of the applicant to accept an offer of pardon from the President. However, a formal petition is not indispensable and, considering the age of the convictions involved and the difficulty in obtaining uniformly complete and accurate information in each case, we urge that section 202(a) be

amended to make clear that it does not contemplate the case-by-case review usually employed in pardon proceedings but rather the granting of pardon by proclamation to all of the offenders in the defined class. If this approach is adopted, section 202(c) should suggest that any pardon granted be in the form of a self-executing Presidential proclamation to take effect upon issuance. This would be similar in form to President Carter's proclamation in 1977 granting pardons to Vietnam-era Selective Service violators.

Fourth, we recommend that section 202(b) and section 202(c) expressly state that any pardon which may be recommended and offered would be based on forgiveness. As presently worded, the proposed legislation appears to be predicated on the assumption that the individuals affected were unjustly convicted and therefore should be vindicated by pardon. In the usual case, a pardon is not granted based on innocence. Rather, it serves as a symbol of forgiveness and is useful in removing the stigma incident to conviction, restoring basic civil rights and facilitating restoration of professional or other licenses that may have been lost by reason of the conviction. We would suggest that any language making reference to pardon contained in either legislation or a Presidential pardon proclamation be carefully chosen to avoid being misinterpreted as a confession of guilt by the Government and, in any event, not go beyond the rather strong language used in President Ford's 1976 proclamation formally rescinding Executive Order 9066, which described the whole episode as a "national mistake" and a "setback to American principles".

In summary, we object to section 202(a) and (b) in their present form as an unconstitutional invasion of the President's pardon authority and as vague and uncertain in their application. However, if section 202 is retained by the Senate Committee, it should be revised to satisfy the considerations mentioned above. In commenting on section 202, we have made no attempt to evaluate S.2116 as a whole and offer no recommendation for or against the proposed legislation in its entirety.

cc: J.E. Perkins
Office of Legislative Affairs
Rm. 1139, Main Justice

bcc: David Waller
Senior Associate Counsel to
the President

[Fred] Korematsu v. U.S.

to erase stain of ~~Jap~~ internment
- welder at ^{Oakland} shipyard - born in U.S. by Japanese parents

Korematsu → tried to avoid the evacuation order → moved into hotel + tried to pass as chimney
was turned in when spotted at drug store.
Was put in jail - confessed he was

Edward Ennis → Head of DOJ Alien Enemy Unit → we (DOJ, A/G) felt no risk

Lieutenant General John DeWitt - concerned there was ^(security) risk

2 others

- one took same stand on the evacuation order

New Yasui - atty + in Army

All convicted of violating the order

Appealed all way to S. Ct. + lost

40 yrs later atty Peter Inoué

→ discovered that govt's own lawyers
~~discovered~~ ^{learned} that

Moved to vacate the conviction
DeWitt's security ~~etc~~ threat claims justifying the order was false.

Hoover indicated FBI had no evidence supporting
necessity of using Japanese-Americans

Originally a footnote in the ^{you to} Kono memo brief indicated
the lack of evidence supporting the evacuation. But
removed before filing ~~it~~ under pressure from military.
If the footnote had remained in the Kono memo
brief

→ our cases should be erased

* Last Nov, Fed Judge in San Fran
1942 conviction thrown out → subject to appeal
Judge said the by the U.S.



U.S. Department of Justice

Pardon Attorney

Washington, D.C. 20530

February 24, 1984

MEMORANDUM FOR: Honorable David Waller
Senior Associate Counsel to the President

FROM: *DS* David C. Stephenson
Acting Pardon Attorney

SUBJECT: Approach to Matters concerning the World War II
Relocation and Internment of Japanese Americans

I am forwarding herewith in accordance with our discussion a copy of our entire file on the subject to assist you in developing recommendations as to the options available to the President.

There are three cases pending involving coram nobis petitions in Federal district courts on the West Coast seeking to collaterally attack the misdemeanor convictions of Messrs. Korematsu, Hirabayashi and Yasui. There is also pending in the District Court for the District of Columbia a class action, Hohri (or Hori?) v. U.S., in which the plaintiffs seek damages for alleged wrongful acts against Japanese-Americans. I talked this morning to Victor Stone, the Department's principal attorney in the three West Coast cases and obtained the following status report on those three cases:

Korematsu: The Government moved to dismiss the conviction and underlying indictment and offered to dismiss the convictions of others similarly situated if they would come forward. The U.S. district judge orally ruled that she would issue an order vacating the conviction and underlying indictment and also (against the Government's recommendation) would issue a written opinion giving her reasons. I understand that the conviction and indictment have been dismissed but no opinion has been issued to date. However, the judge has indicated that she will say that the Government's action is tantamount to a confession of error.



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Yasui: As requested by the Government, the court dismissed the conviction and indictment. He refused to issue an opinion giving his reasons.

Hirabayashi: The court has not ruled on the Government's motion to dismiss the conviction and indictment.

It appears that the number of living Japanese-Americans convicted of misdemeanor violations of Executive Order 9066 is small, perhaps 39 or 40. Apparently none of this group other than the three mentioned above has contested his conviction.

Included in the attached file is a proposed memorandum prepared in August 1983 for the signatures of Paul McGrath and Lowell Jensen to the Attorney General. The memorandum includes a recommendation that the President issue a blanket pardon to all those living Japanese-American citizens who were convicted of violating wartime restrictions. The pardon would be in the form of a proclamation and would not be based on innocence. (I have not been able to ascertain whether this specific memorandum was signed and sent to the Attorney General).

Particular attention is invited to the following memoranda in the attached file:

Memorandum dated August 8, 1983 from Mark Richard to Lowell Jensen.

Memorandum dated August 8, 1983 from David Stephenson to Jay Stephens.

Memorandum dated August 4, 1983 from Greg Walden to Jay Stephens with proposed memorandum to Attorney General attached.

Memorandum dated August 2, 1983 from David Stephenson to Lowell Jensen.

Memorandum dated July 19, 1983 from Lawrence Lippe to Lowell Jensen.

Memorandum dated July 5, 1983 from David Stephenson to Victor Stone.

Much of the remaining material is provided by way of general background.

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Subject

Legal Questions Arising From the June 1983
Recommendation No. 2 of the Commission on
Wartime Relocation and Internment of Civilans

Date

10 JUL 1983

VStone:skb

To

D. Lowell Jensen
Associate Attorney
General Designee

From

Lawrence Lippe, Chief
General Litigation and
Legal Advice Section
Criminal Division

This memorandum deals with several issues that might arise should the Government chose to forgive or excuse, by pardon or judicial action, certain World War II military-related convictions under P.L. 77-503. That law punished intentional violations of duly promulgated military regulations as criminal misdemeanors and subjected violators to one year of imprisonment and a \$1,000 fine.

1. THE SCOPE OF THE PROBLEM AND THE UNAVAILABILITY OF POSTHUMOUS RELIEF.

The Commission on Wartime Relocation and Internment of Civilians, created by P.L. 96-317, recommended in Recommendation No. 2 that "the President pardon 'those' who were convicted of violating the statutes" imposing a curfew on American citizens on the basis of their ethnicity and requiring the ethnic Japanese to leave designated areas of the West Coast..." The Commission further recommended that "the Department of Justice review other wartime convictions of the ethnic Japanese and recommend to the President that he pardon 'those' whose offenses were grounded in a refusal to accept treatment that discriminated among citizens..." (emphasis added) Presumably, since all "those" to be pardoned have an objection based upon the discrimination among citizens, the Commission apparently only meant to recommend pardons for the American citizens of Japanese descent convicted of curfew or evacuation violations, i.e., only about 39 of the roughly 70,000 citizens actually evacuated. 1/ Moreover, since

1/ Commission Recommendation No. 2 does not contain language similar to Commission Recommendation No. 4 which specifically addresses both "American citizens of Japanese ancestry and Japanese resident aliens." If the roughly 6 Japanese aliens convicted under P.L. 77-503 were also pardoned, no obvious basis would exist to distinguish the roughly 35 other similarly situated German and Italian aliens convicted during the same period. (These estimates have been compiled from old Department of Justice files.)

1798, see 1 Stat. 577, aliens who are citizens, denizens, subjects or natives likely to favor or show allegiance to countries with whom we are at war have always been subject to summary expropriation of their persons and property. 50 U.S.C. 21, c.f. United States ex rel. D'Esquiva v. Uhl, 137 F.2d 903, 904 (2d Cir. 1943).

Of the group of 39 U.S. citizens of Japanese descent originally convicted of curfew or evacuation violations, we will presume for the purpose of this memorandum that most of those individuals are still alive. To the extent that particular defendants have died, their death moots any new judicial collateral attack on their conviction ^{2/} and any exercise of the pardon power. See the memoranda of May 12, 1976, from the Deputy Attorney General and of August 1956 from the Assistant Attorney General, Office of Legal Counsel, which conclude that the President does not have the power to grant posthumous pardons, Attachment A.

2. THE PARDON POWER.

As the attached materials from the Office of the Pardon Attorney show, there are two types of pardons which could be issued and two different methods to accomplish those results.

The standard "full, complete and unconditional pardon" does not connote innocence but rather assumes guilt and a grant of forgiveness by the President. Consequently, it does not serve to terminate a pending collateral attack on the validity of the underlying conviction unless the pardon is accepted by the recipient. Burdick v. United States, 236 U.S. 79, 91 (1914); and see Bjerkan v. United States, 529 F.2d 125, 126-128 & n.2 (7th Cir. 1975). The pardon also does not operate to expunge the record of conviction, although it may be useful "in removing the stigma incident to convictions." Memorandum of David C. Stephenson, Acting Pardon Attorney, Attachment B. Approximately 100 pardons of this type are granted each year.

A second distinct type of pardon is one which specifically recites that it is granted "on the grounds of innocence." The last such pardon of this type was issued to Carl H. Buck in 1965 (Attachment C). If properly worded, it allows the recipient to sue the United States for up to \$5,000 if the recipient has been sentenced to and served a term of imprisonment, 28 U.S.C. 2513. Pretrial detention alone does not trigger the statute, Ekberg v.

^{2/} Death pending direct review of a criminal conviction abates the appeal and requires dismissal of any petition for certiorari, Dove v. United States, 423 U.S. 325 (1976); Dunham v. United States, 401 U.S. 481, 483 (1971). Since there are no possible continuing "adverse collateral legal consequences" after death, Carafas v. La Vallee, 391 U.S. 234 (1968); Sibron v. New York, 392 U.S. 40, 55 (1968), any new collateral attack on the conviction of a dead person should be dismissed as moot.

United States, 76 F. Supp. 99, United States v. Keegan, 71 F. Supp. 623, 633 (S.D.N.Y. 1947)). 3/

Typically pardons are considered after an individual applicant submits a petition and supporting information which may be investigated by the FBI, 28 C.F.R. 1.1, 1.6 (1983) (Attachment D). If the Associate Attorney General (with the assistance of the Pardon Attorney) on behalf of the Attorney General, 28 C.F.R. 0.36 (1983), recommends to the President that a pardon be granted and the recommendation is accepted, then a "warrant of pardon" is mailed to the petitioner, 28 U.S.C. 1.7 (1983).

A second type of pardon-granting procedure is also available and was utilized by President Jimmy Carter. On January 21, 1977, his second day in office, he issued a blanket pardon (not on grounds of innocence) to all persons who committed nonviolent violations of the Selective Service Act between August 4, 1964, and March 28, 1973, and who were not Selective Service employees. The size of the class of people pardoned and their individual identities were not predetermined before issuance of Presidential Proclamation No. 4483 which immediately pardoned them all. If individual class members desired a certificate of pardon, they were required to make a written application to the Department. See, the redraft of § 1-3.108 of the U.S. Attorneys' Manual (Attachment E); Proclamation 4483 (1977) (Attachment F); and Executive Order 11967 (1977). 4/ President Truman also issued pardon proclamations, on December 24, 1945, and December 24, 1952, (Attachments H & I), granting pardons (not on grounds of innocence) to certain persons who had served in the armed forces. To date, we have been unable to find any blanket pardon proclamation issued on grounds of innocence.

While it amounts to something less than issuing a posthumous pardon, Presidents have written posthumous letters containing ceremonial apologies and expressions of support to relatives of deceased individuals. See the letter of President Carter dated July 24, 1979, to Dr. Richard Mudd (Attachment J). Indeed, a prior ceremonial apologetic statement on this very subject, the World War II internment of Americans of Japanese descent, was issued by President Ford on February 19, 1976, Presidential Proclamation 4417 (Attachment K). There, President Ford variously described this event as a "national mistake", a "setback to fundamental American principles," "indignities suffered by those [Japanese Americans] on our mainland," and a "tragedy." He further stated, "we now know what we should have known then -- not only was that evacuation wrong, but

3/ Our best estimate is that about 33 U.S. citizens of Japanese descent might be in a position to sue for \$5,000 if they are still alive and were now pardoned for innocence.

4/ Neither the Office of Legal Counsel nor the Office of the Pardon Attorney have any legal memoranda concerning the lawfulness or appropriateness of the blanket pardon granted by Proclamation 4483.

Japanese-Americans were and are loyal Americans." (emphasis added) Petitioner Korematsu may attempt to use this statement against us in the coram nobis proceeding.

3. PROSECUTORIAL POWER TO DISMISS INDICTMENTS AFTER CONVICTION

In Rinaldi v. United States, 434 U.S. 22, 25 n.8 (1977), the Supreme Court held that the Government's motion to dismiss a prosecution was timely even when first raised by the Solicitor General in response to a petition for certiorari after the trial and direct appeal had been concluded. The Court stated:

*** When the Solicitor General has discovered a violation [of the Petite policy] in a case pending before this Court, he has sought to remedy it by moving to have the case remanded to allow the Government to dismiss the indictment. Exercising our power to afford relief which is "just under the circumstances," 28 U.S.C. § 2106, we have granted the Government's motion on several occasions. (citations omitted)

The Government's power to dismiss the indictment was not held to be dependent on whether or not it was exercised before conviction or before the imposition or execution of sentence. Accordingly, there is no logical reason that an even later discovery of a Petite violation, or correction by the Government of another similar problem which served the "public interest," Rinaldi v. United States, *supra*, 434 U.S. at 29, at a time after the denial of a defendant's certiorari petition, would not be correctible on collateral attack or in a post-conviction motion to withdraw a guilty plea under Rule 32(d), Fed. R. Crim. P. Compare, United States v. Watson, 548 F.2d 1058, 1063-1064 (D.C. Cir. 1977) (Post trial Rule 32(d) jurisdiction coextensive with 28 U.S.C. § 2255 jurisdiction); United States v. Cariola, 323 F.2d 180, 183 (3rd Cir. 1963) (coram nobis petition to vacate 24 year old judgment of conviction not time barred); Cf. Hiss v. United States, 542 F. Supp. 973, 986 (S.D.N.Y.) (coram nobis petition to vacate 28 year old conviction).

In other words, if there is any basis now for jurisdiction in the Federal courts, then it is mostly likely that the prosecutor has the power to move (in the court which issued and retains power over the judgment) to dismiss the underlying indictment. 5/ Such action by the prosecutor is presumptively

5/ In the Korematsu petition which has been filed in the Northern District of California, the collateral attack petition alleges coram nobis jurisdiction under 28 U.S.C. 1651. The question of jurisdiction turns on the existence at this time of continuing "adverse legal consequences" from that 40 year old conviction. While we are ready to contest Korematsu's assertion of jurisdiction in this regard, see *infra* 6-7, our success on this jurisdictional issue is not assured. Moreover, if the Government did not contest such coram nobis jurisdiction, it is likely that the courts would not independently raise any objection to it.

correct and "the motion should be granted unless the trial court has an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest." United States v. Hamm, 659 F.2d 624, 631 (5th Cir. 1981) (en banc).

We have found no authority for the notions either that a pardon must, by necessity, precede or accompany a prosecutor's post-conviction motion to dismiss an indictment, or that old information and indictments from several districts could be dismissed by the declaratory action of a single district court other than that in which each particular information or indictment was originally filed. The caselaw developed in collateral attacks brought by defendants suggests that the only venue available to attack the old judgments is in each original sentencing district. Cf., 18 U.S.C. § 2255 ¶1 and Rule 4(a), §§ 2255 Rules.

4. A SUMMARY OF THE GOVERNMENT'S ANTICIPATED RESPONSE IN KOREMATSU V. UNITED STATES

The Korematsu petition alleges newly discovered exculpatory historical facts, allegedly improperly suppressed by the Army at the time of the federal district court trial in 1942, and again by the Department of Justice at the time of the Supreme Court review in 1943 and 1944. Allegedly these facts would have shown no military necessity for the 1942 military exclusion order that was violated. The Supreme Court upheld this conviction after finding that there was a rational basis for the curfew and mass evacuation of 110,000 aliens and citizens of Japanese descent from parts of four western states as ordered by the military. Hirabayashi v. United States, *supra*, 320 U.S. 81, 99 (1943); Korematsu v. United States, *supra*, 323 U.S. 214, 218 (1944). The Supreme Court went on to hold, however, in Ex Parte Endo, 323 U.S. 283 (1944) that Congress had not authorized the internment of citizens after they had been excluded from this military zone, and such internment was, therefore, unlawful.

The Government's anticipated response to the Korematsu petition, which is due to be filed on August 29, 1983, will make four main arguments. 6/

Initially we will contend that this petition states no sufficient reason to justify why the petition was filed at this late date. Assuming *arguendo* that the substantive allegations are all true, which we dispute *infra* 10-11, every one these substantive claims was a matter of public knowledge, at least by 1949 when Morton Grodzins published the seminal work on the

6/ We anticipate that the response we ultimately file in Hirabayashi v. United States, (W.D. Wash., Voorhees, D.J. presiding) and Yasui v. United States (D. Or., Belloni, D.J. presiding) will be similar to the response filed in Korematsu v. United States (N.D. Ca., Patel, D.J. presiding).

evacuation decision, Americans Betrayed, "Politics and the Japanese Evacuation" (1949, Chicago and London, reprinted 1974). That work, cited 28 times in the Commission's Report, details virtually all the same intelligence information discussed in the petition including the work of the Office of Naval Intelligence (pp. 145-146 & n.46 188-189), the FBI (pp. 188 n.23, 257-258 & n.49), and the FCC (pp. 291-293), all of which contradict any evidence of off-shore or radio signalling. Grodzins' book also highlights the position of General DeWitt, the conflict between the War Department and the Department of Justice, the characterization by the military of sociological and political issues as military issues, and the faulty uncritical acceptance of that characterization by the Supreme Court. Finally, Grodzins' book suggested re-evaluation of the cases in light of the "new facts" Grodzins found (p.357). The research for Grodzins' book included careful examination of the Department of Justice files (p. 182 n.6, 208 n.6) and personal interviews with Ed Ennis, then chief of the Alien Enemy Control Unit (pp. 231 n.1, 232 n.3, 255 n.57), James Rowe, Jr., then assistant to the Attorney General (pp. 240 n.21, 266 n.78), John J. McCloy, then Assistant Secretary of War (p. 259 n.65, p. 264 n.74), and Francis Biddle, then Attorney General (p. 270 n.85), all conducted in 1942 and 1943 (p. 18). The availability of this information to Grodzins in 1942 and 1943 flatly contradicts the claim that Korematsu's information is "newly discovered" and was not available before these Supreme Court cases were litigated. At all events, these facts and the inferences which flow from them were clearly a matter of public knowledge after Mr. Grodzins' book was published in 1949 -- thirty-three years ago.

In a recent 9th Circuit opinion, Maghe v. United States, F.2d ____ (No. 82-5198, May 2, 1983), the circuit court reiterated the rule that a coram nobis petition must show sound reasons for the failure to seek relief earlier. United States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866 (1981); United States v. Morgan, 346 U.S. 502 (1953). A recent newspaper interview with petitioner Korematsu reveals that until recently, he was not interested in re-opening his case. That is insufficient reason to allow a thirty-three year delay, along with its attendant loss of recollection and witnesses (e.g., General DeWitt died in 1962; Morton Grodzins died in 1964). In sum, the petition alleges that the recent discovery of critical documents under the FOIA justifies the delay. Our response is, however, that petitioners' tardy rediscovery of documents discovered and discussed in the book Americans Betrayed, first published in 1949, does not justify the delay.

The second nonsubstantive defense which the Government will argue is that today, thirty-five years after the misdemeanor convictions and service of sentences, no live controversy is left which presents a viable case or controversy and which supports the invocation of Federal court jurisdiction to entertain these collateral attacks. In short, the cases are moot.

Collateral attacks upon old criminal convictions, where the sentence has already been served, are moot "if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57 (1968). This doctrine was recently discussed in Lane v. Williams, 455 U.S. 624, 632 (1982). There, the Supreme Court noted that the typical legal consequences which warranted an exercise of collateral relief involved civil penalties such as loss of the right to vote, the right to serve as an official of a labor union for a specified period of time, or to engage in certain businesses. None of those allegations are made here. Indeed, the misdemeanor convictions at issue did not deprive any of the three petitioners of their civil rights (to vote, etc.). Moreover, the outstanding misdemeanor conviction which is in no way indicative of moral turpitude, has not prevented petitioner Yausi from being an attorney licensed as a current member of the bar of the State of Colorado and the holder of an important public office. (The attached newspaper article (Attachment L) shows that he is the Executive Director of the Denver Commission on Community Relations.) As in Lane v. Williams, supra, since no felony violations are involved,

*** No civil disabilities such as those present in Carafas [v. La Valle], 391 U.S. 234] result . . .
At most, certain nonstatutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected *** In these circumstances, no live controversy remains.

In our case, there are not even de minimus legal collateral consequences of the conviction, now 40 years old. The character of the conviction (a malum prohibitum misdemeanor not showing moral turpitude and not punishable by more than one year imprisonment) would render it inadmissible for impeachment purposes at a subsequent legal proceeding, compare Rule 609(a) & (b), Fed. R. Evid. The misdemeanor conviction would also be irrelevant in any enhanced sentencing procedure for multiple felony offenders, compare 18 U.S.C. 3575(e)(1). Although the facts surrounding misdemeanor convictions -- even if pardoned for innocence and dismissed at this time -- would be available to a sentencing judge at a subsequent proceeding (18 U.S.C. 3577), that fact will not support collateral review, Lane v. Williams, supra, 455 U.S. at 632 n.13. 7/

7/ This same concern, i.e. the total absence of any continuing adverse collateral consequence, is the primary reason that the Office of the Pardon Attorney reports that pardons are rarely recommended where only misdemeanors are involved. (See Attachment M.)

Finally, there is no reasonable possibility, particularly after the Commission's work and President Ford's apologetic words in Proclamation No. 4417 supra, that these same complaining parties "would be subject to the same action again," Weinstein v. Bradford, 423 U.S. 147, 149 (1975) cited in Lane v. Williams, supra, 455 U.S. at 634. This is, therefore, not a situation where mootness can be avoided by invocation of the doctrine that this case raises legal issues "capable of repetition, yet evading review." Lane v. Williams, supra, 455 U.S. 633-634. To insure that the Executive Branch could never again, on its own terms and in the absence of a declaration of martial law, incarcerate American citizens without Congressional action, in 1971 Congress enacted 18 U.S.C. 4001(a). It provides that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." And the only Act of Congress which had previously allowed such action, Public Law 77-503 most recently embodied in 18 U.S.C. 1383, was explicitly repealed by Public Law 94-412, Title V, § 501(e), September 14, 1976, 90 Stat. 1258. By these actions, Congress legislatively repealed the Korematsu holding and deprived it of any continuing significance. There is, therefore, no possibility that any continuing legal consequence will be imposed upon Korematsu or any other person on the basis of this 40 year old misdemeanor conviction and the case should therefore be dismissed as moot. 8/ To the extent that political, historical or humanitarian redress is appropriate, the Commission has correctly identified it as residing in the executive pardon power of the President and the legislative power of Congress.

The Government's third argument is that even assuming arguendo that some military information was withheld from the Supreme Court, those omissions were not relevant to the grounds upon which the Korematsu case was decided in the Supreme Court. Therefore, since it was not such a fundamental error "as rendered the proceeding itself irregular and void," United States v. Morgan, 346 U.S. 502, 509 n.15 (1954), it is not cognizable in a coram nobis proceeding.

This argument is premised on the notion that retrospective collateral review of a final judgment "is not an endeavor to be undertaken lightly." Lane v. Williams, supra, 455 at 632-633 n.13. In addition to being timely made and necessary to alleviate some actual legal harm, the allegations must be much more than cumulative. Indeed, they must show fundamental error.

In this case, a look at the 1944 Supreme Court record shows that even at that time, General DeWitt's Final Report was under heavy attack. Both sides cited to the Supreme Court the October

8/ Moral stigma, standing alone, has been repeatedly rejected as a sufficient basis to sustain a collateral attack petition such as those filed here. St. Pierre v. United States, 319 U.S. 41, 43 (1943); Martineau v. Perrin, 601 F.2d 1201, 1204-1205 (1st Cir. 1979).

1942 Harpers magazine summary of the Office of Naval Intelligence "Ringle Report". The article itself shows it was "made public with Government assent" and advocated individual exclusion hearings, not group exclusion. Moreover, the 1943 and 1944 briefs show that at that time the petitioners challenged the Government to produce individual cases of espionage or sabotage from among the resident aliens and citizens, noting that the FBI would not have let such cases pass, if they existed. The Government responded by conceding that no resident Japanese had been convicted of espionage and sabotage and that, by and large, the great majority of Americans of Japanese descent were concededly loyal. Moreover, the Government not only did not repeat General DeWitt's charges in regard to unauthorized and disloyal ship-to-shore and short-wave radio signalling, but also repudiated those allegations in a footnote -- which petitioners find insufficient, but contemporary 1944 scholars had no trouble deciphering, see E. Rostow, "The Japanese American Cases -- A Disaster," 54 Yale L.J 489, 520 (1945).

In the face of these concessions by the United States, the Supreme Court intentionally chose over the lengthy dissent of Justices Roberts (Korematsu v. United States, 323 U.S. at 226), Murphy (supra at 240), and Jackson (supra at 244-245), to adopt a standard of review that would not require it to go behind the military decision into the facts which led to that decision, made by a general during wartime in a military area. This standard of review made it unnecessary for the Supreme Court to decide whether or not a correct decision was reached and whether or not the least restrictive racially-based conditions were adopted. Rather, the Court decided that irrespective of the correctness of the decision or its "true" motivation, the decision would be upheld if there was any rational basis to support it. This the Court could, and did do, without a careful examination of petitioners' allegations concerning the "true" motivation of General DeWitt. Contemporary commentators, as well as Justice Murphy in dissent (323 U.S. at 235-242), noted that had the Court carefully examined the facts then before it, or adopted a different standard of review, the case would probably have come out differently. Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Civilians (1983) at 237. But the Supreme Court did not choose to adopt either of those strategies. Indeed, after the Supreme Court decision, Korematsu filed a petition for rehearing in which he explicitly reiterated that there was no reliable evidence in the record to support the evacuation order and that a remand to the trial court to elicit the facts was imperative. Korematsu complained that basing the validity of General DeWitt's actions, as the majority did, on "possibilities" of espionage and sabotage was improper, since "Possibilities are always hypothetical." (Reh. Pet. at 9). But that is exactly what the Supreme Court did. It concluded that since General DeWitt's wartime fears were hypothetically possible, they were rational and would not be further scrutinized in this "war-powers" setting, despite their obvious racial implications.

In the context of this holding of a very limited standard of review applicable to the "war powers" of the Executive Branch of Government, which holding though old and unused has never been overruled, factual evidence about the loyalty of Japanese Americans -- even assuming arguendo that it was previously unavailable to the Supreme Court due to intentional misconduct of the Government -- is plainly irrelevant to the basis for the decision and the outcome of the case. Evidence of loyalty did not change the opinion of the majority of justices in 1944 despite Justice Murphy's views and it did not result in the rehearing requested in 1945. Therefore, it should make no difference to the outcome of the case today. In these circumstances, petitioners' allegations, even if true, do not suggest that the 1944 Supreme Court, which chose not to independently examine the facts, made a "fundamental error" concerning the facts which so completely undercuts their rationale as to render the majority opinion "irregular" or "void".

Finally, our last argument reaches the merits of petitioners' allegations that there was governmental misconduct in the withholding of documents showing racist behavior by General DeWitt. Here, we will assume arguendo that the alleged bad faith bases for our failure to turn over certain documents and General DeWitt's actions were relevant to the grounds upon which the Supreme Court affirmed the conviction.

We will take the position that the historical evidence presented by petitioners can be rebutted by other historical evidence to show, at a minimum, that there was a colorable basis for our decision to act as we did in 1944. Moreover, we will show that the evidence offered to show that bad faith was the Government's "true" motivation is rebutted by other historical documents. We will also argue that from our current perspective 40 years "down the road," it is impossible to conclude -- with the degree of certainty necessary for petitioners to meet their heavy burden of justifying an evidentiary hearing about forty year old events -- whether or not attorneys in the Office of Solicitor General and General DeWitt acted out of purely personal and improper racist motives, or whether they acted in good faith, e.g. in order to minimize the danger associated with a Japanese invasion of the West Coast.

In this regard, we will show that General DeWitt took considerable time to decide the evacuation issue; that intra-organizational friction existed that may have led General DeWitt to discount many of the proffered intelligence reports; that many careful and respected politicians and attorneys, including the Congress and the President agreed with General DeWitt's proposed evacuation and a similar evacuation of Hawaii; that General DeWitt proposed somewhat similar restraints upon thousands of recent immigrants of German and Italian descent and complained bitterly at the lack of vigor with which they were enforced; that General DeWitt's successor, General Emmons, complained about the same lack of enforcement of the same

regulations; and that General DeWitt's concern about the Government's inability to hold tens of thousands of speedy or meaningful loyalty hearings was born out by the conduct of the few hundred loyalty hearings which were held. Even Ed Ennis, General DeWitt's chief intellectual adversary at the Department of Justice stated in 1971 that General DeWitt truly believed in the correctness of his decisions when they were made. Mr. Ennis' views are especially pertinent since he disagreed with General DeWitt in 1942, went on to work for the Japanese American Citizens League, and then for 20 years was the General Counsel of the A.C.L.U.

With respect to the actions of members of the Department of Justice, we will show that they were taken by people sympathetic to petitioners' position who went out of their way to be candid and honest with the Supreme Court and had no motivation to do otherwise; that in later years, none of those people -- such as Ed Ennis -- ever impeached the propriety of their professional behavior in connection with this case or the behavior of their co-workers; that even before the Supreme Court cases were decided, the Department opened its files and freely permitted its attorneys to speak out about the evacuation decision with outsiders such as historian Morton Grodzins, and to publish articles about the evacuation decision, such as the article in the 1942 October Harpers magazine; and finally, that petitioners' objections which seek to impeach the propriety of our right to make legal arguments, i.e. our right to argue in the courts for judicial notice or a limited holding, are simply frivolous in light of the very large array of factual and legal propositions put before the Supreme Court by both sides for the Court's choice in this case. 9/

From all of the above arguments, we will conclude that the historical review and ceremonial relief sought here is not before a proper and competent forum. Rather, if any redress is appropriate, such redress is a matter for the exercise of Congressional or Presidential power as the Commission has recognized.

5. CONCLUDING OBSERVATIONS

In retrospect, the 1942 decision to evacuate and incarcerate American citizens of Japanese descent has been almost universally condemned as overly harsh, even if lawful. In 1948, Congress authorized financial restitution for the property damage

9/ Consideration could even be given to inviting petitioners to petition for certiorari since the Supreme Court is in the best position to evaluate the petition as it is the forum in which most of these alleged improprieties are supposed to have occurred. We expect that the Supreme Court, should it choose to hear the case, would agree with us that neither collateral relief nor invocation of the court's contempt or disciplinary powers are warranted.

sustained due to the "then prevailing military necessity," H. Rep. 732, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code Cong. Serv. 2297, 2301, ultimately paying out \$37 million under the Japanese-American Evacuation Claims Act, P.L. 80-886, 62 Stat. 1231, 50 U.S.C. App. § 1981 et seq. Moreover, as noted above, President Ford has already made some apology for this "tragedy of that long-ago experience." Presidential Proclamation 4417 (1976).

The Commission's recommendations (especially Recommendation No. 1) appear to overlook President Ford's Proclamation; Recommendation No. 2 calls for a pardon, presumably a blanket pardon. Although the Commission does not indicate whether a standard pardon or a pardon for innocence is appropriate, the Commission's conclusion that there was no military necessity for the decision and that General DeWitt acted at least in part for racist motives, suggest that the Commission might have called for a pardon on grounds of innocence, had they considered the two types of pardons. The potential monetary liability under 28 U.S.C. 2513, of \$5,000 per defendant who served any term of imprisonment, if pardons for innocence were granted to the roughly 33 U.S. citizens who served a sentence of incarceration, should amount to only a relatively small potential liability (\$165,000), even assuming each person was alive, sued, and was awarded the maximum award possible. Such pardons would in all likelihood be accepted and moot out the Korematsu, Yasui and Hirabayashi collateral attack petitions. 10/

Standard pardons, while not likely to be accepted by the above three petitioners, might nonetheless be determined to be appropriate by you in order to satisfy the "public demand for apology" articulated by the Commission. As noted above, our best legal defenses do not rely on the correctness of the internment decision but rather on the extent to which that 1942 decision may be insulated from judicial review at this late date. As is obvious from the above, if there is a Presidential declaration, its particular wording ought to be carefully considered as it is likely to have serious ramifications on the outstanding criminal and civil suits. 11/

10/ This assumes that these petitioners are given some preview of the language that might be employed.

11/ You may wish to consult Jeffrey Axelrad, Director of the Torts Section, Civil Division (724-6810), on other potential financial consequences. He has informed us that the class action civil suit he is defending, Hori v. United States, No. 83-0750 (D.D.C., Oberdorfer, D.J. presiding) seeks damages in the amount of approximately \$24 billion. By contrast, the Commission in Recommendation No. 5 has called for a Congressional appropriation of \$1.5 billion.