

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

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4 FRED TOYOSABURO KOREMATSU, )  
5 )  
6 Petitioner, ) No. 27635-W MHP  
7 )  
8 v. ) San Francisco, California  
9 ) November 10, 1983  
10 UNITED STATES OF AMERICA, ) 9:15 A.M.  
11 )  
12 Respondent. )  
13 )

14 PETITION OF FRED KOREMATSU FOR WRIT  
15 OF ERROR CORAM NOBIS AND GOVERNMENT'S  
16 MOTION TO VACATE CONVICTION AND DISMISS  
17 INDICTMENT OF FRED T. KOREMATSU  
18 BEFORE THE HONORABLE MARILYN HALL PATEL

19 APPEARANCES:

20 For the Petitioner:

21 Minami & Lew  
22 BY: DALE MINAMI, ESQ.  
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BY: DENNIS HAYASHI, ESQ.  
MICHAEL J. WONG, ESQ.

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\* KAREN KAI, ESQ.  
← PETER IRONS, ESQ., and  
DONALD TAMAKI, ESQ.

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STEPHEN BOMSE, ESQ., MICHAEL SHEPARD, ESQ., and ANDREA PETERSON, ESQ., of Heller, Ehrman, White and McAuliffe; on behalf of American Civil Liberties Union of Northern California, Inc., Amicus Curiae

For the Respondent:

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For Minoru Yasui:

PEGGY NAGAE, ESQ.

For Gordon Hirabayashi:

RODNEY KAWAKAMI, ESQ.

Reported by:

Joanne Farell

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P R O C E E D I N G S

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3 THE CLERK: Criminal Action 27635-W MHP, United  
4 States versus Fred Toyosaburo Korematsu on Motion to Vacate  
5 Conviction and to Dismiss the Indictment.

6 Counsel, your appearances, please?

7 MR. STONE: Victor Stone for the United States.

8 MR. MCGIVERN: William McGivern, Assistant United  
9 States Attorney.

10 MR. MINAMI: Dale Minami for Petitioner, Your  
11 Honor.

12 THE COURT: Are there other appearances of  
13 counsel?

14 MR. RUSKY: Robert Rusky for Petitioner.

15 MS. KAI: Karen Kai for Petitioner.

16 MR. IRONS: Peter Irons for Petitioner.

17 MR. HAYASHI: Dennis Hayashi for Petitioner, if  
18 Your Honor please.

19 MR. BOMSE: Stephen Bomse and Michael Shepard  
20 and Andrea Peterson on behalf of the American Civil  
21 Liberties Union, amicus curiae and former counsel to Mr.  
22 Korematsu in the original criminal proceedings.

23 MR. TAMAKI: Donald Tamaki for Petitioner, Your  
24 Honor.

25 MS. BANNAI: Lorraine Bannai for Petitioner.

1 MR. WONG: Michael Wong for Petitioner.

2 MR. MATSUMOTO: Russell Matsumoto for Petitioner,  
3 Your Honor.

4 MR. MINAMI: If I may introduce counsel for  
5 Minoru Yasui, Peggy Nagae and for Gordon Hirabayashi,  
6 Rodney Kawakami.

7 THE COURT: The posture of this litigation is  
8 as follows: That in January of this year a petition for  
9 Writ of Coram Nobis was filed by Petitioner Korematsu in  
10 this Court, this Court being the Court in which he was  
11 convicted in September of 1942, that conviction having  
12 been affirmed by the Supreme Court in 1944.

13 The conviction was for an offense under an Act of  
14 Congress of March 21, 1942 by reason of violation of an  
15 exclusion order denominated No. 34, which was issued  
16 pursuant to an executive order, that Executive Order No.  
17 9066.

18 The petition was based upon several grounds having  
19 to do with misrepresentation made in the nature of support-  
20 ing military necessity for the underlying executive order  
21 and exclusion orders implementing that executive order,  
22 and the Act of Congress, as well as the arguments of  
23 military necessity supporting both the conviction and the  
24 affirmance of that conviction, as well as alleged failure  
25 to provide certain information to the Supreme Court in

1 representing the nature of the military necessity in  
2 existence at that time.

3 The government was given an opportunity to respond  
4 to that petition. A continuance was granted on at least  
5 one occasion.

6 Some period for discovery was allowed in the interim  
7 so the petitioner could obtain discovery and the govern-  
8 ment finally responded in a relatively brief response,  
9 essentially moving to set aside the conviction and dismiss  
10 the indictment.

11 It appears to me that that motion, although not  
12 denominated as such, was made pursuant to Rule 48(a).  
13 I have indicated to the parties that Rule 48, Federal  
14 Rules of Criminal Procedure, does not appear to me to  
15 be a basis for the government's motion at this stage of  
16 the proceedings, the judgment being a final judgment and  
17 the sentence, as such, having been served.

18 If the government wishes to be reheard with respect  
19 to the present posture of that motion, I will hear them  
20 now and hear a response by the petitioners with respect  
21 to whether 48(a) is the appropriate vehicle for the govern-  
22 ment to make its motion.

23 Do you wish to be heard, Mr. Stone?

24 MR. STONE: I would wish, Your Honor.

25 If you'll allow me to make one presentation, I could

1 just include that as a short part of that, if you think  
2 this is the appropriate time.

3 THE COURT: I'd like for you to address the  
4 48(a) issue first, or the basis for the motion, whether  
5 it's 48(a) or some other ground, and then if you were  
6 going to set forth the reasons for that, do that at that  
7 time.

8 MR. STONE: I guess I'll do that now, Your Honor.

9 Good morning, Your Honor. As the Court is well aware,  
10 the government has requested that the Court make the same  
11 substantive ruling and grant the same substantive relief  
12 which Mr. Korematsu, as petitioner, has requested, namely  
13 that the conviction be vacated and the underlying informa-  
14 tion be dismissed.

15 We do that in the context of a long history by the  
16 executive and legislative branches, which has recognized  
17 that this was a very unusual situation in the history of  
18 this nation that resulted in legislation on at least  
19 six or seven occasions to remedy different facets of this  
20 problem.

21 Initially in 1948 there was the Japanese-American  
22 Evacuation Claims Act as a result of one of the efforts  
23 of one of the amicus currently in this case, the Japanese-  
24 American Citizens League. And, as a result of their  
25 activities after 1958, there was a further statute passed

1 in 1971 which made it clear that no action, such as  
2 Executive Order 9066 which was issued before there was  
3 legislative action, could ever again issue to imprison  
4 American citizens.

5 That statute was signed by President Nixon. It was  
6 followed by additional efforts, and again there was  
7 testimony before Congress, and Congress was well aware  
8 that it was intending, consciously, to limit the effect  
9 of this very case, Korematsu vs. United States, as well  
10 as the Hirabayashi case and the precedent which the  
11 Supreme Court previously established.

12 And to that end in 1975, there was various legislation  
13 to repeal the statute under which Mr. Korematsu was  
14 convicted, and it was, in fact, repealed in 1976 and  
15 signed into law by President Ford.

16 At that time that that was underway, Japanese-American  
17 groups came into direct contact with the White House and  
18 asked what the continuing status of the executive order  
19 itself was, to which President Ford responded in an  
20 official proclamation, No. 4417, and I would like, at this  
21 point, to read it and make it part of the record.

22 It is entitled "An American Promise by the President  
23 of the United States of America, a Proclamation."

24 It reads: "In this bicentennial year, we are  
25 commemorating the anniversary dates of many of the

1 great events in American history. An honest  
2 reckoning, however, must include a recognition  
3 of our national mistakes as well as our national  
4 achievements.

5 "Learning from our mistakes is not pleasant,  
6 but as a great philosopher once admonished, we  
7 must do so if we want to avoid repeating them.

8 "February 19th is the anniversary of a sad  
9 day in American history. It was on that date  
10 in 1942, in the midst of the response to the  
11 hostilities that began on December 7, 1941, that  
12 Executive Order No. 9066 was issued, subsequently  
13 enforced by the criminal penalties of a statute  
14 enacted March 21, 1942, resulting in the uprooting  
15 of loyal Americans.

16 "Over 100,000 persons of Japanese ancestry  
17 were removed from their homes, detained in  
18 special camps, and eventually relocated.

19 "The tremendous effort by the War Reloca-  
20 tion Authority and concerned Americans for the  
21 welfare of these Japanese-Americans may add  
22 perspective to that story, but it does not erase  
23 the setback to fundamental American principles.

24 "Fortunately, the Japanese-American  
25 community in Hawaii was spared the indignities



1 suffered by those on our mainland.

2 "We now know what we should have known then --  
3 not only was that evacuation wrong, but Japanese-  
4 Americans were and are loyal Americans. On the  
5 battlefield and at home, Japanese-Americans --  
6 names like Hamada, Misumori, Marimoto, Noguchi,  
7 Yamasaki, Kido, Munemore and Miyamura -- have  
8 been and continue to be written in our history  
9 for the sacrifices and the contributions they  
10 have made to the well-being and security of this,  
11 our common Nation.

12 "The executive order that was issued on  
13 February 19, 1942, was for the sole purpose  
14 of prosecuting the war with the Axis Powers,  
15 and ceased to be effective with the end of  
16 those hostilities.

17 "Because there was no formal statement of  
18 its termination, however, there is concern among  
19 many Japanese-Americans that there may yet be  
20 some life in that obsolete document. I think it  
21 appropriate, in this our Bicentennial Year, to  
22 remove all doubt on that matter, and to make clear  
23 our commitment in the future.

24 "NOW, THEREFORE, I, GERALD R. FORD, President  
25 of the United States of America, do hereby proclaim

1 that all the authority conferred by Executive  
2 Order No. 9066 terminated upon the issuance  
3 of Proclamation No. 2714, which formally  
4 proclaimed the cessation of the hostilities  
5 of World War II on December 31, 1946.

6 "I call upon the American people to affirm  
7 with me this American Promise -- that we have  
8 learned from the tragedy of that long-ago  
9 experience forever to treasure liberty and  
10 justice for each individual American, and resolve  
11 that this kind of action shall never again be  
12 repeated.

13 "IN WITNESS WHEREOF, I have hereunto set  
14 my hand this 19th day of February in the Year  
15 of Our Lord 1976, and of the Independence of  
16 the United States of America the 200th.

17 "GERALD R. FORD."

18 [End reading.]

19 And that is the substance of it. Subsequent to that,  
20 President Ford signed the legislation repealing the  
21 statute, as I previously mentioned, which Mr. Korematsu  
22 was convicted under.

23 Both prior and subsequent to that, Congress passed  
24 statutes which provided special retirement provisions  
25 of the Social Security Act and the Federal Civil Service

1 Act to grant special credit to people who had been interned.

2 Of course, more recently, several of the states,  
3 including California, have extended special compensation  
4 to former civil service employees.

5 And then in 1980, President Carter signed a bill  
6 which we have described at some length in our pleadings  
7 and which resulted in the formation of a commission and  
8 the appropriation and expenditure of over a million dollars  
9 so that commission could again attempt to lay bare the  
10 record of what President Ford and President Nixon and  
11 the Congress in 1948, recognized had apparently been done  
12 wrong during World War II, both as a lesson and as a  
13 mechanism which would forever guarantee the rights of  
14 these and all American citizens.

15 One of the recommendations which that Commission,  
16 which was established recently, came up with was a  
17 recommendation of an executive pardon of all those people  
18 convicted of violations which were still outstanding.

19 It was the decision of the executive branch to try  
20 and go further than that and to affirmatively ask that  
21 the outstanding convictions and any underlying information  
22 or indictments be dismissed, not only as to this petitioner  
23 and others who have petitioned, but as to all of those  
24 people who suffered that legal result and wish to have it  
25 so done.

1           In that regard, we made the motion which we filed  
2 with the Court. I recognize that the court has explained  
3 that it has some problems, due to the fact that we are  
4 beyond the time of final judgment, and so there was some  
5 question whether the executive has the power under Rule 48(a)  
6 or indeed under the common law to make such a motion at  
7 this time.

8           I believe that the executive does have that power  
9 and we of course, urge the Court to take that action.

10          The cases which we've been directed to are quite  
11 ancient and do not carry federal authority which would  
12 normally be controlling over this Court.

13          We'd like to note one case which we recently cited  
14 to the Court, Hamm vs. Rock Hill, a 1964 Supreme Court  
15 case, does advert to the fact that the 1934 Supreme Court  
16 case, United States vs. Chambers, left open the question  
17 whether the effect of various rulings such as invalidating  
18 a statute could be applied where final judgment was  
19 rendered prior to the ratification of that repeal of the  
20 statute.

21          That doesn't suggest that the question is a settled  
22 one, but it at least suggests, in our mind, the question  
23 is open and the Court does have the power to use that  
24 precedent, at a minimum, as at least one basis of its  
25 ruling, if it so chooses.

1           And therefore, we continue to urge the Court to  
2 use that as at least one basis for its ruling.

3           THE COURT: What you're asking for is that the  
4 motion made by the government subsequent to the filing  
5 of the petition to set aside the conviction and dismiss  
6 the indictment be granted and that the petition filed  
7 by the petitioner be denied or be dismissed, rather; is  
8 that correct?

9           MR. STONE: That was our motion as it was --

10          THE COURT: Is that still your motion?

11          MR. STONE: That is the motion that I've been  
12 empowered to come here and make, and we would ask the  
13 Court, if the Court could grant us the indulgence of 10  
14 or 12 days, a chance to review whether or not the second  
15 part of that statement is necessary, still a necessary  
16 part of our position.

17          But I'm in a position right now to state that that  
18 is the motion that I've been asked to present.

19          THE COURT: Is there anything further at this  
20 time, Mr. Stone?

21          MR. STONE: Just that we would say that our  
22 differences, as we've expressed them, deal primarily with  
23 the question of jurisdiction.

24          We agree that it would be in the interests, in the  
25 public interest to grant the relief of vacating the

1 conviction and dismissing the underlying information, and  
2 we think that there is no purpose further to be served by  
3 leaving it outstanding where the Congress and a whole  
4 variety of presidents, all of the last four and now with  
5 this motion, the current administration, all believe that  
6 there's no further usefulness to be served by conviction  
7 under a statute which has been soundly repudiated.

8 Thank you.

9 THE COURT: Thank you.

10 Mr. Minami, I would ask that you be heard only upon  
11 procedural issues at this stage, before I make any ruling  
12 as to how we will proceed, and then I will let you get to  
13 the substance of the petition.

14 And the procedural posture of the question being  
15 whether it is appropriate for the Court to grant the  
16 motion as made by the government and dismiss the petition.

17 MR. MINAMI: Your Honor, as set forth in our  
18 reply, our position is that this Court may directly rule  
19 on the petition at this point.

20 Since the government has not responded to our petition  
21 and the serious allegations, except with the motion to  
22 vacate, in which they did not contest our allegations,  
23 we contend that their non-responsiveness entitles  
24 petitioner to appropriate sanctions, notwithstanding  
25 Rule 55(e).

1           In a case I'd like to cite for the Court, Gampoli vs.  
2 Calfano, 628 F.2d 1190, the Ninth Circuit in 1980 held  
3 that Rule 55(e) does not preclude the imposition of  
4 sanctions which prevent the government from presenting  
5 further evidence.

6           The court stated in that case once the plaintiff has  
7 presented a prima facie case and thereby shifted the  
8 burden of proof to the government, at that point in the  
9 proceeding the judge may treat the government as he would  
10 or she would, as it should be, any other civil litigant  
11 and may impose appropriate sanctions for failure to comply  
12 with court orders.

13           One of those sanctions may be the foreclosure of  
14 defenses. If the foreclosure results in judgment for the  
15 plaintiff, the judgment is on the merits and not a  
16 default judgment within the meaning of Rule 55(e).

17           Based on the evidence we have produced, based on the  
18 Commission report, petitioner submits that he has  
19 established a prima facie case of government misconduct  
20 and a denial of equal protection.

21           In such a situation, the burden shifts to the  
22 government. The government has now had 10 months in which  
23 to respond and has chosen not to do so.

24           It has thus not carried its burden. Therefore, we  
25 believe plaintiff is entitled to a favorable ruling. And

1 that sets forth, I think, in summary, our position on  
2 that motion, Your Honor.

3 THE COURT: Thank you. While it's not entirely  
4 clear, still, the nature of the government's motion,  
5 assuming for the moment that it is under Rule 48(a) or  
6 under some general theory of prosecutorial right to  
7 terminate prosecution, that right has long since terminated  
8 when judgment became final and sentence was imposed, and  
9 so until the time the Supreme Court rendered its decision,  
10 the government had an opportunity to either notify the  
11 Court of any information which it believed would render a  
12 different decision and cause the conviction of the  
13 district court to be set aside or any misconduct or other  
14 information or error that they thought the Court should  
15 have before it in rendering its decision.

16 Rule 48(a) has its antecedent in the doctrine of  
17 nolle prosequi which was the doctrine that the prosecutor  
18 has a right, through prosecution and trial, to dismiss  
19 the proceedings, the only question being whether jeopardy  
20 is attached.

21 That doctrine has found its way into Rule 48(a).  
22 Admittedly, there is very little precedent, if any, under  
23 48(a) to guide us.

24 But it is clear that Rule 48(a) speaks to the  
25 prosecutorial right to dismiss an indictment. Even so,



1 once that indictment has been filed in court, leave of  
2 court must be obtained.

3       What the court may do under those circumstances is  
4 carefully circumscribed. It becomes less so as the  
5 proceedings carry with them more liability, namely, after  
6 trial it must be with the consent of the defendant,  
7 because jeopardy has been attached.

8       But it is clear that at least at the time that  
9 judgment has become final, that all appellate proceedings  
10 have been exhausted and the sentence is imposed, that  
11 there is no longer any prosecutorial right to proceed  
12 under that or any related doctrine.

13       The only thing available for the Court to correct its  
14 records is an extraordinary writ. That has usually been  
15 in the form of a writ of coram nobis. And that is the  
16 appropriate vehicle, whether it be by motion or petition  
17 of the petitioner or by the government for the Court to  
18 correct fundamental errors in its record.

19       Whether it be by reason of fraud upon the Court,  
20 misconduct, perjury of testimony, any fundamental error  
21 that has occurred in the proceedings, the burden is upon  
22 the petitioner to establish by a preponderance of the  
23 evidence that such error has occurred.

24       Therefore, I conclude that it is inappropriate for  
25 the Court to do anything at this stage with respect to

1 the government's motion, other than to treat it as  
2 essentially a non-opposition to the petition and deal with  
3 the petition on the merits.

4 With respect to making findings, given the fact this  
5 is essentially a non-adversarial proceeding since the  
6 government has not opposed the petition, I do not find  
7 that it is necessary for this Court to conduct the kind of  
8 proceedings that will be needed to determine the admissi-  
9 bility of evidence, conduct an evidentiary hearing in  
10 order to grant the petition, because it is non-adversarial.

11 All that this Court need do, but indeed has an  
12 obligation to do, is to weigh over and evaluate  
13 independently whether the petition should be granted,  
14 and may look to the circumstances under the conviction,  
15 the facts that are now known and learned since the time  
16 the conviction was obtained and affirmed.

17 It may look to the fact that the government has  
18 responded in the fashion that it has, which is, albeit  
19 non-opposition, tantamount to a confession of error,  
20 even though they have not admitted to various allegations  
21 that are contained in the petition.

22 It may look to determine whether justice will be  
23 done by a failure to grant the petition and, further,  
24 the Court may look to correct its own records, if it is  
25 determined that as a result of the proceedings its own

1 records are contaminated.

2 Certainly it has long been recognized, far before  
3 the dates of the federal rules themselves, that the  
4 inherent power of the court is such that it has the  
5 power at any time to correct its own records, where either  
6 by reason of error or misconduct, fundamental error or  
7 misconduct, those records require correction in order to  
8 undo an injustice.

9 With respect to the reasons for which that petition  
10 should be granted, I will hear from you now, Mr. Minami.

11 MR. MINAMI: Your Honor, members of the Court  
12 staff, opposing counsel, co-counsel and members of the  
13 audience: We are here today to seek a measure of the  
14 justice denied to Fred Korematsu and the Japanese-American  
15 community 40 years ago.

16 At the outset, we dispute vigorously the character-  
17 ization of the public interest which might support the  
18 granting of the petition as advanced by the government.

19 The government's definition of public interest is  
20 contained in the motion to vacate the conviction. If  
21 reviewed closely, the reasons advanced by the government  
22 are neither real nor substantial.

23 In effect, the effect of their position is to avoid  
24 a consideration of significant factual and constitutional  
25 issues.

1           The reasons may be summarized as follows as stated  
2 in the motion: It is time to put behind us the controversy  
3 which led to the mass evacuation in 1942.

4           A second reason: No completely satisfactory answer  
5 can be reached about these emotion-laden issues.

6           Simply put, these are not reasons, but excuses for  
7 not admitting error and for refusing to confront the real  
8 public interest in concluding this legal chapter.

9           It is uncontested that the Court has a duty to  
10 independently review the public interest in granting this  
11 petition.

12           In that context, we would like to set forth the  
13 public considerations that we believe are controlling in  
14 this case.

15           First, it must be recognized that we are dealing with  
16 an extraordinary case. The case was originally decided  
17 by the United States Supreme Court over 40 years ago.  
18 The allegations we put forth are perhaps unique in legal  
19 history, charging that high government officials suppressed,  
20 altered and destroyed information and evidence in order  
21 to influence the outcome of a Supreme Court decision.

22           The case itself is enormously significant, as Fred  
23 Korematsu says, "My name must be known by every law  
24 student and lawyer in the country."

25           The case has been cited extensively and been the

1 subject of law review articles over the years.

2 This is not just a 40-year-old misdemeanor, as the  
3 government characterizes it. This is a monumental  
4 precedent which affected deeply and irrevocably the lives  
5 of a hundred thousand Japanese-Americans and a countless  
6 number of friends and neighbors by sanctioning the mass  
7 banishment of a single racial minority group.

8 The total in lost property, lost opportunities, broken  
9 families and human suffering was staggering. This case  
10 also establishes some of the most criticized and controver-  
11 sial precedents in legal history.

12 First, the mass exclusion of an identifiable minority  
13 based on race without notice, without hearing, without an  
14 attorney was justified.

15 Secondly, military judgments in times of crises are  
16 virtually unreviewable by the courts, even though the  
17 courts are functioning and no martial law has been declared.

18 Korematsu vs. The United States has never been over-  
19 ruled and has never been reversed. Today we know that  
20 this Supreme Court decision rests on a non-existent  
21 factual foundation.

22 Evidence we have presented in this case underscores  
23 that assertion.

24 Some brief examples. Agencies responsible for the  
25 investigation and monitoring of Japanese-Americans felt

1 that they presented no danger great enough to warrant  
2 mass exclusion. Their opinions and reports were  
3 suppressed from the Supreme Court.

4 Department of Justice officials felt an ethical  
5 duty to reveal evidence contrary to that offered to and  
6 accepted by the United States Supreme Court. This  
7 evidence was likewise suppressed.

8 Responsible government agencies, such as the Federal  
9 Communications Commission and the FBI, flatly refuted  
10 claims presented to the Supreme Court as facts that  
11 Japanese-Americans were implicated in illegal signaling  
12 through radio and light transmissions to enemy vessels.  
13 This evidence of refutation was also suppressed.

14 The factual argument is described more fully in the  
15 petition supported by exhibits attached to the petition  
16 and to the reply.

17 The conclusions of the Commission on Wartime Reloca-  
18 tion and Internment of Civilians which was alluded to  
19 earlier are especially relevant here. As the Court  
20 undoubtedly recalls and as is reflected in the trans-  
21 cripts of our court appearances on March 14th and May 9th,  
22 1983, the government conceded great credibility to the  
23 Commission and its findings.

24 In fact, the schedule set for responding revolved  
25 around the issuance of the Commission report and recommenda-

1 tions.

2 The government indicated to this Court that the  
3 position of the U.S. government would rest strongly on  
4 the Commission findings and recommendations, and on March  
5 14th when the Court referred to Personal Justice Denied,  
6 the report of the Commission, the attorney for the  
7 government stated, "I think there is a substantial  
8 amount of material in here," referring to Personal Justice  
9 Denied, "that directly bears on the issues in this case."

10 And at the same hearing, the government attorney  
11 agreed that it would be appropriate for the Court to take  
12 judicial notice of the government report.

13 I only recite these facts because it is clear from  
14 the record that the factual findings, the conclusions of  
15 Personal Justice Denied, had a great influence on the  
16 government's failure to respond in the motion to vacate.

17 So when the government offers little substantial  
18 reason for granting the petition, the record clearly  
19 indicates that the conclusions of Personal Justice Denied  
20 were the influential, if not controlling, reasons for  
21 their actions.

22 The Commission's findings, then, should be included  
23 in the grounds for granting the petition.

24 The conclusions made bear directly on this case and  
25 include the following: that no military necessity warranted

1 the exclusion of Japanese from the West Coast; that  
2 Executive Order 9066 was not justified by military  
3 necessity; that General DeWitt's rationale that ethnicity  
4 determines loyalty does not provide a credible justifica-  
5 tion for the necessity of exclusion; that no evidence of  
6 imminent attack, no evidence of planned sabotage, no  
7 documented act of espionage, sabotage or Fifth Column  
8 activity was ever committed by an American of Japanese  
9 ancestry.

10 A final conclusion helps complete this picture. The  
11 broad historical causes which shaped these decisions,  
12 which include curfew, exclusion, imprisonment, were race  
13 prejudice, war hysteria and failure of political leader-  
14 ship.

15 These and other conclusions directly contradict the  
16 findings by the United States Supreme Court in 1944 in  
17 Fred Korematsu's case.

18 If the facts, as presented through the Commission,  
19 were known to the Supreme Court, we believe there would be  
20 a reasonable likelihood of a different result.

21 The government, however, is arguing that these  
22 findings, memorialized forever in a decision from the  
23 highest court of this land, now should be forgotten.  
24 It is arguing, in essence, that we should put the contro-  
25 versy behind us, that we should, in a sense, let old



1 wounds heal.

2 But whose wounds need healing? The Japanese-Americans  
3 who have lived with the stigma of this decision for 40  
4 years and who never received a judicial declaration of  
5 wrongfulness or wrongdoing or adequate compensation for  
6 their suffering, or is it the wounds of guilt, of high  
7 government officials who were responsible for this great  
8 civil rights disaster?

9 The government's approach turns the idea of public  
10 interest on its head. The government, in effect, is  
11 advocating letting the guilty go free and keeping the  
12 innocent imprisoned in the shame and suffering they  
13 endured for 40 years.

14 It is advocating keeping the public imprisoned in  
15 the ignorant notion that this was an "unfortunate"  
16 incident as the government describes.

17 Even the government's motion to vacate indicates  
18 an unwillingness to face the facts and the constitutional  
19 issues.

20 The motion states that the Commission found no  
21 completely satisfactory answer that can be reached upon  
22 these emotion-laden issues, citing the Addendum and  
23 Congressman Lungren's Additional Views.

24 To the contrary, the satisfactory answer was found  
25 and unanimously so by the Commission -- that no military

1 necessity existed to justify the exclusion; that the  
2 exclusion and detention was a result of hysteria,  
3 prejudice and failure of leadership.

4 The Addendum confirmed that finding and Congressman  
5 Lungren, a member of the Commission, raised additional  
6 concerns, but stated specifically that he concurred with  
7 the findings of the Commission.

8 The attitude of the government to our serious allega-  
9 tions of misconduct and unconstitutionality of the  
10 military orders under which Fred Korematsu was convicted,  
11 is precisely why a judicial declaration of the grounds  
12 for granting the petition is necessary, because this was  
13 not an unfortunate incident. This was not a mistake.  
14 This was a deliberate and calculated plan to exclude and  
15 imprison a single minority group.

16 Yet the government has not completely admitted and  
17 recognized this wrong. For Fred Korematsu, the public  
18 interest grounds are clear. He lived 40 years with the  
19 conviction while carrying the burden of losing the case  
20 which sanctioned the mass imprisonment of his people.

21 For him to fight as a representative of all Japanese-  
22 Americans virtually alone, when his community was either  
23 too young, too tired, too old or too frightened to fight,  
24 and risking imprisonment and a criminal record, entitles  
25 him to some consideration.

1 Surely after 40 years of fighting, Fred Korematsu's  
2 interest is part of the public interest. For the Japanese-  
3 American community, Fred's fight was their fight.

4 Most knew in their hearts that the curfew, exclusion  
5 and imprisonment was wrong, but they were too consumed  
6 with the business of survival to do anything about it.

7 They, too, have an interest in Fred's case, in Fred's  
8 vindication, in order to validate their own beliefs that  
9 they were not criminals in 1942.

10 Included in this community were a number of Japanese-  
11 Americans convicted of curfew and exclusion violations.

12 The government has offered to move for vacation of  
13 their convictions, but there is no guarantee that another  
14 judge in another venue or jurisdiction would find the  
15 public interest reasons suitable for granting the motion.

16 Findings in this Court would undoubtedly support the  
17 proper determination of public interest in another  
18 jurisdiction.

19 For this country, the entire incident is a lesson.  
20 A lesson that the government, including the executive,  
21 legislative and judicial branches, allowed a grave  
22 injustice to occur.

23 We are not so naive to believe we have a perfect  
24 system, because no one has, but we are not so stupid to  
25 believe that we can deny our mistakes and our wrongs and

1 still progress as a country.

2 As an institution, as a people, as a country, we will  
3 truly be condemned to relive history unless we learn its  
4 lessons.

5 In this sense, the public interest is not served by  
6 the government's refusal to confess error. Despite the  
7 evidence we have produced and despite the unequivocal  
8 findings of the Commission, unless the government confesses  
9 error or unless a judicial declaration includes a recogni-  
10 tion of those errors, we will repeat these mistakes.

11 Clearly, the executive branch and the legislative  
12 branches have spoken and have acknowledged the grave  
13 constitutional error of exclusion and imprisonment of  
14 Japanese-Americans.

15 As mentioned earlier, President Ford, on February 19th  
16 1976, rescinded Executive Order 9066, calling the uproot-  
17 ing of loyal Americans a "setback to fundamental American  
18 principles."

19 Even the major participants in the exclusion and  
20 detention decisions eventually repudiated their actions.

21 Earl Warren, who later became a great Chief Justice  
22 of the United States Supreme Court; Justice William O.  
23 Douglas, who voted to uphold the government's position  
24 in Hirabayashi v. Korematsu, recanted in his later  
25 years and also Tom Clark, a U.S. Attorney then, who later

1 became a United States Supreme Court Justice, also  
2 repudiated his role.

3 Only the judicial system has not yet had the  
4 opportunity to recognize this wrong.

5 This is significant because the judicial system is  
6 so often the last refuge for powerless minorities such  
7 as Japanese-Americans who had neither the numbers nor  
8 the money to influence electoral politics.

9 The principle of judicial review is critical to our  
10 constitutional system. It is especially important when  
11 individual freedoms guaranteed by the Constitution are at  
12 stake.

13 The court, not Congress and not the executive, is  
14 the arbiter of the law and the ultimate protector of our  
15 freedoms.

16 Alexander Hamilton recognized that the necessary  
17 power of the court is to "declare all acts contrary to  
18 the manifest tenor of the constitution void. Without this,  
19 all the reservations of particular rights or privileges  
20 would amount to nothing."

21 Thus, there is no complete vindication without a  
22 judicial declaration of the constitutional wrongs  
23 inflicted on Japanese-Americans.

24 It is singularly appropriate for this Court to  
25 decide what public interest is served in granting this

1 petition: that no military necessity existed to justify  
2 the military and executive orders; that critical evidence  
3 bearing on issues before the Supreme Court in 1944 were  
4 deliberately suppressed and had this evidence been  
5 produced before the Supreme Court, there existed a reason-  
6 able likelihood of a different result; that based upon  
7 these facts which demonstrated that no military necessity  
8 existed, Executive Order 9066 and military orders under  
9 which Fred Korematsu was convicted were unconstitutional.

10 The public interest, then, demands more than a  
11 sterile recitation that we should let bygones be bygones  
12 and requires that the real substantial reasons be exposed  
13 so that this tragedy will never be repeated.

14 The danger in accepting the government's reasons  
15 for granting the petition is the danger described by  
16 Justice Jackson in a dissent in the Korematsu case.  
17 In referring to a situation where the court validates  
18 a principle of law such as was upheld in Korematsu vs.  
19 United States, Justice Jackson stated, "The law lies  
20 around like a loaded weapon ready for the hand of any  
21 authority that can bring forward a plausible claim of  
22 urgent need."

23 For those Japanese-Americans interned, for those ex-  
24 internees in the audience, for Fred Korematsu and for  
25 this Court, this is the last opportunity to finally achieve

1 the justice denied 40 years ago.

2 Thank you, very much.

3 THE COURT: Thank you.

4 Is there anything further, Mr. Minami?

5 MR. MINAMI: If we may beg the Court's indul-  
6 gence, Mr. Korematsu would like to make a statement to  
7 the Court.

8 THE COURT: I will allow him to do so at this  
9 time. Mr. Korematsu?

10 MR. KOREMATSU: Your Honor, I still remember 40  
11 years ago when I was handcuffed and arrested as a  
12 criminal here in San Francisco.

13 I was going to say here in this building, but it  
14 wasn't. It was on Mission Street, that building over  
15 there.

16 And I also remember Mr. Ernest Besig of the American  
17 Civil Liberties Union standing beside me at the hearing.  
18 He posted the bail of \$5,000 -- Mr. Besig posted the bail  
19 of \$5,000. And I was supposed to be free to go as a  
20 civilian, but as we were ready to go out the door the  
21 M.P.s were there with guns and they said, "I'm sorry,  
22 you can't leave."

23 And they have orders from their commander. And so  
24 right away they raised the bail to \$10,000, and so  
25 Mr. Besig said, "Well, we will just let you go with the

1 M.P.s and see what happens."

2           So that's how it was going back and forth. As an  
3 American citizen being put through this shame and  
4 embarrassment and also all Japanese-American citizens  
5 who were escorted to concentration camps, suffered the  
6 same embarrassment, we can never forget this incident as  
7 long as we live.

8           The horse stalls that we stayed in were made for  
9 horses, not human beings.

10           According to the Supreme Court decision regarding my  
11 case, being an American citizen was not enough. They say  
12 you have to look like one, otherwise they say you can't  
13 tell a difference between a loyal and a disloyal American.

14           I thought that this decision was wrong and I still  
15 feel that way. As long as my record stands in federal  
16 court, any American citizen can be held in prison or  
17 concentration camps without a trial or a hearing.

18           That is if they look like the enemy of our country.  
19 Therefore, I would like to see the government admit that  
20 they were wrong and do something about it so this will  
21 never happen again to any American citizen of any race,  
22 creed or color.

23           Thank you.

24           THE COURT: Thank you, Mr. Korematsu.

25           Does the government have a response at this time?



1 MR. STONE: Just about two minutes, if the Court  
2 will allow me.

3 THE COURT: I will confine you to approximately  
4 that, then, no more than five.

5 MR. STONE: The government's response, Your Honor,  
6 is that the difficulties, many of the difficulties we have  
7 encountered emanate from the very same document which we  
8 have, of course, told the Court that it could recognize  
9 exists, namely the Commission's report.

10 To the extent that we are in a court of law and deal-  
11 ing with legal matters, that Commission's report has  
12 concluded and we find ourselves, I think, unanimous in  
13 agreeing with it. It says, at page 238:

14 "Today the decision in Korematsu lies over-  
15 ruled in the court of history. First, the Supreme  
16 Court, a little more than a year later in Duncan v.  
17 Kahanamoku, reviewed the imposition of martial  
18 law in Hawaii and struck it down, making  
19 adamantly clear that the principles and  
20 practices of American government are per-  
21 meated by the belief that loyal citizens  
22 in loyal territory are to be governed by  
23 civil rather than military authority, and  
24 that when the military assumes civil functions  
25 in such circumstances it will receive no

1           deference from the courts in reviewing its actions."

2           And later, at page 239, that:

3                     ". . . each part of the decision, questions  
4                     of both factual review and legal principles have  
5                     been discredited or abandoned."

6           We don't think it lies around like a loaded gun and  
7           to that end, the legislative and executive branches have  
8           repealed any authority that any underlying statutes might  
9           once have had.

10           But this Commission did not reach the conclusion, in  
11           fact it suggested exactly to the contrary, that there  
12           were particular acts of suppression by the government that  
13           might have occurred when the cases were litigated.  
14           Particularly pages 8 and 237, suggest contrary findings.

15           Now, to the extent the Commission reaches those  
16           conclusions, those conclusions are not neatly applicable  
17           here. The standards for admissibility of evidence before  
18           the Commission and the standards of proof required and  
19           applied by that body are not the same as would be required  
20           and applied in a court of law, and although they might  
21           relate to the threshold question of whether the petitioner's  
22           petition could be entertained, they don't relate to the  
23           underlying question which, if it isn't a legal matter,  
24           it is certainly a symbolic matter with which we completely  
25           agree with Mr. Korematsu and Mr. Minami, and that is that

1       irrespective of specific proofs or facts, there is  
2       justification in light of the history of this republic  
3       and the efforts that it has made since that mistake, as  
4       the President of the United States described it, was  
5       made, which justifies vacating the conviction and dis-  
6       missing the petition.

7               Thank you, Your Honor.

8               THE COURT: Is the matter submitted for the  
9       Court's ruling?

10              MR. MINAMI: Yes, Your Honor.

11              MR. STONE: That means the Court would deny us  
12       any leave to file anything further?

13              THE COURT: Yes, and the reasons for that are as  
14       follows: The government has essentially responded with  
15       a non-response. It has not set forth or sought to set  
16       forth any objections to the offers made by the petitioner  
17       with respect to the various exhibits, citations to various  
18       authorities, including those contained in its most recent  
19       filing and appendices, even though it has had time to do so.

20              What it has sought to do, in a very meek kind of  
21       response, is to say that "It should be set aside, we  
22       agree with the ultimate result. We were not prepared to  
23       confess error or to acknowledge that any of the errors  
24       contained, alleged in the petition, are true."

25              It leaves the Court in a very difficult position,

1 because essentially I have to make a determination as to  
2 whether there was just cause to grant the petition.

3 I am not inclined to conduct full-blown hearings for  
4 the purpose of having evidence that meets the niceties of  
5 the Federal Rules of Evidence in order to support a  
6 finding which all parties agree would be appropriate by  
7 this Court.

8 However, I do have an obligation, as I indicated  
9 earlier and is supported by both the Young case and the  
10 Sibron case to make an independent determination of whether  
11 the petition should be granted and the reasons for grant-  
12 ing it.

13 Since the government has responded in the fashion in  
14 which it has, I am reading that as tantamount to a confes-  
15 sion of error, albeit the specific errors are not acknowl-  
16 edged.

17 I don't think in the present posture of the case it  
18 is necessary for me to accord each of the allegations made,  
19 and the requests for judicial notice made by petitioner,  
20 with the niceties of the Federal Rules of Evidence.

21 I think it is sufficient for me to rely upon the  
22 report, that being the report of the Commission on Wartime  
23 Relocation and Internment of Civilians which were interned  
24 in 1942, which both the petitioner and the government  
25 have referred to.

1 I think it is sufficient for me to refer to that and  
2 the other exhibits that have been submitted by the  
3 petitioner as essentially government documents supporting  
4 their position, and to do so, because those documents,  
5 although not meeting the standards of evidence admissible  
6 in a court of law, contain the necessary trustworthiness  
7 because of the investigation and the means by which that  
8 investigation was conducted to justify the Court's making  
9 an independent determination.

10 But I need not accept the meek acquiescence of the  
11 government and merely set aside the conviction without  
12 independently assessing the merits of the petition and  
13 the grounds for granting it.

14 As a result of the government's conduct in this case  
15 and at the time of conviction and its affirmance, as a  
16 result of those matters made known both in the Commission  
17 report and the other exhibits that have been presented  
18 to this Court, it is clear that the Court, as well, is  
19 implicated and, as I indicated earlier, the Court is not  
20 without power to correct its own records and should do so  
21 and wipe its own slate clean to the extent that it is now  
22 possible to do so where that record stands with a taint,  
23 both upon our legal and upon our social and political  
24 history.

25 In making this evaluation, I have indicated that I

1 have referred to the Commission report as well as the  
2 other exhibits that have been submitted by petitioner and  
3 rely upon their general trustworthiness for supporting the  
4 decision which is acquiesced in by the government.

5 Those records show the facts upon which the military  
6 necessity justification for the executive order, namely  
7 Executive Order 9066, the legislative act that was enacted  
8 thereafter attaching criminal penalties to a violation of  
9 an exclusion order and the exclusion orders that were  
10 promulgated thereafter were based upon and relied upon  
11 by the government in its arguments to the Court and to  
12 the Supreme Court on unsubstantiated facts, distortions  
13 and representations of at least one military commander,  
14 whose views were seriously infected by racism.

15 There are numerous authoritative facts to the contrary  
16 contained in the record in which the government was advised  
17 and aware at the time the executive order and the other  
18 orders that I've referred to were promulgated, which  
19 contradicted the military necessity facts set forth by  
20 General DeWitt and upon which the executive order and the  
21 other promulgated orders rely.

22 Those related to the number of Japanese who were  
23 considered to be actually disloyal and which other  
24 governmental agencies acknowledged were minimal, if any,  
25 and that to the extent that it was necessary to segregate

1 out any persons of nationality or background who were dis-  
2 loyal to the United States during that period of time,  
3 it was possible to do so and it was possible to do so with  
4 the Japanese community as with any other community.

5 The overwhelming number of Japanese were citizens,  
6 were residents of the United States, were loyal to the  
7 United States; that the various acts that suggested  
8 either the potential for espionage or sabotage that had  
9 occurred or could occur in the future, were essentially  
10 non-existent or were controverted by evidence that was in  
11 the possession of the Navy, the Justice Department, the  
12 Federal Communications Commission and the Federal Bureau of  
13 Investigation.

14 The Court is satisfied, after reviewing all of these  
15 records, including most particularly the report, that  
16 justice would indeed be done if the motion or the petition  
17 for a Writ of Coram Nobis were granted, that the public  
18 interest is served by granting the motion and that the  
19 Court's records, themselves, should be purged of a proceed-  
20 ing which was fundamentally unfair.

21 While some of these facts have been known to the  
22 parties for some time, it has not been until recently that  
23 they have been in such a position that they could be  
24 compiled and submitted to warrant the filing of a petition  
25 before this Court.

1 In fact, it is clear that the Court, in its inherent  
2 power, at any time, has the power to clear the Court's  
3 records where they are contaminated by unjust proceedings.

4 Nor can it be said that merely because a misdemeanor  
5 conviction of long standing has been in existence and it  
6 is merely a misdemeanor, that the petitioner has suffered  
7 no injury.

8 The very nature of this conviction is injurious to  
9 a citizen, because its implications are such that he is  
10 branded as disloyal.

11 In this case, Mr. Korematsu has specifically filed a  
12 declaration stating the collateral consequences that he  
13 has suffered as a result of that conviction. That  
14 declaration has not been refuted by any facts submitted  
15 by the government, nor have they submitted anything in  
16 opposition to that.

17 The fact of the conviction is what triggers the  
18 consequences that Mr. Korematsu has referred to. Whether,  
19 in fact, those consequences are justified lawfully is of  
20 no consequence or concern to this Court.

21 The mere fact of the conviction, based upon his  
22 assertions, has triggered consequences which this  
23 Court should be aware in setting aside the conviction  
24 and justifies the setting aside of the conviction.

25 The nature of the conviction goes beyond Mr. Korematsu.



1 The government, by its position, appears to agree. The  
2 public interest and Mr. Korematsu's interest are justly  
3 served by vacating the conviction.

4 I would caution all the parties and the persons in  
5 this Courtroom that this Court cannot, by wiping out the  
6 conviction, erase from the books of the Supreme Court's  
7 decisions or from history the case of Korematsu v. United  
8 States.

9 Perhaps the Korematsu decision, as has been referred  
10 to by the government, stands as an anachronism. I think  
11 legal scholars agree to say it stands for very little,  
12 if anything, in the way of precedent.

13 Perhaps what it stands for most of all is it should  
14 continue to stand for a caution that in times of war,  
15 military necessity or national security, our institutions  
16 must be all the more vigilant of protecting constitutional  
17 guarantees.

18 It should stand for the proposition or the caution  
19 that in times of distress the shield of military necessity  
20 or national security must not be used to protect govern-  
21 mental actions from close scrutiny and accountability,  
22 and that in times of international hostility and antagonisms  
23 our institutions must take the leadership, whether those  
24 institutions be the legislative branch, the executive  
25 branch or the judicial branch, to protect all citizens

1 from the petty fears and prejudices that are so easily  
2 stirred up during those times.

3 While Korematsu v. United States may stand in the  
4 Supreme Court reporters of this land as a decision with  
5 little, if any, precedential value any longer, even  
6 under the current state of law, as a result of setting  
7 aside the conviction today the factual underpinnings  
8 for it are removed and it stands for the signal of  
9 caution, if anything, that I have referred to.

10 The conviction that was handed down in this Court  
11 and affirmed by the Supreme Court in Korematsu v. United  
12 States is, by virtue of granting a Writ of Coram Nobis  
13 today, vacated and the underlying indictment dismissed.

14 I will prepare a memorandum decision that more  
15 fully explicates the order of the Court that I have  
16 verbally stated from the bench.

17 But if you will submit a brief written order setting  
18 aside the conviction and dismissing the indictment today,  
19 then that can be signed and penned today so that as of  
20 today, the conviction is set aside.

21 Thank you, Counsel.

22 (Whereupon, the hearing on the petition and motion  
23 was concluded.)

24 ---ooOoo---

25