5-18-1984

Transcript of Proceedings, Hirabayashi v. United States (C83-122V), Western District of Washington

United States District Court - Western District of Washington

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI, Petitioner,	)	
vs.	)	No. C83-122V
UNITED STATES OF AMERICA, Respondent.	)	

TRANSCRIPT OF PROCEEDINGS in the above-entitled and -numbered cause, heard before the Honorable Donald S. Voorhees, Judge of the United States District Court, commencing at 2 o'clock p.m., May 18, 1984.

THE COURT: Good afternoon.

Would you call the calendar, please?

THE CLERK: Yes, Your Honor. C83-122V, Gordon Hirabayashi vs. The United States of America.

THE COURT: Would you kindly make your appearances by just stating your name and the party you represent?

MR. STONE: Victor Stone for the United States.

THE COURT: Your name again?

MR. STONE: Victor Stone for the United States.

MS. BARNES: Susan Barnes for the United States Attorney's office.

MS. BANNAI: Your Honor, I'm Kathryn Bannai, attorney for the Petitioner Gordon K. Hirabayashi.

MR. HALL: Your Honor, I am Camden Hall, attorney for Mr. Hirabayashi as well.

THE COURT: And is the Petitioner present?

THE PETITIONER: Yes. I am Gordon Hirabayashi, the petitioner.

THE COURT: I see. Very well.

MS. BANNAI: Your Honor, if I may have the permission of the Court, I would like to introduce other counsel for Mr. Hirabayashi present today, as well as

counsel for Minoru Yasui and Fred Korematsu.

THE COURT: Well, I don't believe they are counsel in this case, so I am going to deny that motion now.

Let me say to all of you, in anticipation of this hearing, I have read all of the exhibits introduced on behalf of the Petitioner. I haven't gotten through all the exhibits recently introduced by the Government. I have read all of "Personal Justice Denied," the report of the Commission which was published in December of 1982. I have read, in addition to that, at least two scholarly treatises on this whole situation.

So the hearing this afternoon is primarily upon the Government's motion to dismiss, so let me hear from you, Mr. Stone.

MR. STONE: Good afternoon, Your Honor.

One point that I would make, I think the Court has a copy, and if not, I will be happy to try and get a copy to the Court, an addendum published to the Commission's report.

THE COURT: Was that the small volume?

MR. STONE: No. In addition to the small volume which contains its recommendations, there was a mimeographed addendum which highlighted some of the

factual problems which they decided they need not resolve in reaching their recommendations. I will be happy to supply it to the Court.

THE COURT: All right. Let me do this before you start. Those of you who came in first in the back of the room, if you want to come up and sit in these chairs here, there are three, six, nine, eleven chairs, if you would care to come down in the well of the court and sit, any of you, just feel free to come forward.

And then there are a few seats, I think reserved for the press inside the little gateway there, if more of you want to come and fill up that bench there, I would be happy to have you do so.

Now there are some additional seats on the first bench here, if any of you wanted to take those seats, and there are five or six more chairs here if you want to come forward.

I hate to interrupt you, Counsel, but this may be a lengthy hearing, so any of you back there who are now standing, I believe there are sufficient seats for you to be seated, if you would care to be seated.

Mr. Barnett, I see you here. I know that you, Arthur Barnett, you've been in this case since '42, I believe. Is that correct?

MR. BARNETT: That's correct, Your Honor.

THE COURT: All right. Now, Mr. Stone.

MR. STONE: Thank you, Your Honor.

I thought I would make just a very brief outline of what you've already read in our pleadings and leave some time, since this hearing was set at Your Honor's request, for you to ask any questions you would like.

THE COURT: Incidentally, I would appreciate either you or someone filing with me this supplemental report which I have not seen.

MR. STONE: Yes, I will, Your Honor.

Essentially the pleading that started this action was a request for coram nobis relief, a post-conviction request in a 40-year-old misdemeanor conviction case which was tried in this court during World War II.

That petition raised allegations that there had been misconduct during the handling of the case, the Government's case. That was the issue it raised in order to have this Court take some action, presumably on coram nobis, setting the case for a new trial. The Government, by furnishing the Court with the original pleadings which were filed in the Supreme Court in this case and some in the Yasui case, some in the Korematsu

case, and copies of some published books and records has shown the Court, and in the reply which we just received, the very last reply filed by Mr. Hirabayashi's counsel, they concede that the vast majority of documents involved are not in fact newly discovered. They now seem to confine their allegations of newly discovered misconduct to some Exhibits Q double A and double B, which are exhibits that are internal Government prosecutorial memos that were done by people involved in the prosecution of this case back in 1942. They were attorney work product and they reflected the personal views of the prosecutors. They were not evidentiary documents, and they do not on their face reflect any facts. They simply reflect the judgment of the various federal prosecutors along the way, many of whom I'm freely and happy to admit were hesitant about prosecuting this case, and unhappy generally about prosecuting this case.

THE COURT: It wasn't so much unhappiness about prosecuting the case, was it not, but that they were hesitant about not disclosing certain information? At least that's the impression that I got.

MR. STONE: The documents themselves show that they were hesitant about prosecuting the case in the way that it had been presented. The way it had

been presented by both parties, quite openly in the District Court, was whatever the need to evacuate people, it's unconstitutional as a matter of law, and at later stages in the cases, although that appears to have been conceded by all sides and perhaps even in the Supreme Court, as we point out, the Supreme Court in their opinion in the Hirabayashi case says Mr. Hirabayashi seems to concede that evacuation might be an appropriate response to this kind of threat. Nonetheless, the question is whether it's constitutional.

Various attorneys for the Government thought that perhaps that issue should have been litigated, but they didn't include any new information in their documents which is not included in all the many other exhibits you have, all of which came to light either during the actual handling of the case, particularly in the Supreme Court where much of General DeWitt's off-color comments were before the Court, or in the handling of the Korematsu case a year later where many of the same allegations were made again, or in published Law Review articles and published books on the subject right through the end of the 1940's.

During that period of time, all of these many same factual sources came out. And Mr. Hirabayashi's counsel at page 14 of that last brief do not contend

that those are newly discovered.

They seem to argue at one point that nonetheless the Government presented an argument that said the case had to be affirmed because time was of the essence and the military leadership here, in what was then a declared war zone, didn't have the time to sift through, making individual determinations.

If you look, we have cited you to the page in the Hirabayashi brief and then attached a copy of that brief where the Government did not exclusively make an argument that time was of the essence. They argued in the alternative; that on the one hand, time was short and, on the other hand, the people who had a military job to do at the time didn't feel qualified to make those determinations, irrespective of time.

There is an argument that even if the documents were known, the actual authorship of various documents, in particular one published article which was published and freely available to everybody, was only published as the views of an intelligence officer working for the United States.

THE COURT: That was the article in Harpers?

MR. STONE: Yes, the Harpers magazine article. There were allegations in the Korematsu brief that must have come from the office of Naval

Intelligence because it was a matter of public knowledge that the Office of Naval Intelligence was in fact the office charged with the intelligence responsibility, along with the FBI, for these matters.

So it was quite clear to the Supreme Court and the various dissents in the Korematsu opinion make it quite clear that everybody was aware of how the case was being tried, and several people, including some of the dissenters and some of the petitioners, asked the Supreme Court to send it back so that it might be tried on a real factual record, but the Supreme Court didn't feel that that was appropriate, either because it recognized that many of these issues were then classified and it couldn't expect them, in the context of an ongoing war, to try those issues, or because it felt that it had enough in front of it, which I think it did rule that as a matter of public record its view was that there was no showing that the ruling was completely irrational.

Perhaps, as it even alludes in the Supreme Court's own opinions, it was unwise, and the Government did not defend it as a wise decision, and President Ford has backed very far away from it in 1976 when he said it was clearly a national tragedy.

THE COURT: I think you've said in your

brief that the nation has tried to make amends.

Let me ask you this, and then I'm going to have counsel for the petitioner respond, what is it that the Government wants me to do?

MR. STONE: The Government's request, and it has been followed explicitly by the District Court in the District of Oregon, and it's been, I think, echoed in substantial part both in the decision in the Korematsu case in San Francisco recently, with which we don't completely agree on jurisdictional grounds, but as we point out in our memo, substantively it essentially follows the request that we made there, and I would call to the Court's attention I just saw today in the newspaper that there is another suit that was also dismissed due to the amount of time that has passed, a civil suit that was filed in the District of Columbia, where again the Government's position is that there is no necessity for what would be a detailed and difficult factual inquiry now into 40-year-old events.

As Judge Battell stated, it's not necessary to reopen the partially healed wounds of an earlier period in order for the Government to determine that it has no desire to go forward with its prosecution; that even if the Court would order coram nobis relief

and give the Government an opportunity to retry the case, the Government would exercise its Rule 48(a) discretion then.

Consequently, the Government at this earlier time before we even have the need to convene such a hearing, which we would clearly feel obligated to defend because of the imputations of character which are many. Rather than go through that rather lengthy and I think difficult exercise, where many of the parties and many of the documents are not available, I think it's pretty clear --

THE COURT: Many certainly are deceased.

MR. STONE: Certainly, and some of the most critical documents, some of the most critical ONI, Office of Naval Intelligence, documents don't seem to be able to be located. The Commission itself has said that.

THE COURT: Couldn't Commander Ringle's report be found?

MR. STONE: Oh, that is found, but Commander Ringle did not work for ONI headquarters. The headquarters unit of ONI, as well as the headquarters field offices in Los Angeles and San Francisco in the various Naval districts where the material that -- there is an affidavit from Hiko Yoshenaga Herzig in the civil

case in Washington, D.C. that she was never able on behalf of the Commission to catch up with those files for one reason or another.

So we do have scattered papers from those people, but we do not have complete files, and it would be pretty clear that that kind of thing would have to be reconstructed.

Commander Ringle himself I do not believe worked even in the headquarters unit of the Naval District where he was when those various memos of his were written. He worked in the field office, I believe, the San Pedro field office of the Los Angeles office, so it's not clear exactly what the lines of command were and how the papers arrived at various places other than the fact that they were of course all interesting to the decision makers and the decision makers attempted to inform themselves both through channels and outside channels of as much information as they could before making their decisions.

THE COURT: Let me ask you again, then, and I don't mean to be impolite --

MR. STONE: Sure.

THE COURT: What is it that the Government wants me to do?

MR. STONE: The Government, having recognized

that this inquiry and the request that we respond has revived our need, in effect, if we were interested in it, to have to gear up a prosecution, believes that once it has been requested to involve itself again in a criminal prosecution, be it on appeal from a case or on certiorari, it once again gives the Government the Rule 48(a) discretion to decide whether it's a case which the Government has any interest in going forward with, and devoting a substantial amount of its and the Court's resources to, the Government has no trouble, as we have not had from the very beginning in this case, in telling you that we don't have any interest in reprosecuting this case or devoting our or the judicial resources to reprosecuting this case and working through a labyrinth of 40-year-old history even as a prerequisite to doing that.

Consequently, we have moved under Rule 48(a), both in the spirit of the request by the Commission that executive grace in the form of pardons be granted, and in light of the statement made by President Ford in 1976 that this is an incident which is one that this government has attempted to make various amends for, recognizing that irrespective of the merits of the decision to move people, it imposed tremendous

hardships.

The Government has, consequently, on those bases, recognizing that as Judge Battell said, that there are partially healed wounds of this earlier period, that it might help further heal the wounds for us to move to dismiss, to vacate the misdemeanor conviction and dismiss the underlying indictment.

And, frankly, I think that had those misdemeanors been brought to the attention of President Truman in 1947 when he pardoned thousands of other war-related convictions, including convictions which involved refusals based on that very same treatment of Japanese-Americans in this war zone, that had these been brought to President Truman's attention, it is very likely he would have pardoned these misdemeanor offenses then. I think perhaps they were overlooked precisely because they are misdemeanors and it has rarely been considered necessary to take such action in the case of a misdemeanor.

We have gone on in what we filed with the Court to demonstrate that we think there are other serious threshold problems with doing this by way of coram nobis remedy, which Mr. Hirabayashi's counsel asks for.

THE COURT: Let me ask you this: Are there

not serious problems on a dismissal under Rule 48, because it seems to me that Rule 48 does not empower the Court to dismiss or to vacate a conviction and dismiss the indictment after a conviction.

MR. STONE: Well, Your Honor, the law is quite clear, and the most recent cases, the Weber case from this very district that went to the Ninth Circuit and we cite it, the Ninth Circuit had to reverse a district judge from this district who refused to vacate a Rule 48(a) request after an appeal had been dismissed. Once that appeal was dismissed, it's quite clear that that case had also been -- had proceeded to final judgment. I believe there was a conviction in that case as well.

Later, when the district judge refused to do it, the Ninth Circuit reinstated that appeal. They couldn't just take it back.

THE COURT: Can you tell me the facts of that case, roughly?

MR. STONE: I believe that was a case where several individuals were tried and convicted in this district, and testimony came out for the first time at trial which led the U.S. Attorney to believe that despite the conviction of the jury, which he could not say was not based on substantial evidence, and despite

the lack of any kind of misconduct, he nonetheless wished to move to dismiss the case under Rule 48(a). Notice of appeal had already been filed from the conviction, so he made that known to the Court of Appeals.

They did not simply remand the case. They dismissed the appeal. After the dismissal of the appeal, he went back in the District Court and said to the District Court, "We'd like to dismiss this case." The District Court, I guess, concerned that there were no reasons of the type suggested here by Mr. Hirabayashi's counsel, there were no misconduct of prosecutor reasons or insufficiency of evidence reasons. It was simply a termination by the U.S. Attorney that he would rather not have prosecuted the case, refused that request.

That refusal was appealed and the original appeal was reinstated by the Ninth Circuit; reinstatement because it was clearly too late to file the notice of appeal again, and they reversed that. They said that it's clear that the prosecutor's power, it has always been clear, and they cited some law there, revised, for example, after conviction and sentencing on, for example, appeal, or after appeal on petition for certiorari.

THE COURT: What about the situation in this

case where there is a trial, an appeal to the Ninth Circuit which then certifies it to the Supreme Court, who then affirms it. Does this Court then have any power at the request of the Government to vacate that conviction and dismiss the underlying indictment?

MR. STONE: Well, I think it does, Your Honor, by virtue of what has happened here. I don't think I could have walked in here to you independently so many months ago and simply said "I'd like to make a Rule 48(a) motion on a case there has been no activity on." But as long as coram nobis is indeed a valid post-conviction motion in a criminal case, and it has been filed, and Your Honor has found it sufficient to require the Government to respond, as has happened here, at that point once again the prosecutorial assist has been passed to the Government.

We have been asked to be involved in a case. Had you simply dismissed it without our involvement as district judges do routinely in 2255 cases in habeas corpus cases, we would have had no role to play. But we have had a role to play. Indeed, I personally have had a very substantial role. I have spent months examining old files, old prosecutorial memos, having to learn about what happened in the Supreme Court some forty years ago. I have written numerous memos which

ultimately will play a part in whether we wish to continue defending our prosecuting, much as I would if you had just decided to allow them a late appeal.

Consequently, just as in the Weber case where, after the appeal was dismissed and the district judge in effect says to the Government, "You are still involved in this case," and the Government says, "Well, if I'm still involved, I move to dismiss." Similarly here, I'm being called upon, Your Honor, to answer. If my motion is denied, I guess like in the Weber case, it may be that the Department will want to find out whether it should have been denied.

But assuming it had to be denied, the next step will be you will require me, no doubt, to conduct a hearing and maybe later a trial, if someone decides to go forward.

I think it's beyond dispute that once I'm put to the burden of conducting a trial, I can move to dismiss under Rule 48(a). Consequently, it is the action of the petitioners and the Court reinvolving the Government which allows us, we believe, and the Supreme Court precedents do not suggest the contrary. They certainly don't hold the contrary. Under those unique circumstances, once we are reinvolved and our resources are again called upon, that is our call,

assuming that the interests of justice warrant, to make that motion and have the Court follow it.

Now, the additional point that I made and what I filed to Your Honor was if there were any question, it seems to us quite clear that the "All Writs Act" gives the Court an awful lot of discretionary power not simply limited to that one variety of the All Writs Act power called coram nobis. The Court has many other kinds of powers.

Our problem with coram nobis basis is the jurisdiction is coram nobis presupposes a factual mistake which makes a difference, which made a difference to the outcome of the case, and notwithstanding Judge Battell's holding to the contrary, she need not have found and she did not find that anything alleged made any difference or would have made any difference. She said she could not and did not have to find that it made any difference to the outcome of the case.

THE COURT: Why did she say that? Did she give a reason for that?

MR. STONE: She simply relied on a case called United States v. Taylor, which is a Ninth Circuit case that was brought to the Ninth Circuit where a district judge denied a hearing on coram

nobis, and before those words which she cites the Ninth Circuit says "We recognize in this case that if the allegations are true, it clearly would have been harmful and changed the outcome of the trial in those circumstances."

That kind of allegation of Government misconduct is enough to get to a hearing, and they then reaffirmed in a footnote that in order to actually grant relief after a hearing, the standards promulgated in Morgan that harm and a different outcome - the judge's conclusion would be a different outcome - it would be necessary to grant relief.

But they were talking in a different context. She has construed it, decided that it gives us some leeway, but we don't see any other cases that rule that way and, frankly, she is attempting to make some new law there which it seems to me would open the door to a huge number of inmates or ex-inmates, defendants, who wish for a variety of reasons, possibly now they would like to be free of the felony conviction which prohibits them from carrying a gun, or whatever, to come in here and ask the Court to review questions which they would not have to show the Court could have made a difference to the outcome of the case.

So we have institutional reasons why, for

reasons that go way beyond this case, we don't think that rule is a sound one, and indeed the Supreme Court has only recently said in the Hasting case in the Supreme Court that harmless errors are not the stuff of which reversals even on direct appeal are made.

So we cannot urge the Court to follow Judge Battell's ruling jurisdictionally, but we do know that substantively we found it was not appropriate to make findings, factual findings, conduct hearings, make any legal rulings as to issues of law long decided. She said that while she is happy to say she's not very happy with the decision in the original Korematsu-Hirabayashi-Yasui cases, they are nonetheless the precedent that would need to be extinguished in a future case because she has no power to overrule those legal holdings, certainly not in the context of the misconduct thresholding query, and consequently she decided that she could dispose of the case without a hearing.

She found that there was sufficient public interest without reaching any conclusion about misconduct. That's how we read that opinion. We believe she would have had to hold a hearing if she wished to make that kind of a decision.

Again, --

THE COURT: I might say this to you, that my personal feeling is that I must hold a hearing; that I can't take judicial notice of all of these things that have been brought to my attention, and I recognize that a great number of them are probably accurate, but I just don't think that I can take judicial notice of those things and would therefore, if I decided to go the route of coram nobix, set down a hearing at which factual findings and evidence would be presented, probably mostly in terms of exhibits, and then factual findings made.

Now, if I granted coram nobis, and say I found that there were grounds, I would assume that the only thing I could do would be to set aside the conviction and retry it.

MR. STONE: That's right, Your Honor. I think that's right.

THE COURT: Can you retry it? I think the statute itself has been repealed.

MR. STONE: Well, there is a general savings clause. We could retry it. I think we have the authority, if somebody really wanted to. I cannot envision it, but I am not being faced with that decision. I don't formally have to make it now, but I think yes, any case which is set aside can be retried.

I believe it was the state of New Jersey that recently tried a prize fighter, Rueben Hurricane Carter, after twenty years when his conviction was set aside on coram nobis.

I really think at that point you have re-activated the criminal case and our jurisdiction does not depend on anything new.

THE COURT: I think you said that if I would do that, then at least you think possibly the Government would then act under Rule 48 and move to dismiss.

MR. STONE: Well, we would certainly make the motion again, Your Honor, and again, that presupposes that we wouldn't in the meantime, that the Solicitor General wouldn't decide in his wisdom whether or not we should have gone to the Court of Appeals before that and tried to get that Rule 48(a) denial overturned, just as they did in Weber. They went up to the Court of Appeals when the district judge didn't want to grant the Rule 48(a).

Again, I would add your inclination not to take judicial notice was also followed by Judge Battell who did not take judicial notice and who felt, unfortunately, that the requests made of her go to the ultimate issue and therefore they would require trial.

THE COURT: I didn't read her opinion carefully because I really didn't want to be influenced by what she said, but as I did read it, it seemed to me she said that even though I won't take judicial notice, she almost, in effect, did take judicial notice.

MR. STONE: Well, I will not hesitate to admit to the Court that she said an awful lot of things which I guess I feel constrained to call dicta because she made some definite statements that she would not make findings of fact, and I have to conclude -- and that she would not take judicial notice and I therefore have to conclude that the things she said after that are dicta. That has to be my position.

I will point out, irrespective of what happened there, and irrespective of how the Court ultimately does go here, we think that there are these other jurisdictional problems about whether anything was newly discovered, whether anything would make any difference to the ultimate outcome, whether in fact all of these same issues were raised in 1942 and the Supreme Court decided not to send the case back and thereby decided these issues.

So we think that there are many jurisdictional problems which we do not waive, and we think

there are many problems with the Commission's report, so that while we freely acknowledge is exists, there are many facts in there we would wish to contest, Your Honor. I make no bones about that. That's why we think you should see the addendum caused the vice-chairman of the Commission, the only active congressman of all the commissioners, to say that he had severe reservations about some of their factual conclusions. His ultimate feeling that a mistake was made was not changed, but it still gave him some pause.

We know that Mr. Hirabayashi certainly would not expect us to make the kinds of untried allegations about other individuals, many of whom are still alive, in order to give him the relief that he feels may becloud him, and so we would feel constrained by those obligations to go forward if the Court has no other jurisdictional problems.

THE COURT: All right. Then let me do this. I think you probably have stated the Government's position, have you not, on your motion?

MR. STONE: Yes, I have, Your Honor.

THE COURT: And as I understand it, your motion is - and it's in the pleadings - is to vacate the conviction and dismiss the underlying indictment?

MR. STONE: That's right. It is a

misdemeanor but it was an indictment, and essentially we believe that the public reasons, the public interest reasons, are those which were pretty clearly stated by both the Commission and President Ford in 1976 at the urging of the Japanese-American community, and the Congress when they repealed the underlying statute here, and those were that many mistakes were made, and sometimes that causes people in power to decide that perhaps they should not have handled things the way they did, and that may be the basis of a Rule 48(a) motion just like in the Weber case.

THE COURT: All right. Let me ask the Petitioner's counsel, then, why shouldn't I grant the Government's motion? Doesn't that give this petitioner all the relief that he wants, which is to have a conviction set aside, all of the adverse effects of that conviction removed from him?

MS. BANNAI: Your Honor, to the extent that the Government agrees that Mr. Hirabayashi's conviction should be vacated and the indictment dismissed, we are in agreement indeed.

However, Mr. Hirabayashi seeks and I believe is entitled to, under a petition for writ of error coram nobis, an independent judicial review of his case and an explanation of the reasons supporting

vacation in his case through an opinion of the Court or entry of findings.

We ask the Court in that process to acknowledge that he was denied his constitutional rights to a fair trial and appeal in his case.

With regard to the 48(a) motion, it is our position, and I believe it is supported by the case law, the case of Weber notwithstanding, that a 48(a) motion is not appropriate in this case. The Government cites no authority that 48(a) is properly applied in a post-conviction coram nobis proceeding.

Mr. Hirabayashi has been convicted, sentenced, and exhausted all of his appeals, and now brings this case to the Court by way of request that an extraordinary writ, a petition for writ of error coram nobis be issued.

In addition, the Government cites no authority to support its proposition that a Court could, independent, could grant a Rule 48(a) motion to dismiss without an individual judicial inquiry into the facts supporting the vacation of the conviction.

What this would entail is an examination of the public interest reasons supporting the dismissal, and if Your Honor would allow, I would like to be able to discuss why we believe that Rule 48(a)

is not appropriate in this case.

THE COURT: I would like to have you do that, and you might also discuss what the Government counsel spoke about and that is, say I granted the writ, then, since we now have it back in this court, would the Government not then have the power to come in and to move for dismissal? Or if we had a hearing and say from the beginning of the hearing the Government might move to dismiss.

MS. BANNAI: I would just like to deal with that immediately and state that Mr. Harabayashi is here today seeking that his petition for writ of error coram nobis be granted. Indeed, if this entails the necessity of an evidentiary hearing, Mr. Hirabayashi will proceed along those lines, and that is his primary objective at this time.

It may be that the Government then would be able to, if the Government chose to reinstitute a prosecution of Mr. Hirabayashi to then perhaps indeed move to dismiss under Rule 48(a), and we would of course in that circumstance want some additional time to present supplemental pleadings to the Court.

Your Honor, petitioner's argument will be divided between myself and Mr. Camden Hall. I will generally address the reasons why Mr. Hirabayashi

requests the Court deny the Government's motion to dismiss and why it is appropriate for the Court to grant Mr. Hirabayashi's petition for writ of error coram nobis.

Mr. Hall will rebut the constitutional issues concerning this Court's jurisdiction raised by the Government in its supplemental points and authorities, and address any other constitutional issues raised by the petition that are of interest to the Court.

THE COURT: Let me say this to you, and maybe this will be for your benefit, too, Mr. Hall. I am almost certain I would not grant the writ now, that is, the thing that I would do if I go that direction would be to set it down for trial, have exhibits identified and a hearing held. I don't know whether that changes the focus of your argument, but I am certain that I would not take judicial notice of all these things that have been presented to me.

Let me say to you, as I said before, I have read almost every word of the things that have been presented to me, but I just don't feel that I can take judicial notice of it and grant the writ and set aside the conviction at this hearing.

MS. BANNAI: Yes, Your Honor. The purpose

of my argument will be to try to convince the Court that indeed the Government's motion to dismiss based on Rule 48(a) should not be granted.

THE COURT: All right.

MS. BANNAI: Mr. Hall will address the issue of constitutional jurisdiction, that is, why, as asked by Your Honor, this case is not moot due to lack of adverse collateral legal consequences.

In 1942, Gordon K. Hirabayashi challenged the constitutionality of the curfew and exclusion orders imposed on Americans of Japanese ancestry. He believed that the judicial grant in its role as overseer and protector of the Constitution would exonerate him and proclaim that this country's constitutional safeguards would apply to all citizens, regardless of race.

Mr. Hirabayashi's petition for writ of error coram nobis represents his continued and persistent belief that the Court will reaffirm these basic principles of equality and democracy. As the Government has pointed out, the Executive and the Legislative branches of the Government have taken steps to acknowledge the injustices done to Americans of Japanese ancestry.

However, the Executive and Legislative

branches of government have no power to address and correct errors in the judicial proceedings which upheld the constitutionality of the exclusion and incarceration of Japanese-Americans from the West Coast.

Two of the three branches of government have acknowledged the injustice perpetrated upon its own citizens and have admitted error. The Judicial branch of government, however, now has the opportunity to rectify the injustice that was dealt to Mr. Hirabayashi and to Americans of Japanese ancestry.

The Government has filed a motion to dismiss, to vacate Mr. Hirabayashi's conviction and dismiss this indictment. However, Mr. Hirabayashi seeks his relief on the basis of his petition for writ of error coram nobis and not on the basis asserted by the Government in its motion.

The Government urges the Court to grant the motion because it is a forty-year-old misdemeanor conviction. It is time to put the controversy behind us and no completely satisfactory answer can be reached by the Court. The Government's motion, we believe, is inappropriate.

The Government cites Rinaldi v. United States and U. S. v. Hamm as a legal basis for its motion. Both of these cases arose from motions brought pursuant

to Rule 48(a). The purpose of Rule 48(a) is to allow the Government to terminate a prosecution. Such authority is not without its limitations. Neither under the common law antecedent of 48(a) nor under 48(a) does the Government have the opportunity to unilaterally terminate a prosecution after a person has been convicted and exhausted all of his appeals.

Since Mr. Hirabayashi has been convicted, sentenced, and exhausted all of his appeals, the Court should rule that 48(a) is not applicable to the present case.

With regard to the Weber case, in that case the Ninth Circuit dismissed the appeal on the basis of the Ninth Circuit Court's understanding that the parties would return to the trial court for entry of a dismissal under Rule 48(a). When the trial court denied the Rule 48(a) motion, the Ninth Circuit reinstated the original appeal and instructed the trial court to grant the motion to dismiss.

I think that that is a different situation than we find ourselves in here today. In that case Mr. Weber was able to bring the case on appeal to the Ninth Circuit which sent it back to the District Court. In that case Mr. Weber was not seeking post-conviction relief.

However, if the Court is inclined to grant the Government's motion, the Court has a long-established duty to conduct an independent review of the circumstances which are alleged to support vacation of the conviction. The purpose of such a review is to protect against prosecutorial impropriety and to insure that the public interest is served.

THE COURT: Let me say this to you. The Government comes in all the time and dismisses various indictments and the Court really never makes an examination of the underlying reasons because there is a prosecutorial discretion to dismiss actions before trial, and I know of no practice of the Court looking into the reasons for it.

We defer to the Executive Branch on the decision whether to prosecute or to dismiss, so that if I should decide to go with the Government's motion, I don't think that I would have the discretion or the power to go behind the Government's exercise of discretion. Do you think I should?

MS. BANNAI: Yes. I believe that the case law establishes that the Government needs to present substantial reasons that show that the public interest would not be disserved by a dismissal of the case. Of course our position is that 48(a) doesn't apply in

this case, that is, this is not a pretrial situation or prejudgment situation. This is a petition on an extraordinary writ.

In addition, we believe this is an extraordinary case, and I will be addressing that issue.

We believe the Government hasn't addressed in this case the public interest which we believe exists independent of and in addition to Mr. Hirabayashi's individual interest. We feel that the reasons that the Government advances are just excuses.

We strenuously disagree with the Government's reasons --

THE COURT: Don't you admit that this is a different case, but wouldn't you agree with Government counsel that the country as a whole has recognized the injustice of the relocation program and has, to a large extent, tried to make amends, and that the Government is not -- I didn't have the feeling the Government was just trying to make an excuse here in moving to dismiss?

MS. BANNAI: We feel that the Government has presented some reasons indeed; that in fact the Executive and the Legislative Branches have taken steps to make amends. We feel, however, that Mr. Hirabayashi's conviction, however, is not addressed by the Executive and Legislative actions, and Mr. Hall

will be addressing the issue of collateral legal consequences which we believe still flow to Mr. Hirabayashi and which would make it important for this Court to deny the Government's Rule 48(a) motion to dismiss.

THE COURT: Let me ask you, and maybe Mr. Hall will address this, if I granted the Government's motion, wouldn't the collateral consequences evaporate just as if we had a coram nobis hearing and the judgment was set aside, the conviction was set aside, that is, the collateral consequences?

MS. BANNAI: It is our belief that in order for Mr. Hirabayashi to be clear of his collateral legal consequences that indeed the petition for writ of error coram nobis needs to be considered by this Court, and the Court to make an independent judgment as to the reasons supporting the vacation of the conviction which would not be satisfied were the Court to merely grant the Government's motion as it presently stands and as set forth in the order submitted to the Court by the Government.

Mr. Hirabayashi's convictions serve to hold the constitutionality of the exclusion and incarceration of 110,000 persons, solely on the basis of race and national origin. It is not your typical forty-year-old misdemeanor by any stretch of the imagination.

The United States Constitution embodies fundamental principles of equal treatment and justice. These principles are challenged when American citizens are herded into concentration camps without charges brought, without trials, without representation of counsel.

The deprivation of fundamental rights and liberties to 110,000 people underscores the importance of the legal issues we present to the Court today, and also the importance of our petition for writ of error coram nobis.

No factual basis existed to justify the Government's exclusion program. As concluded by the Commission of Wartime Internment and Relocation of Civilia, this program was rooted in race prejudice, war hysteria and absence of political leadership. Hastily uprooted Americans suffered enormous economic and personal losses. Allowed only to take what they could carry with them, many lost their homes, businesses and farms.

They also lost opportunity for education and employment. Incarceration irrevocably harmed the family relationships and cultural and social fabric of the Japanese-American community. And now, forty years later, the Government urges the Court to ignore the

human life and principles that were broken.

I would like to now discuss our view of the conduct of Government officials during the prosecution of Mr. Hirabayashi's case. I would take strong exception to Mr. Stone's argument that petitioner has admitted that the vast majority of materials we have supplied to the Court in support of our coram nobis petition in fact were available many years ago. That simply is not the case, and I believe he is misconstruing our reply to the Government's supplemental authorities and --

THE COURT: Let me say this to you. Just as I feel that I cannot take judicial notice of the materials themselves, neither will I take judicial notice of the fact that they may have been available at certain times in the past, so you don't need to be concerned about that.

MS. BANNAI: Thank you, Your Honor.

The conduct of Government officials started with the issuance of Executive Order No. 9066, and continuing throughout the prosecution and appeal of Mr. Hirabayashi's conviction was justified under the dubious claim of military necessity. The Government, however, had documents which directly refuted their position. Their claim of military necessity was

invalid and untrue.

The Government intentionally withheld these documents from both the petitioner and the Court, and I will be discussing two examples of this. One I would like to discuss is the Final Report of General DeWitt and second I will be discussing the Ringle Report.

THE COURT: Well, on the Ringle Report, you go ahead. This is the thing that concerns me and the reason why I feel I would have to have a trial here. The Final Report of DeWitt - and I may be wrong on this - didn't come out until after the trial, and perhaps not until after the Supreme Court hearing was held. I'm not sure about that, but these time sequences are things that certainly I would have to address, when certain things became known to the Government. I'm sure you understand that.

MS. BANNAI: Yes, indeed. It's a little confusing because there was an original final report which is discussed in our petition.

THE COURT: Then it's really the changing of that report you point to primarily, isn't it?

MS. BANNAI: Yes, as well as the destruction of the original version of the report.

THE COURT: How did any copy ever survive? I thought there were all sorts of affidavits that we've

burned every copy there is, and so on and so on.

MS. BANNAI: I understand that a certificate of I guess proof of the destruction of the documents in fact was found and that led to discovery of the report itself. I realize it's a very difficult issue factually. If the Court would prefer, I could discuss that as well as the Ringle Report or simply discuss the Ringle Report, if the Court feels that that issue is not --

THE COURT: Why don't you just discuss them briefly because I think I am fully aware of them, aware of your position, but you go ahead.

MS. BANNAI: With regard to General DeWitt's Final Report, Edward J. Ennis of the Department of Justice was responsible for preparing the Government brief to the Supreme Court in the Hirabayashi case. He asked the War Department to send him General DeWitt's Final Report for use in preparing the Government's Supreme Court brief.

The original version of the Final Report was completed in April of 1943. This was before the Supreme Court decided the Hirabayashi case. However, the War Department withheld the Final Report from the Department of Justice until February of 1944 under the guise of military classification.

The original Final Report contained DeWitt's contention that regardless of the amount of time spent, the Government would not be able to distinguish loyal Japanese-Americans from disloyal Japanese-Americans.

THE COURT: And he said that time was no problem.

MS. BANNAI: Right. DeWitt inferred that because of the racial characteristics of Japanese-Americans, it would be impossible to make such distinctions.

The Government's argument in the Hirabayashi case was contrary. The Government argued that time was of the essence and that the War Department had acted reasonably in its exclusion program because many months or perhaps years would be required for loyalty investigations.

The Supreme Court adopted the Government's argument and upheld the curfew order under review. Had the court understood the real motivation for exclusion, the Court's decision would have been different than it was in the original Hirabayashi case.

Furthermore, the War Department was keenly aware of the significance of the "time is of the

essence" argument. When the War Department saw how the original version would undermine its case, the circulated draft was recalled and ordered destroyed. War Department records were subsequently altered to conceal receipt of the original version of the Final Report.

A second document of great importance and also not revealed to the Court was the Ringle Report. This report was prepared by the Office of Naval Intelligence. The Office of Naval Intelligence had the responsibility to conduct surveillance of the Japanese-American community.

Lieutenant Commander Ringle was charged with this responsibility. Commander Ringle was an expert in the Japanese language and culture. In his official capacity, Ringle wrote a report that went to the heart of the question of Japanese-American loyalty. He reported that the identification of disloyal Japanese-Americans would be an easy task. If there were any disloyal Japanese-Americans, they could be identified either by name or club membership.

He concluded that no more than three per cent of the Japanese-American population should be under any suspicion. He reported that the so-called "Japanese problem" had been magnified largely out of

proportion, largely because of racial characteristics; that the Japanese-American problem was no more serious than that of the German and Italian portions of the U.S. population, and lastly, that Japanese-Americans should be handled on an individual and not on a racial basis.

THE COURT: Let me ask you, because I was not able to clear this up in my own mind in the records, but of this I know I am right, and that is the Japanese-Americans in Hawaii were not under a curfew restriction nor were they relocated.

MS. BANNAI: That's my understanding, except on, I believe, a selective basis.

THE COURT: Some may have been arrested and detained. In the United States, I know that no native German-Americans, citizens, nor no Italian-Americans were relocated or under curfew except on a selective basis.

MS. BANNAI: Right.

THE COURT: So it is only the Japanese citizens on the West Coast who were relocated?

MS. BANNAI: Indeed an anomalous result of German and Italian aliens received individual loyalty hearings while American citizens received no individual loyalty hearings resulted.

THE COURT: Is that right? I was unaware of that, that there were individual hearings for Italian-Americans and German-Americans. Was that aliens or citizens?

MS. BANNAI: I believe for aliens, and I believe so for citizens, also.

The assertions which I have just stated undermine the position taken by the Government in its legal briefs and oral argument in petitioner's case. The Government made no mention of the Ringle Report. In fact, it argued that the identities of the potentially disloyal were not readily discoverable.

Mr. Ennis, as I stated, was responsible for preparing the brief in the Hirabayashi case, and stated in a memorandum to Solicitor General Fahey that the Department of Justice may have a duty to advise the Court of the existence of the Ringle Report. He stated, and I quote, "In one of the crucial points of the case, the Government is forced to argue that individuals' selective evacuation would have been impractical and insufficient when we have positive knowledge that the only intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary."

He further remarked that not to tell the

Court about the Ringle Report might approximate the suppression of evidence.

THE COURT: Now, was that written before the Hirabayashi appeal or was that before the Korematsu?

MS. BANNAI: I believe that the letter was written - I don't have the date here. It was during the Hirabayashi appeal and was written while Mr. Ennis was preparing the brief in the Hirabayashi case, and he was advising Solicitor General Fahey.

THE COURT: Is that right?

MS. BANNAI: This is the Exhibit Q which is described in the affidavit of Peter Irons as one of the newly discovered, examples of newly discovered documents, and certainly the significance of this letter to Mr. Hirabayashi's case I think is quite apparent.

Other documents from agencies responsible for intelligence gathering, including the FBI and the FCC, corroborated the fact that there was no military necessity. This information was withheld from the petitioner and withheld from the Court.

Significantly the document which establishes this conduct are all from the Government's own files. The petition for writ of error coram nobis affords the Court an opportunity to expunge its own records.

In United States v. Morgan, the Supreme

Court held that coram nobis is the appropriate remedy to correct fundamental errors and under circumstances requiring such action to achieve justice.

The misconduct we have cited in our petition, the exhibits and other documents, was undertaken by the Government at the expense of Mr. Hirabayashi's constitutional rights to a fair trial and appeal in this case, and at the expense of the integrity of the judicial system.

This prosecutorial misconduct presents a compelling circumstance and error of fundamental character to warrant coram nobis relief. We believe that the Court has an opportunity in this case to articulate an expected standard of conduct for Government officials, particularly in time of war when liberties and individual rights should be more ardently protected.

The Court has an opportunity to deter unlawful and illegal conduct, particularly when the Government imposes restrictions on easily identifiable minority.

The Government's motion we believe is without authority and should be denied by this Court. We would ask that if the Court were disinclined to take judicial notice of the facts and the documents

submitted in this case, and that the Court does not feel it has sufficient record before it in order to reach the merits of this petition, that this matter be set for further hearings and proceedings to culminate in a hearing on the merits of the petition of Mr. Hirabayashi, petition for writ of error coram nobis.

Thank you, Your Honor.

THE COURT: All right. Now, the court reporter has been writing constantly, and is still writing, since I guess 2 o'clock. So I'm going to take a regular recess of fifteen minutes.

There are a few seats still over here. I just hate to see people stand all through this hearing. There are some seats on this front bench, if you people will move a little bit closer together. While I am gone, feel free to try to find a seat.

We will resume at 3:15.

(Recess.)

THE COURT: Mr. Hall.

MR. HALL: Your Honor, I would like to, at the outset, thank you for giving us the opportunity to make this presentation. I know it's --

THE COURT: Let me ask you this. I believe that you or someone requested that Mr. Hirabayashi be

permitted to make a statement. Is there a time when you want that to be done?

MR. HALL: At the conclusion of my presentation.

THE COURT: At the conclusion of your argument. All right.

MR. HALL: I know the proceedings before the Court are somewhat unusual and probably none of us will have an opportunity for good or ill again like the one we have today or in this case.

I am honored to be a part of this case and I am honored to be before the Court today. Also, I would like to welcome Mr. Stone to Seattle. I have gotten to know him a little bit over the course of these proceedings and I think he is doing the job that is required to be done and doing it admirably.

There is obviously great interest in this case and it's more than a case really involving one individual. I think we have to be candid in admitting it has a fair amount of symbolic importance, and indeed I think to some extent the reason that the room is as filled as it is today gives testimony to that symbolism.

I would like to, before entering into the formal part of my hopefully brief presentation, to

address some of the questions the Court raised in questioning a few minutes ago. At the outset the Court asked Ms. Bannai to the effect that the Government comes in all the time and moves to dismiss indictments, and can the Court really go behind the motivation of the Government and, in effect, question prosecutorial discretion.

We believe, for example, under the authority of cases such as Young v. United States, which has been cited in this case, that even where the Government confesses error in proceeding, and though it's entitled to great weight, this does not relieve the Court from its judicial obligation of examining independently the errors so confessed.

Now, the Government here does not necessarily confess errors, although I suppose one could make the argument that in the posture of the pleadings, that is in effect what has happened. I'm not going to make that argument at the moment, but I don't think we've waived that argument if it should be made or if we should desire to make it later. The fact of the matter is, when the Government comes in to dismiss an indictment, it's rare that there are what we might call adverse collateral legal consequences which have transpired as a consequence of the indictment affecting

the individual who is indicted. Here, however, we have a significantly different situation where we not only have an indictment. We have a trial, we have a conviction, we have appeals and we have sentences served, and we have, as I will try to comment a little later, a significant array of adverse collateral legal consequences which have befallen Mr. Hirabayashi, and it is for this reason, Your Honor, we believe most respectfully to both the Court and to counsel, that the Court has an obligation to do more than just accept the Government's offer of vacation of the indictment.

THE COURT: Let me ask you this: What are the collateral consequences that would be suffered by Mr. Hirabayashi if the Government's motion were granted, that is, other than those he presently suffers?

MR. HALL: To begin with, I think it is important -- I think there is one collateral consequence, among many, that as a matter of fact, I just thought of a few minutes ago. One of the last times I appeared before this Court, although I have been here many times, was with regard to the Seattle School District busing case.

I was just this morning going through the brief in that case to see if it had any information that might be useful in this case, and I came across

the fact that in that case - it happened to be the Korematsu case - was cited to the United States Supreme Court as being an example of an instance where the United States Supreme Court had approved of blatant racial classification. Of course Korematsu cites the Hirabayashi case, and so forth.

If the Court were to grant the Government's motion, on the face of it, it would deprive the petitioners in this case from the opportunity of demonstrating to the Court and indeed to the world that the grounds on which Mr. Hirabayashi were tried and convicted and the grounds on which the appeals were not granted were without merit and were in violation of his due process, and here is the point that I wish to make.

If the Court were to enter a written opinion expressing the Court's findings on the issues, those findings would find their way into Shepherd's Citator and from this day forward and forevermore, any person who wishes to cite Hirabayashi, and who is careful and reads the Citator, will find that note to this decision and will know that the facts upon which the United States Supreme Court made its decision, for example, if this were the Court's ruling, were twisted or distorted in the process, affecting Mr. Hirabayashi's

trial.

That's just one example. It may be sort of a mundane example but it's not an unimportant example because what Mr. Hirabayashi is asking is really something more than a personal vindication of this situation, although that is certainly there. I think what he is asking, in all due respect to Mr. Hirabayashi, is to set the record straight, to at least have the opportunity to present to the Court the facts as we understand them, subject of course to the Government's opportunity to rebut those facts, if it so wishes, so that the Court can then make some rulings and findings which hopefully will have at least some precedential value. I know this isn't in Mr. Hirabayashi's mind, but if that occurs then we go into the Citator and become an opinion of record and the Hirabayashi case would, to that much anyway, stand for a lot less than it does today. That's one example.

There are other collateral legal consequences which exist to some extent without regard to whether the motion of the Government is granted. I would like to get to those in a few minutes.

In addition, the Government, while it is not offering a pardon, the comment was that if President Truman had known in 1947 essentially what we

know today, he may have pardoned Mr. Hirabayashi.

Mr. Hirabayashi has never spoken about this, but I would submit that in order to be pardoned for something, you have to, in effect, be admitting that you did something for which a pardon is appropriate, and I believe, most respectfully again to the Government and to the Court, that Mr. Hirabayashi's position is he didn't do anything which is susceptible of pardon.

Of course we are aware of the legal niceties that he has been convicted and there is a United States Supreme Court decision, but there is a moral principle here and that's why the issue of pardon is one of some inflammatory note.

The Court did also ask when Exhibit Q, I think it was, was authored, and I believe it was April 30th --

THE COURT: Which one is that? Which exhibit is that?

MR. HALL: It is the letter from Mr. Ennis to Mr. Fahey.

THE COURT: Oh, yes.

MR. HALL: April 30th, and for the Court's information, the United States Supreme Court ruled in the Hirabayashi case on June 21st, 1943.

THE COURT: I know the mandate issued in

July, July 20th of '43.

MR. HALL: Yes.

Now, with the Court's permission, I would to begin my forman comments.

George Hirabayashi was born in Seattle in 1918. He is an American citizen and he was entitled to all the privileges of citizenship, to life, liberty, and the right to pursue happiness. These were, as this Court knows and has said and articulated many times, among the greatest gifts shared by man. They form the very foundation of what is precious about American citizenship, about what it means to be an American.

Mr. Hirabayashi's birthright as an American citizen entitled him to be judged by what he did; not by who he was, his race, his parents' origin. It should have made no difference if his parents were Japanese.

Then, in the middle of his senior year at the University of Washington, his life was truly changed. The catharsis following December 7, 1941 created the change. Not only was that a day which will live in infamy, it gave birth to infamous acts. One such act was the decision of frightened people to exclude all persons of Japanese extraction, citizens

and aliens alike, from certain parts of the Western United States including Mr. Hirabayashi's home here in Seattle.

I would like to underline at this point, Your Honor, the issue that co-counsel mentioned a few minutes ago, the anomalous situation where we had foreign aliens of German or Italian extraction who were entitled to various hearings and due process with regard to what the Government would do to them after the war broke out in Europe. Again, we had American citizens of Japanese extraction in the United States living on the West Coast who were denied those same rights and due process activities.

Another infamous act, Your Honor, was the decision by the same people to establish an 8 p.m. to 6 a.m. curfew. Mr. Hirabayashi in an act of personal sacrifice and civil disobedience long before civil disobedience was in vogue in this country, assuming it ever was, and I think it probably is from time to time, consciously and one might say even conscientiously, disobeyed the curfew and refused to report to the authorities as a preliminary step to his exclusion from his home.

He was arrested, indicted, and tried by a jury whose passions in time of war can only be guessed,

and convicted of violating the misdemeanor laws. Gordon Hirabayashi, the Supreme Court said, had never been to Japan; had never had any association with Japanese residing there. He was sentenced nonetheless to a prison term for three months on each charge, the sentences to run concurrently.

He quickly appealed. The appeal was quickly transferred to the United States Supreme Court which, acting on the information essentially supplied to it by the Government because the Government was in the sole and exclusive control of the information that affected the underlying statute, the presidential proclamation, the proclamations and directives of General DeWitt, affirmed Mr. Hirabayashi's conviction.

Last night I read again the Hirabayashi case, and it's a difficult case to read because it says so many things that don't apply any more in the jurisprudence that you and I practice today in 1984. It talks about the fact that Japanese citizens have by law been excluded from doing many things, including in some cases by some state laws, marrying people other than Japanese individuals. It talks about the fact that Japanese were precluded from certain -- even citizens were precluded from certain activities that were shared by other citizens. And, of course, it

talks about Gordon Hirabayashi.

During the argument before the Supreme Court, the Government, despite its clear knowledge to the contrary, and co-counsel has mentioned this, kept secret not only from Mr. Hirabayashi and his attorneys but also, most significantly, from the Court itself, certain information which counsel has iterated and I won't reiterate.

The Government knew that this information, that the representations that it was making to this Court were either not true or significantly in doubt, and yet did not share that information with the Court.

We believe, based upon a reading of the Hirabayashi case, which relied very strongly on the Government's representations - the Court has already alluded to one representation that the Court relied upon which is found at page 99 of the United States Report - that the judgment of the military authorities and Congress that there were disloyal members of the Japanese population whose numbers and strength could not be precisely and quickly ascertained, was an important element in the finding of the Court.

The Court says at the end of its decision, shortly before the dissent, or rather the concurring opinions of Justice Douglas and others, that the

Government had done what it was required to do because the military commander, in light of the knowledge then available, had acted properly. Of course the Supreme Court, believing that the knowledge then available was that which the Government was telling it existed, made these rulings.

We believe that at the very least, it was a breach of faith with the Court, if not an ethical breach, and at the very most it was a denial of Mr. Hirabayashi's due process rights in his ability to defend himself not only before the trial court but also before the Supreme Court.

Now, almost forty years, forty-two years to the day after the United States Supreme Court ruled, Mr. Hirabayashi asks this Court to correct the past errors which have placed a brand of infamy upon his brow.

Now, we don't ask this Court today to grant a writ of coram nobis. In effect, during the recess one of the attorneys working this case reminded me, and I think it's an excellent way to put this, our position at this point, in effect what we're doing today is making an offer of proof. We are in effect telling the Court that if we have a hearing on the issue of whether a writ of coram nobis should be

granted, this is the proof which we will offer.

We ask for an evidentiary hearing on the issue of whether a writ of coram nobis should be granted in order to do more than just offer the proof but to try to make the proof, subject of course to the opportunity of the Government to respond. If the writ of coram nobis is granted, then the Court will presumably have to make some kind of findings and conclusions in support of its decision.

If at that point the Government wishes to, through whatever prosecutorial prerogatives it has, to determine we're not going to prosecute Mr. Hirabayashi, that's fine. We may - I can't commit my co-counsel and my client, of course, at this point - we may agree at that point in the proceedings to say fine, we're not anxious to be prosecuted, either, but we are anxious to get to that point and hope that the Court can see its way toward giving us the opportunity to present the evidence so that the Court can make findings and so that the Shepherd Citator can at least be corrected.

But it goes beyond the Shepherd Citator. Counsel has stated, and properly so, I think, because it's certainly a point which ought to be before the Court, that this case is not properly before the Court

because it does not present a case or controversy as is required by Article III of the United States Constitution.

We believe to a large extent that issue is disposed of by reference to the Sibron case which we called the Court's attention to, and even by reference to the Lane case, which was cited essentially by the Government, which cites to the Sibron case. The Sibron case says in a nutshell that it's an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences, and the Sibron case goes on to state that the mere "possibility" that this will be the case, is enough to preserve a criminal case from ending inagminously in the limbo of mootness.

According to Sibron, in a case seeking judicial review of deprivation of constitutional rights, they are not made moot because the sentence has been completed, and indeed, the courts have ruled, including our own Ninth Circuit, in the Chavez case, among others, that the burden of overcoming the presumption of adverse collateral legal consequences is borne by the Government.

We most respectfully maintain to both the Court and counsel that the Government has not proved

that adverse legal consequences do not derive from the expereince to which Mr. Hirabayashi has been subjected.

Now, the Williams case, or the Lane case, rather, has been distinguished in our papers. Briefly, we believe it doesn't reply because there the respondents only attacked the sentences that were in issue and the sentences expired, and indeed, in that case, as the Court points out, the respondents never attacked either the substantive or procedural grounds with regard to the parole issue which was really the main issue in the case.

Furthermore, the legal consequences which implode from the events affecting the respondents, their parole and so forth, were very narrowly circumscribed by the statutes of the state of Illinois. And as I said earlier, the Court goes on to say that the Lane case is not a Sibron type of a case, and goes on to talk about Sibron, what a Sibron type of case is, and we respectfully believe Sibron is the law which is more applicable in this case rather than Lane.

In any event, the existing collateral legal consequences which are visited upon Mr. Hirabayashi include the following, for example: He indicated in his affidavit filed with this Court that he was denied the opportunity to sit on a jury some years ago. He

tried to call Judge Bowen, whom I know Your Honor knew, because Judge Bowen was the presiding judge. Of course Judge Bowen wouldn't tell him why Mr. Hirabayashi was disqualified from the panel, and Mr. Hirabayashi only speculates and, in all candor, it's a lot more than speculation. I think that the reason that he was not allowed to be on the jury panel had something to do with his notoriety.

In addition, and more immediate, and indeed in a sense more pathetic, is the fact that to this day, or at least as of October of last year after this lawsuit became a reality --

THE COURT: I think I saw the letter.

MR. HALL: -- an individual who I don't believe signed his name, or her name --

THE COURT: Did not.

MR. HALL: -- wrote to Mr. Hirabayashi and, among other things, talked about what "your people did" and made comments that I don't think bear repeating in the record at the present time. The fact of the matter is, the stigma that Mr. Hirabayashi suffers to this day is to, I think some extent, articulated in the animus that motivated that kind of a letter.

We believe that with an opportunity to, if we may use the term, set the record straight, that this

kind of stigma and this kind of reaction to Mr. Hirabayashi as an individual and as a member of a group would be significantly dissipated if not totally annihilated.

Counsel has maintained, and I think very well again, that there is no way to prove that whatever stigma or whatever collateral legal consequences Mr. Hirabayashi today suffers derived from the misdemeanor convictions as opposed to the hard felony conviction, which is a part of Mr. Hirabayashi's past, and it's our position, Your Honor, most respectfully, that the felony conviction, while it was pardonable many, many years ago, received virtually no notoriety. The notoriety that has accrued or has befallen Mr. Hirabayashi is a result of the misdemeanor conviction and the proceedings that existed then and the United States Supreme Court decision, and we think therefore it is virtually conclusive that --

THE COURT: Can you answer this for me? I think it might have been in the record. How many persons were there who did as Mr. Hirabayashi did, refused to obey the curfew order or refused to report?

MR. HALL: I frankly don't know. I know there were more than just three or four, but we know the three or four individuals who --

THE COURT: Who were convicted.

MR. HALL: -- who were convicted and who were the standardbearers.

I think at a certain point since the law was made - this is speculation again on my part - at a certain point after the Hirabayashi, Mitsui and Korematsu cases, if there were other convictions coming along it was sort of difficult to argue that new law should be made in the face of the Supreme Court, United States Supreme Court decisions. Decisions based on information which was, shall we say, less than candid, or less than candidly presented by the Government.

In addition, as to further collateral or potential collateral legal consequences, as the Court knows, numerous state laws provide that admissions in court of misdemeanor convictions can be used for impeachment. Now, we don't know if Mr. Hirabayashi is going to have the misfortune of being in court on some other occasion and somehow his past history is going to be used for impeachment, and yet this is an infirmity that doesn't light my feet. It doesn't light counsel's feet. We've never been convicted of a misdemeanor violation. If we go to court as a defendant or as a witness, no one can impeach us by virtue of our past

misdemeanor convictions, and yet Mr. Hirabayashi stands on a different footing from us and we respectfully believe that he shouldn't have to, Your Honor.

Even the Government concedes that Mr. Hirabayashi's past convictions may be considered by a sentencing judge in a subsequent proceeding, and again we don't suggest that Mr. Hirabayashi is going to have to be sentenced. And yet it's a badge of infamy, if I may use that term, which he carries with him which you and I and counsel don't carry with us because we've never been through what he's had to go through.

We believe, respectfully, Your Honor, that Mr. Hirabayashi has demonstrated this case is not moot. In effect, so too has the Government, demonstrated the case is not moot. This again goes to the Article III case or controvery issue. The Government cannot first refuse to acknowledge its own misconduct, which I take it is the position of the Government, or the unconstitutionality of its acts, which I again take it is the position of the Government, and then be heard to trumpet that there is no reasonable likelihood that similar violations will not occur.

I know Mr. Stone won't be responsible for similar violations, and I presume tht many, many

people won't be responsible for similar violations, but in the face of the Government's refusal to in effect say "mea culpa," we believe that the possibility exists and that this Court has an opportunity to influence the future, if you will, do its part to assure that future violations of this sort do not again persist.

Mr. Hirabayashi seeks complete judicial vindication; not merely an advisory opinion of the Court. To date, as counsel has said, it's only the judicial branch of Government which has not purged its record, and we believe that this Court has an opportunity to at least partially accomplish that and to provide us with an opportunity to present the evidence as to why the record should be purged.

To the extent the Government offers no admission or explanation, since it does not address the merits of Gordon Hirabayashi's allegations, these proceedings are adversary. Indeed, through its failure to respond to the merits of the petition in this case, the Government gives the appearance of seeking to subvert the truth-finding process and to erect a stone wall around its prior misconduct.

Mr. Hirabayashi has exercised due diligence in bringing this action. Counsel has, I think,

addressed that point and I won't mention it further. We believe further, Your Honor, that the Government should be estopped from asserting the defense of laches due to its own clean hands. At the very least, before the Government is heard to assert laches, we believe an evidentiary hearing is required to see if the Government's hands are clean or not so that it has an opportunity to make that assertion.

This action raises issues of fundamental character relating to Gordon Hirabayashi's constitutional rights to due process, equal protection of the laws, and a full and fair trial. It also addresses issues concerning a pattern of serious governmental misconduct or allegations thereof, concealment or destruction of relevant exculpatory evidence in a criminal proceeding affecting Mr. Hirabayashi.

Today, Your Honor, the Court asks this Court -- today, Your Honor, Mr. Hirabayashi asks this Court to deny the Government's effort to frustrate his petition and to cast aspersions on the rectitude of his position. He asks this Court to permit him to eradicate not only the stain which men clothed in the robes of Government have placed on his life, but also the stain they have spread on the fabric of our nation.

To accomplish this will not only require a

dismissal of his indictments and convictions but a well-founded judicial conclusion that what our government did to Gordon Hirabayashi was wrong; that it was more than any American citizen should be required to bear. It remains a mistake, as the Government has admitted, and that it was, in effect, an infamous act.

Yes, Gordon Hirabayashi even asks more than this, however. Simply put, he asks that this Court participate in a process which will assure him and all future persecuted and unpopular minorities that because they are unpopular, that because they do not have sufficient power, our Government will not and cannot deprive them of their freedom and constitutional birthright. This is what this case is about.

I thank the Court and I would like to have this opportunity, if you don't have any questions, to present Mr. Hirabayashi.

THE COURT: I do not have.

All right. Before I do call on Mr. Hirabayashi, Mr. Barnett, after the petitioner speaks, since you were in on this case from the very beginning, I think, I would be happy to hear from you. I know you were co-counsel. I would be happy to hear from you if you have anything to say.

MR. HALL: Mr. Barnett has been of a great deal of assistance to us.

THE COURT: I am sure he has.

MR. BARNETT: Just this, Your Honor, that this was the original Court of error. The case was tried here. The witnesses were heard here. Judge Black overruled the demurrer which called on the Government to specify the facts upon which a citizen of the United States could be indicted.

Had he sustained that demurrer, the Army would have had to come forward with the proof it did not have, which is what is admitted now. That's the main point I want to make now.

THE COURT: Were you in on the original trial?

MR. BARNETT: Yes, I was, Your Honor.

THE COURT: You were co-counsel?

MR. BARNETT: I was a witness but I was not listed as co-counsel because it looked like I would be in conflict. Another witness, Your Honor, was Floyd Small, who sits against the wall. Floyd, will you stand?

And I don't know, Your Honor, that Gordon Hirabayashi was introduced.

THE COURT: No; he was introduced.

MR. BARNETT: I am a trial lawyer, Your Honor, and I know Your Honor was a trial lawyer. When we go into the trial the Court will find defects which will give the Court a basis to find error to support the claims of Hirabayashi for a coram nobis petition eradicating his sentence.

Now, in the supplemental brief by counsel for the Government, he cites the Supreme Court conviction of Hirabayashi as though it was still law. This Court has the challenge of the century to right a case in which the Supreme Court will not overlook the constitution of the United States nor will any more trial courts do it in the absence of proof.

THE COURT: All right.

Mr. Hirabayashi?

THE PETITIONER: Your Honor, my name is Gordon Hirabayashi. I am the petitioner in this case. I wish to thank the Court for this opportunity to make a statement.

During World War II, as an American of Japanese ancestry, I had the constitution to protect me. Nevertheless, I was sent to prison for trying to live like other Americans. The others of Japanese ancestry were summarily uprooted and incarcerated en masse into internment camps, purely on grounds of their

ancestry.

While constitutional guarantees existed in 1942 and '43, public institutions did not have the will nor the inclination to uphold them. It was devastating to me to witness my government committing act after act stripping me from my constitutional rights.

Because of the stand I took in 1942, I have continuously had to defend my actions and prove my loyalty. We have filed a petition for a writ of error coram nobis because I had felt the Supreme Court decision was a black mark on constitutional law. As a citizen, I considered it my responsibility to contribute toward the establishment of respect and honor for the constitution.

Moreover, I wish to have the United States continue to be regarded as a model for democracy, particularly among the newly emerging countries in the Third World where I researched and taught during the first decade of my professional career.

It is ironic that while I, among others, brought to these areas the attractions of American democracy, they wanted to know why America would imprison its own citizens for being of a particular ancestry. With great effort I was able to make a

positive response, declaring my continuing faith in the American system of justice and my belief that there would come a day when the injustices suffered would be acknowledged and the conviction overturned.

On the personal side, Your Honor, I have filed a petition to clear my name of the stigma of questionable loyalty to the United States. I believe it is important to assume active responsibilities of citizenship. My citizenship is something I deeply cherish.

One of the duties of citizenship is voting, and I have voted in all of the presidential elections since I became eligible to vote. The constitution which guarantees the rights and privileges are mere scraps of paper unless citizens are prepared to uphold them, especially during crises when it counts the most.

When confronted with the option of obeying the Government orders or to violate them, I had no choice but to disobey. My whole philosophy of life and motive to maintain good citizenship demanded that I uphold the constitutional guarantees. The alternative to prison was to give up on American principles.

Preparatory to my District Court trial in October, 1942, the Government subpoenaed my parents from Tulle Lake Concentration Camp to testify as its

witnesses. The Government's intent was to demonstrate that my parents were born in Japan; that they had emigrated from Japan; that therefore I was of Japanese ancestry and thus subject to Western Defense Command proclamations.

My legal committee at the time, including Art Barnett, had offered to house my parents, even though they were Government witnesses. When the Government hesitated, a suggestion was made to deputize the hosts so that technically my parents would be under protective custody. These offers were refused and my parents were confined to jail for ten days.

I relate this incident for two reasons. First, the Government was totally unconcerned about my constitutional rights. The Government wanted to win at all cost to justify its treatment of Americans of Japanese ancestry. Secondly, the gross callousness in which they treated my parents after bringing them to Seattle, depressed and shocked me to the core. The confining of my parents in jail is a scar that I carry to this day.

At my District Court trial in October, 1942, Judge Black gave this instruction to the jury, and here I am paraphrasing. "You can forget all that discussion about the Constitution by the defense. You are to

determine solely whether the defendant is of Japanese ancestry. If he is, you are to determine whether he had registered and left for camp, as instructed. If he had failed to comply with any of these orders, you are to return a verdict of guilty."

That, in the final analysis, was my trial. Loyalty had nothing to do with my conviction. From the time I originally made the decision to violate the exclusion order, I had maintained the faith that when my case finally got to the Supreme Court, I would have my day in court. I fully expected that as a citizen, the Constitution would protect me.

Even though I lost, I did not abandon my belief in the Constitution. Accordingly, when the discovery of government misconduct gave me an opportunity to petition for a writ of error coram nobis, I did not hesitate for a moment.

After filing the petition, I received an anonymous letter signed "A Japanese friend, and I hope it will always be thus," dated October 28th, 1982. I believe this writer meant a friend of the Japanese, and I hope it will always be thus. With your permission, I would like to quote an excerpt from that letter which opens as follows:

"Dear Mr. Hirabayashi:

"Have you ever attempted to estimate the enormous hatred of the Japanese after the heinous attack on Pearl Harbor?"

The letter goes on.

"Maybe our government did irrational things. So did your people when they attacked the Islands. That certainly was uncalled for. This was war and during such a confrontation one can expect bizarre solutions to problems. Have you forgotten how the U.S. Government helped Japan to reestablish itself as a world power? And what the American people gave wasn't peanuts, either. Can't you find anything to be grateful for, or is your ambition cloistered in a desire to get even no matter what the consequences? If you can't bury your hatchet, then perhaps our government was too lenient. Perhaps there should have been five or ten nuclear bombs dropped on your people and then forgotten."

Your Honor, I believe it is relevant to note that this is a letter written not forty years ago during the war, but in the 1980's. I also wish to note that this writer throughout his letter regards me not as an American citizen but as an Imperial Japanese subject, just as during the war my government were satisfied to label me as "Non-alien" rather than

"citizen."

If the unimaginable had happened to citizens during World War II, can it happen again to another minority group? Just recently Vincent Chin in Detroit was beaten to death with a baseball bat by two unemployed auto workers. They had thought he was Japanese. Like the Government during World War II, they singled him out because of his ancestry.

During the hostage crisis a few years ago, many Americans, including some high ranking Government representatives, talked about interning persons of Iranian ancestry. My case stands for the precedent that it can happen again. This is not only my case. This is not only a Japanese-American case. This is an American case.

Since the answer to the question "Can it happen again?" is yes, it is vitally important during relative periods of calm to insure that "bizarre solutions" have less opportunity to occur again.

In conclusion, I wish to ask the Government why it continues to this day to defend violations of our constitution and not acknowledge my petition in the interests of justice.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Stone, would you care, or Ms. Barnes, would you care to make a response?

MR. STONE: I can either respond if Your Honor would like in some detail to a lot of the things that were said or I can just make very brief response.

THE COURT: Let me tell you what it is really my intention to do after hearing the arguments and studying the briefs is to deny the Government's motion to dismiss and set down an evidentiary hearing, in effect, a trial on the coram nobis, so would you want to address that tentative decision?

MR. STONE: Yes, Your Honor, and I'd like to explain what I think is foremost. Perhaps I should just start from that point.

I think that the problem with setting this for hearing is really threefold. The narrowest ground that I think the Court has to consider is if it were to set a hearing, has there been a legal basis, that is, a sufficient offer of proof for a hearing.

As a legal matter, pure and simple, have there been sufficient newly discovered allegations which justify what is a rather substantial burden and departure from what has been done in the other similar cases of this matter? In fact, we think that if the Court reviews those documents, you will see that there

is no document among them that was not available which went to the substantive proof of what went on before 1950.

To bring such a hearing now in 1984, thirty-four years after it could have been brought, when many of those people are dead and gone and many of those records are lost is something that is just simply contrary to the precedent that has been established and which binds this Court. As you can imagine, it puts the Government at quite a disadvantage.

Why wasn't it brought before? That's something we will postpone for a moment. Let's look at the second consideration. Do any of those allegations warrant a hearing because they would result in a different result if the case were tried again? The Ringle Report which suggested that he conceded that approximately three out of a hundred people might be suspect. The time when the House and Senate of the United States passed the law which was violated here, they said they conceded no more than ten out of a hundred people were suspect. They conceded that 90 per cent of the people would be unfortunately moved without just cause.

The General's position would have to be, if I were a General, I need only hear you tell me that

one out of a hundred is a potential problem. If I don't have time to go through 110,000, I have a rational basis on which to act.

Now, in retrospect, we may say "General, you've got to have at least ten out of a hundred, or at least ten out of a hundred and some basis to believe that," but if he is getting information that even says three out of a hundred, where he has been clearly, as many of the historical treatises made clear, where he has been told the people on the island of Hawaii did not do their job. Our best ships, our most ready reserves, were devastated and a country on that front was exposed. You may not make that mistake. Now, the man need only have a rational basis, and the law which bound the Supreme Court then and binds this Court has never been reversed is that a General's decision in a war zone is not controlled by hindsight.

So we would have to go back now and litigate what he knew in 1942 and what was available to him.

THE COURT: Didn't he, for one thing, know that there was no demonstrable sabotage or espionage in Hawaii leading up to the --

MR. STONE: No. As a matter of fact, Your Honor, I think we're getting very far afield, but the state of knowledge in '43 or '44, when Mr. Ennis

prepared briefs in the Supreme Court, is not what was in General DeWitt's hands in 1942. He had varying estimates. He had people like Lieutenant Commander Ringle who I pointed out was not from the Headquarters Unit ot ONI telling him that they thought any mass evacuation would be an overreaction. And he had other intelligence which suggested that there might well be a raid on the airplane factories that he was charged to defend at all costs.

Now, how he chose to react is his state of mind in 1942; not in 1943; not in 1944. Now, you're asking to go back and open up issues --

THE COURT: Doesn't he have to take into consideration, though, those facts which were made known to him, that is, as to whether there was sabotage or Fifth Column activity on Hawaii by American citizens, or J. Edgar Hoover's letter where he said - I think he said - "We know the people who should be picked up. We know their identity."

MR. STONE: The public record will show, Your Honor, and the public record does show that he did not act without the best available information being made available to him, whether or not it was accurate, whether or not it was sufficient by our standards.

Assuming for the moment that it was only Mr. Ringle's report, it told him that three and a half per cent of the population was something he had to worry about. Now, whether someone could tell him "But don't worry; we know who those three and a half per cent of the population are," that is something he didn't have to take anybody else's word for. And if he was concerned that he would be exposing the United States at a time that they were losing World War II to a problem, that is a decision we have to look at through his eyes.

Now, all of the documents which question his judgment in that regard were available before 1950, because that question, that judgment was questioned in the Supreme Court. It was questioned in the briefs in Mr. Hirabayashi's case. It was questioned in Eugene Rothchild's argument in 1945. It was questioned by the War Relocation Authority itself when it published those materials in 1946. It was investigated. The Department's files were turned over, and it was written about by Morton Grodson in his seminal work "American Betrayed" in 1949, when he said then that he thought the Supreme Court ought to reconsider the case.

Then General DeWitt was still alive. I could find out what he was relying on, perhaps, and all

the other people that he dealt with were still around, and some of his files might have been intact. That was not done for nearly thirty-five years, and there is no document before this Court the substance of which was not available then.

Sure, Mr. Ennis had some of the same feelings in 1944 and 1945 that Mr. Grotzens had in 1949, and Mr. Ennis in 1946 left the Government, became the General Counsel of the ACLU, and for thirty years functioned as the General Counsel of the ACLU. He was one of the people instrumental in getting the Japanese-American Claims Act passed. But if he felt that there were some kind of Government misconduct which infected the whole case, his clients were the Japanese-American Citizens League at that point. How come he didn't bring it to their attention?

We submit that the Supreme Court made it very clear, and indeed, I think what you just heard about the instructions that the judge gave the jury made it very clear that it was impossible, and I think ultimately that's what we'd be trying to prove here, whether it would have been impossible for a General to conclude that he had any rational basis to do it. That was a determination which nobody wanted to take up at that time.

As a result, they took up the question whether it was lawful, and the Supreme Court made a ruling in light of the times and the War Powers clause which was invoked then, that much as it disliked General DeWitt's decision, and it said so, and the Government said it was not thrilled with his decision, that the rule of law was that a court in hindsight only may determine whether there is any rational basis for a judge, and in fact, I submit that the Ringle Report is itself a rational basis. It doesn't say that there is nothing to worry about. It tells the General to conduct individual hearings instead of mass hearings.

Now, whether or not he had to conduct mass hearings or individual hearings shows the Court, I think, prima facie, how difficult this question has to be forty years down the line. Just to give you some background on just how complex this is --

THE COURT: You don't need to tell me that.

MR. STONE: Well, you asked what happened in Hawaii. The documents will -- I can tell you what happened in Hawaii. The General there pleaded with the Central Staff in Washington that he needed every available man to rebuild that place, and since it had been bombed, he didn't care if he had people who were

known to be Japanese Nationals and paid spies. He needed the labor to rebuild that place, and ultimately there were several boatloads of people who were sent off the island. He said he could neither afford the boat transportation to take them off, becaused he needed supplies, and he couldn't afford to lose the labor which was thirty-five per cent of the work force that was needed to rebuilt. He said the strategic value of the place was already shot.

Most of that is in the Commission's Report. In terms of German and Italian-Americans, the curfew order which was established here, and which is one of the two misdemeanor violations, did absolutely include Italian and German aliens in this war zone.

THE COURT: American citizens?

MR. STONE: It didn't include American citizens.

THE COURT: It did not.

MR. STONE: It included Italian and German aliens, and in fact, there were many cases where spouses of American soldiers were out with their husbands after the curfew and there were cases referred to the Department of Justice for prosecution and the Department had to wrestle with what it was going to do.

Now, were they ordered evacuated from the zone? No. Was there a likelihood that their mother countries would invade this coast? No. But during World War I Germans were ordered evacuated from the District of Columbia, and there were many individual hearings and many individuals were sent to individual internment camps from which they were unable, like these internment camps, to sign various papers and be paroled out of them, like the 30,000 people who were paroled out of the camps. Those were different kinds of hearings and they led to much different results.

Now, the fact that there is no newly discovered critical document before the Court is one of the things that we're trying to deal with in our documents. Another is the fact that while it may be that the timeliness of the Congressional response, the Commission's hearings, has reawakened certain public awareness and has made this more timely, and I understand perfectly that it leads people to want now a legal response. That's not the way the law works.

One cannot simply have the documents at their command, and I take strong exception to the affidavit, by the way, in the record filed by Mr. Irons that because he waited until 1981 to prepare for those hearings and filed a Freedom of Information Act

request and get his response without taking any Freedom of Information Act appeals or anything like that, that somehow the documents were not available since 1968 when the Freedom of Information Act was passed.

I understand the timeliness of it but that does not make it legally available for the first time when it's almost impossible to put the pieces of the puzzle back together again, and when they were well known for a long time.

THE COURT: Let me ask you, and I really have made up my mind on this, it seems to me that this is something the Court has to make a finding on. You may be absolutely right, but I don't think that I can make that finding on the basis of the exhibits that have been introduced here. I think if the Petitioner sets forth a number of exhibits which he feels are essential to a denial of due process to him, then you would have the opportunity to show when those documents first became available, and I would take that into consideration.

MR. STONE: Well, fine, Your Honor. That's fine. If you want to order them to supplement by identifying which documents --

THE COURT: No, I mean on an evidentiary hearing.

MR. STONE: Well, I note for Your Honor's -- and I will point you again to page 14 of their last response where they concede that there is no new document other than the Government counsel's problems arguing the case three years after the General decided the case, the General decided what he was going to do.

Now, that is not something that goes to the difference in the result with respect to whether his action was authorized. That goes to the second question. That goes to whether in fact, even assuming there was a newly discovered document of some kind, whether this would change the result. We have provided you with briefs frankly we think they should have provided you with, the original Supreme Court briefs, and you will see by looking at those briefs there were the same identical issues to argue then. The Harper's magazine article was argued at length. The people argued about the authorship, but they kept insisting that it was intelligence people responsible and the Government did not deny it, because it says on its face the government intelligence officer. In fact, the Government cited it as well. I mean, whether you want to argue how they cited it --

THE COURT: Let me ask you this, and let me do state this to you and the petitioner and everyone.

My mind is really open on this case. I have not decided this case one way or another. I think the whole nation, at least knowledgeable people, now concede that a great wrong was done, but in this particular case I have to make certain findings.

Now, you say the Harper's article was argued to the Supreme Court. If the Government knew that that article was written by the same intelligence officer who authored the January 1942 letter, should it not have said to the Supreme Court, "Don't argue the Harper's magazine article which means nothing, an anonymous article, but on the other hand, say to the Supreme Court, "We feel that you should know that the Office of Naval Intelligence did not agree with DeWitt."

MR. STONE: That article does not say that, Your Honor, and there is not one shred of proof before you --

THE COURT: Which article did not?

MR. STONE: The Harper's article does not say --

THE COURT: Forget about the Harper's article. Didn't the Government have a duty to say to the Supreme Court, "The Office of Naval Intelligence, responsible for intelligence in this area, particularly

with people of Japanese extraction, disagrees and does not feel there is a military necessity?"

MR. STONE: You are assuming a conclusion, Your Honor. That's what we would have a hearing over. In fact, they did not say that because it was probably 1977 before most of the documents relevant to their determination were declassified by the National Security Agency.

The Government is not prepared to say and was not prepared to say then that it could make a full record because the documentation was declassified, or that that article encompassed all of the considerations, but even if it had, keep in mind that article does not say there is no threat. It says the threat, instead of what Congress pegged it at, at 10 per cent, at ten out of a hundred people, is only three and a half per cent. It did not say no threat. That's why the Government --

THE COURT: If I said "no threat," I didn't mean to say that because the article in his letter does say -- I think he said -- that in my opinion, all of those Japanese-Americans who studied in Japan should be picked up, maybe the members of certain militaristic organizations should be picked up.

MR. STONE: Sure. Maybe members of their

families and such, and he recommended strongly in favor of individual hearings.

The Supreme Court had that issue briefed, whether individual hearings were required, at great length, and discusses it, and ultimately said that question, individual versus group hearings was a judgment call by the General.

You're right, Your Honor. That was the issue, and that was the one they decided was the General's call during wartime in a war zone, and if you don't like his call, the responsible reply is you move them out of there. And that's exactly what they did. By the time the report was published in January 1944, he was no longer in charge of the Western Defense Command. He had been a four-star general before. He had been in the Philippines and the war was still going on and he was reduced to a position at the Army War College in Washington behind a desk, which he always said in later years he felt was punishment by General Marshall.

THE COURT: Is that DeWitt?

MR. STONE: That was General DeWitt. But the point is, that was the way the Supreme Court decided the case. They had it in front of them and they made that call, and the military as well expressed

its displeasure.

Digressing for one moment about this business of the Final Report, I'd like to answer your question "How did one volume survive?" That one volume has always been in the National Archives. Not only is that one volume there, but all correspondence about destroying other volumes and indeed, lots of correspondence about lots of changes, first volume to second volume, and how they were written are all there, as well as an explanation that General DeWitt went ahead and had it put in galleys before he really had permission to do so, and apparently he was pretty embarrassed by that, and to the extent that he destroyed copies, he had printed up copies when he really didn't have any authority and perhaps as a General who turns square corners, he recognized that the printing of it was an embarrassment to him. But he did not destroy the copy which has sat in the National Archives, available and declassified.

THE COURT: Declassified when?

MR. STONE: Since 1956 it has been available.

THE COURT: Let me say this to you, because I don't want to get into a heated argument with you because it looks as if I've made up my mind --

MR. STONE: I'll go on to another point, if

I may. The point that I wanted to make was that we have listed in that last reply three separate jurisdictional legal hurdles before the Court convenes a hearing which we feel they haven't met, and we hope you will scrutinize those with care.

THE COURT: All right.

MR. STONE: Beyond that, let me go back --

THE COURT: Let me say this, if you will.

MR. STONE: Sure.

THE COURT: I don't think it's up to the Court to make a finding that they have established these various things in order to have a hearing. It seems to me that they have made a prima facie showing that they may be able to establish certain things and therefore I should have a hearing.

MR. STONE: That's why we filed that brief, Your Honor, to show them that they have not made a prima facie showing, to show that the published documents show there is nothing newly discovered, to show that all of their allegations would not have changed the result, and to show that there is no stigma that the law can redress.

Yes, the Executive and perhaps the Legislature, and they have taken steps, but there is no legal consequence the law can redress. That's

precisely why we filed that, to rebut their claim that they are at the threshold of a hearing. And we add to that the fact that the Court has in front of it a motion by the Government which is now being presumably ordered to go all through all that material to have a hearing where the Government says this is an exercise that is not appropriate for the Judicial Branch.

I have heard several times today the statement that even though the Executive and Legislative Branches have moved ahead and done good things, the Judicial Branch must do them. As Your Honor well knows, the Judicial Branch is not in the same active role as the Executive and the Legislative. The Executive can issue presidential proclamations. The Legislature can pass the bill. In fact, it has created a committee that has done a lot of things. But Your Honor must wait for a live case or controversy. Your Honor, the Judiciary generally is not out front redressing many wrongs until a real case is brought before it.

This is no real case because --

THE COURT: Why do you say that?

MR. STONE: Because we move under Rule 48(a) to dismiss it. That's why it's no real case. There is nothing left if we, as you pointed out before, in an indictment, an individual can't carry a gun under the

law while he's indicted. There is a statute against it. There are a lot of problems with an indictment, even before trial. The Government moves to dismiss. It has explained a rational basis to Your Honor, and in that Weber case the Government couldn't even say there was anything wrong with the proof of the prosecution. That is sufficient.

Here we have helped you, Your Honor, and pointed out that the Executive and the Legislative Branch have obviated this kind of a very complicated hearing. I almost felt that many of the papers make it appear that it's going to be a witch hunt to find out who was the evil person who supplied the material to General DeWitt. I frankly think he probably had a mountain of security information presented to him and I don't know how much of that mountain is left today. Maybe a holehill. But before Your Honor does that, we have concluded that that kind of a proceeding would not be productive and so we have exercised the Executive Branch prerogative which does indeed moot this by moving to dismiss.

Your Honor is in the same position you will be if you grant the hearings and then we made that motion, and it has all the same authority going for it, frankly, and if Your Honor makes that motion, grants

it, we will feel just as confident defending it as we may unfortunately, having to take it up ahead of time, because the Government does not feel it is appropriate, does not feel that the judiciary plays the same role as Congress which can hold hearings on the various bills, has a roving commission which has heard, as Judge Patel points out, something like over seven hundred witnesses and sat is more than a dozen cities. That is Congress' role. They spent a million dollars having that commission.

That is not the role of this Court, and Your Honor I know knows that. It would be one thing if I stood here and told you, Your Honor, that we do wish to prosecute the case again; that we think every case of civil disobedience during wartime has to be defended to the teeth or we can't ever fight a war; that because General DeWitt may have had one piece of information in front of him which justified it and his right, we've got to protect his memory today and therefore we're not going to move to dismiss.

But we're not saying that, Your Honor. We are conceding. We have long conceded. President Ford did it in a public proclamation at the request of these same groups, that it was a mistaken era. In that light, we don't feel it appropriate or even that this

is the forum, with evidentiary objections and the kind of restrictions on cross-examination that one re-examines those questions simply because the Judiciary has never spoken before.

The Judiciary doesn't speak that way. That's not the way the Judiciary speaks. The Judiciary speaks when there is a live case in front of it, and we think it is ample proof that there has never been a loyalty question as to Mr. Hirabayashi. That was clear when President Truman pardoned him or he never would have been pardoned from the Selective Service violation.

No one has even impugned Mr. Haribayashi's loyalty. The worst people involved didn't appear in 90 -- the loyalty of ninety out of a hundred, and they just said we don't know how to decide what to do with the other miscellaneous percentage. We're arguing here over what the size of that percentage was and how they should have dealt with it. Well, that was argued in the Supreme Court. We don't wish to relitigate that, frankly. We think it would be inappropriate where the Executive Branch has decided. It is happy today that President Ford did, and it hopes we won't treat groups as a whole in the future; that they will all get hearings.

It cannot happen again. The statute has

been repealed by Congress, express congressional action, almost ten years ago. The Executive order terminated at the end of World War II and the Executive said it won't do it again, and beyond that it couldn't do it because a different statute was passed in 1970 that said it is no longer within the Executive prerogative to do such a thing. That's 18 USC 4001(a).

The point is the circumstances are very much changed. I believe that everyone has learned from the lesson of that tragedy, as President Ford said, without needing to reopen those same wounds here to determine what was the particular problem that caused a poor judgment to be made at a time when some military people might have been more sensible.

It is because of that, because we don't feel that wound needs to be reopened, and we think it's a deep wound if we open it, that we have made a motion which we ask the Court to grant and that motion of itself causes the Court, in addition to providing a vehicle for a resolution of this case, it also provides the Court with additional obstacles that we do not believe that leaves any case in controversy and that the judicial role is satisfied by moving to vacate and dismiss, just as was done by Judge Baloney

in Oregon, Judge Patel in San Francisco, and Judge Oberdorfer in Washington, D.C., who was forced to say in the context of a huge civil case, "I'm sorry, but that is Congress' role now." That is what he has reluctantly in these 59 pages, I understand, concluded.

That is the congressional role. They have bills in front of them. They have constitution committees, and we don't think there is any question, frankly, of any moral stigma left here. If there was, and we doubt it, we have never seen -- I don't think there is a law professor in this country, although they say the case law may be a stain on the judicial fabric. Everyone has always recognized that plaintiffs wore a badge of honor for being civil disobedience to test that case law. No one has ever suggested that they wore any badge of shame, and we still would contest that.

They never have, and if that weren't clear, we certainly hope the President of the United States, and Congress through their Commission's recommendation, and that I here today make that one thing very clear. We just urge the Court to be very circumspect before what we think is unnecessarily reopening a very large Pandora's Box.

Thank you, Your Honor.

THE COURT: Well, before I proceed further here, I thought maybe Mr. Hirabayashi was going to say some things that I picked up in the transcript of the trial that I think I will just put into the record because they would not otherwise be known, and that was that his father came to the United States in 1909 and his mother in 1914, and they never returned to Japan from that time;

That Mr. Hirabayashi was born in Seattle in 1918, educated in the public schools here. He was a senior at the University of Washignton in 1942 when these events occurred. He had never been to Japan and never had any communication with the Japanese government; never corresponded with any Japanese living in Japan.

He had been active in Boy Scouts, had been an Assistant Scoutmaster. He was active in and vice-president of the YMCA at the University. He had represented the YMCA at conferences in other states, and had never been arrested.

So that here was a young man, I guess twenty-four years of age. It was, of course, an extreme, understandably, I believe, an extreme blow to him and we can only admire his courage for standing up for his rights.

I believe that there are really ample consequences to that conviction, even though many of them are gone. There nevertheless is the stigma of being someone who, in the eyes of the law, disobeyed a lawful statute and a lawful regulation of the United States. And as I believe he said, or as counsel said, what he really is seeking now is vindication of his honor, and I feel that he has that right.

I don't want to open a Pandora's Box and it may be that it would be opened, but I think there are collateral consequences and that he has in the eyes of some people, and perhaps many people, lived under this cloud of having disobeyed a lawful statute of the United States. I think it is no longer a stigma in the eyes of knowledgeable persons.

So I am going to deny the Government's motion to dismiss, and maybe at a later time the Government can come in with that motion and I will have to grant it. I just don't know, but I think at the present time under Rule 48, that where the petitioner objects to the dismissal by the Government, that I cannot grant that motion.

I am going to set down a hearing on the petition for the writ of coram nobis. I think it is a remedy. It's the only remedy that the Court has that

it may be called upon to exercise.

But let me say this to all of you, Counsel, particularly counsel for petitioner, and the people in this courtroom. Even though I recognize - a lot of us do and the Government does - what a monumental error was made, but that doesn't decide this particular case, and the various exhibits and briefs that were submitted to me, not deliberately, but this case and the Yasui and the Korematsu case were so mixed up it's hard for me now to decide what issues were tried by Judge Black in this court.

I don't think the issue of military necessity was raised in the trial court; it was all a constitutional question. It wasn't heard in the Court of Appeals because the issue was certified to the Supreme Court right away over the dissent of Judge Demler. And then in the Supreme Court, I don't know how much the issue of military necessity was presented by the briefs to the Supreme Court or what was cited to them.

So those will be things that will be before me, and I might well, in light of the issues framed in the trial court and the Supreme Court, even though there were a lot of things going on elsewhere about the ONI Report and the FBI Report and the change in the Final

Report of General DeWitt, even though those things were occurring, it is conceivable that they may not have had an effect on this case, and that of course is what I have to look at.

Now, what I must do is to set down a hearing date or a trial date on those things and there is no use keeping everybody else here while we go over those things. Thank you all for the fine arguments that were made to me.

I would like to see counsel and the petitioner, if you would care to be there, in my conference room and then we will look at an evidentiary hearing date and so forth.

(End of proceedings.)

(The following proceedings occurred in the chambers of the Court:)

THE COURT: Let me tell all of you, I thought those were excellent arguments. It is of course a very interesting case. I think that, and maybe the petitioner and his counsel have thought or will give this serious consideration, the thought of accepting the Government's offer, because it is not an open and shut case at all on this particular thing. It might go to a final hearing and the writ of coram nobis be denied, but that is your decision. But I think

you ought to give it good hard serious thought.

MR. HALL: Your Honor, I will say this. There have been discussions between us and the Government.

THE COURT: What?

MR. HALL: There have been discussions between us and the Government, and I think that maybe the discussion can continue.

THE COURT: Because as the Government's brief indicated to me, certainly the attitude of the Government since maybe 1950 or even shortly after the war has changed considerably, so it is not a case of a hostile antagonistic government trying to hand onto the victory that it won.

I, of course, have seen really only one side of this story at the present time. What I was thinking about doing - and I have talked to Elva here who has the job of trying to find time to do these things - would be to set down a time, and I want to do it now. I will talk to you about an appropriate time, a Friday afternoon sometime in the future, and we may not be able to finish it in one Friday afternoon, may have to continue it from Friday afternoon to Friday afternoon, but my trial days, midweek days, are just jammed.

Now, Mr. Hirabayashi, you are in Canada now,

teaching in Canada?

THE PETITIONER: Well, I am retired now.

THE COURT: You're much too young to be retired. Isn't that right, Mr. Barnett? I say he is much too young to be retired.

MR. BARNETT: Oh, yes.

THE PETITIONER: This year I am just tired.

THE COURT: I see. Let me just tell you a little story I thought of a few moments ago. I read a story some time ago about after the Civil War General Pickett was taken to Robert E. Lee's home with another Confederate general. It was a pretty icy sort of a conference because Pickett really had resented what happened to him at Gettysburgh. They came out after the meeting and Pickett said to this other General, "That old man just destroyed my regiment," and the other man said, "He made you immortal."

With you it's something you don't want to go through, but it has certainly made you almost immortal in the legal records.

Well, let's look at the time. How long is it going to take the Government, because I think probably the petitioner has all the exhibits that they're thinking they're going to rely upon, how long do you think it would take the Government to be

prepared?

MR. STONE: I would like to ask a number of questions first, if I may?

THE COURT: Very well.

MR. STONE: The first question, I gather from what you just said, and reinforcing what you said, you have not yet really completed going through our 41-page brief in some detail.

THE COURT: Well, I have. You know, these papers just rained down on my like a snowball, but I have gone through your brief carefully enough to know that I think that I should have a hearing here. That, as I said out there, doesn't at all indicate that I am going to grant the writ and set aside the conviction on the basis there has been a deprivation of due process, but it seems to me the petitioner has made enough of a showing that I should have an evidentiary hearing.

MR. STONE: That takes me to my next question. Is it an evidentiary hearing where you are asking them to now identify what is newly discovered?

THE COURT: I would think it would be more what they rely upon to establish that there was a deprivation of due process.

MR. STONE: And newly discovered?

THE COURT: No. I would think there that

since you are the one who is arguing that much of it, if not all of it, was long ago known, and it is really a defense. It is a laches defense which can be a good defense, that the burden there would be for you to show when those particular records were available to the public.

MR. STONE: Will you expect witnesses as well at this hearing?

THE COURT: I think it probably is pretty much up to counsel. I had thought that it probably could be decided on the documents, but it may not be.

MR. STONE: There is no way it could be decided on the documents. Ed Ennis is still alive; John J. McCloy is still alive. They are in their eighties. I don't know how well they travel, that is another question. I don't know how fragile they are. I don't know whether they will want subpoenas.

MR. HALL: We will probably wish to take their deposition. That may solve the problem.

MR. STONE: I guess what I would request, Your Honor, there are two things I have in mind. One is I would just like to alert you that I may be requested by the Department to ask you whether you would commit to a written opinion your views today. As I tried to indicate out there, this would be, I

think the Attorney General would feel this would be possibly a substantial burden on his right to move under Rule 48(a) and he might wish, in light of that, to do something about it.

I would also ask you whether you would be willing to certify this as an interlocutory appeal question. I don't know whether this is of the type that requires it, but irrespective, if you certify it we have no problem. It would be a substantial imposition to go to such a hearing and we think it would probably have more harmful effects. It is a hearing which I loathe.

THE COURT: I don't have any hesitation at all in putting my thoughts into a memorandum decision on these motions. I probably did not, just because of the lack of time, I probably didn't elaborate on my ideas, but I think I did say that I would deny your motion because I just doubt that I have the power at this time to grant that motion at this posture of the case.

Then I would probably indicate that I feel the petitioner has established a prima facie case and therefore should have a hearing to see whether he can establish the grounds for setting aside the conviction. Would that be enough for your purposes?

MR. STONE: Whatever Your Honor would want to do.

THE COURT: Then let the transcript say whether it says.

MR. STONE: If you would indicate underneath you will certify for an interlocutory appeal, that would be tremendously helpful. I don't know whether we would want to take it up, but it would at least make it available for the Attorney General and he could then decide.

THE COURT: Why don't you do this. I am just thinking about the sequence in which it should be handled. Maybe I should get a memorandum decision out and then you ask for an interlocutory appeal --

MR. STONE: Okay.

THE COURT: -- or certify it for an interlocutory appeal.

MR. HALL: May I suggest that even while this is proceeding, it probably would not be inappropriate to take some preservation depositions.

MR. STONE: I disagree, Your Honor. We have waited forty-three years.

MR. HALL: The only problem is, then I think the record should indicate we are suggesting to the Government to accomodate us in taking some

preservation depositions, and if the issue is appealed and the Government's appeal is reversed and it is sent back for hearing or put back in status quo, we feel that the Government should not then be heard to argue that X, Y and Z, who were alive in May, 1984, are no longer with us.

THE COURT: I think that I would, if the Government takes it up, would deny the privilege to take preservation depositions, to preserve testimony.

MR. STONE: Assuming for a moment that we don't take it up, Your Honor, I would ask that you utilize the procedure, which again we are in somewhat of a Never-Never-Land, this is a post-conviction criminal proceeding. It is not a civil proceeding and it is an unusual --

THE COURT: It certainly is.

MR. STONE: I don't think the Supreme Court left much room for it, but be that as it may, we would still like to see you require some kind of a pre-hearing order so that all sides would know for the purpose of that hearing with you, what it was we expected they were going to produce, as well as their critical documents, in case there were some of them we wanted to agree as to certain aspects of those documents.

THE COURT: I would propose to get to that at the present time.

MR. STONE: In terms of that, I would think any aspect of this case would take us several months to prepare, any aspect.

THE COURT: I would think so, too. I was really thinking about sometime next fall, probably.

MR. STONE: Uh-hmm.

THE COURT: Because the petitioner here and his counsel obviously have been working a long time on this. It couldn't have been done as thoroughly and as well as it was without a lot of time being devoted to it.

Well, why don't we first look at the first Friday that I could do it, maybe after the first of October, because I know I've got a whole bunch of cases before that.

THE CLERK: Also we have that seminar you're going to have to go to in October.

THE COURT: Yes.

MR. HALL: I think I have a case to try with you in October.

THE COURT: Do you? Which one is that?

MR. HALL: The one you told me to settle.

THE COURT: I am telling you to settle this

one.

MR. HALL: I think I got a notice from you yesterday about a settlement conference.

THE CLERK: A 39.1 is what it was.

THE COURT: Well, why don't we -- let's set it down on the 19th and then if I have to change it, I've got to change it. I know that I've got to go back to Washington, D.C. one weekend in October.

MR. HALL: At the beginning of the hearing -- at 1:30 on the 19th of October?

THE COURT: Yes.

MR. HALL: May I -- I know it's difficult, but I am in a case that has about a hundred million pages of documents and maybe a thousand depositions. Depositions start on the 10th of September, and so I need as much advance notice as possible on changes. I can work on the 19th with you, but if it is going to be changed, then I would probably need quite a bit of time after that.

THE COURT: Let me ask all of you about the urgency of time. This matter has been up in the air for forty-two years. We could probably, although I don't know even in 1985 whether I could carve out time that hasn't been filled. Would you rather have successive Friday afternoons? I think I can give you at an earlier

date or a later date, I could try to actually give you a few days.

MR. STONE: It is a tremendous inconvenience for me to come in from Washington and I think I probably would prefer a later date where you can give us a block of time. I think it would also be easier for Your Honor to follow the relevance of something and not have to get into it and postpone it for a week and then have to get back into it each time.

MR. HALL: I think we would like an early date, obviously, but I recognize the problem. If we don't have an appeal, presumably the biggest problem is the preservation of testimony.

THE CLERK: I think we have a better chance of getting it in in November. How many days would this be? If you did it in a day -- how long would it take?

THE COURT: Any idea of the amount of time?

MR. STONE: They are the individuals who want to present documents. At that point they become the movants, so why don't we ask them how many documents and witnesses they are prepared to offer.

THE COURT: It shouldn't take long to get the documents in. I would hope that in the pretrial order that many of those documents could be admitted as being genuine and their relevance admitted. They

may not all be conclusive at all, but it looks to me as if a whole lot of those documents, at least they seem to be authentic and they seem to have some relevance, so I wouldn't think we would need to take much time on documents.

MR. STONE: The problem is going to deal with completeness, as I indicated out there, Your Honor. I am going to have to get document examiners who are research qualified who can tell you if those are complete documents at this point or whether they are missing parts or missing other items that went with them at the time. I know that is going to be the problem with most of these documents.

I also know many of the live witnesses don't recall whether those are complete documents. It's a lot to ask of them, people in their seventies, to ask if they remember. I have already tried and had many of them say I can't remember what I did on my birthday that year.

THE COURT: What time did you say?

THE CLERK: I think that we could take the time, if it's going to be two days, and begin it on November the 5th.

MR. STONE: We're not talking two days. We're talking more like two weeks.

THE CLERK: Two weeks?

MR. STONE: Yes.

THE COURT: I'm not talking about two weeks.

MR. STONE: Okay. Then we maybe had better talk about scope again. Your Honor, I will be blunt. The reputations in that petition of a president of the United States are on the line. It draws the line to him. Secretary of War Stimson, the Attorney General, Assistant John J. McCloy, who was a public servant for many years. There are an awful lot of people whose reputations are on the line, and I know the Department wouldn't allow me to make half a presentation. I can conceive of only quite a lengthy presentation.

MR. HALL: May I think out loud?

THE COURT: All right.

MR. HALL: It may be desirable to appoint some kind of a master to help narrow the scope and to take maximum advantage of the Court's time, because it may not be necessary to proceed from as broad a range of format as counsel suggests, or as we may even think at this moment we want to proceed in. If this is a civil case we have some discovery options available that are not necessarily available to you in a criminal case, but it may be necessary to narrow the issues so that the Court's time is taken maximum

advantage of.

THE COURT: I am just looking at a later date. Let me ask the petitioner, how long do you think it would take?

MR. HALL: Give us a wild guess, three days, four days.

MS. BANNAI: Maybe four days.

MR. HALL: It could conceivably be narrowed down.

MS. BANNAI: A lot would depend on how much is narrowed at the time of the pretrial order lodging with respect to documents.

THE COURT: Well, I think that about the only thing that I can do, even though I would like to get this heard as quickly as I can, where the Government says you may want a week or two weeks, is to try to find the first available time when I can give you two weeks of my time and set it down.

Why don't you give me that answer, if you would?

THE CLERK: I am still suggesting November the 5th. That's because all of those are 39.1's and if the first one goes away, you could put this in there in its place.

THE COURT: What about the others?

THE CLERK: They are 39.1's, also.

THE COURT: I am looking at the numbers of these other cases and they are '82 cases, so I really think this one should go -- should not knock those cases off in case they are still on and don't settle out. If they did settle out, of course you never know that until the last minute or the week before. I think all of you are entitled to a real notice when the hearing will be held, so I think I had better try to get the earliest time when I could maybe have a full hearing.

Are you looking at June, '85?

THE CLERK: Yes.

MR. HALL: Did I hear June of 1985?

THE COURT: That's what I said.

MR. HALL: Judge Bilby has said the WPPSS litigation will start June 1st, but he has also told the manager of the Doubletree Inn at Southcenter, which is where the trial may be held if it is tried in Seattle, that it looks like it will be tried January to June of 1986. He has set on the record a trial date of June 1st and he has not changed that. It is a six-month trial.

I mean I am not necessarily indispensable to the case and I think we could probably safely set the case in June and recognize that I can't be two places

at once, but I think the likelihood of the securities case going to trial in June is marginal so maybe we are safe. I just say that as spectrum --

THE COURT: I really hate to put it that far off. Is there a time ahead of that?

THE CLERK: We don't have anything. We have the Swinomish Tribe in December. We have the U.S. Cruises in January; Pacific Northwest Bell in January. They are going to be two to three weeks, and you have Lynnwood Equipment, which is a 45-day trial.

MR. HALL: Maybe I could make another suggestion. We could maybe, if the Court were willing to do this, tell us that we should have our case prepared by X date and put on call on two weeks' notice. Give us a trial date when you have the two weeks and put us on call if an earlier case settles out.

THE COURT: What do you think about that?

MR. STONE: I don't know what documents they are preparing to produce. I have looked at the documents they have already produced and they don't convince us. If they did, we would not have taken the position we did, so I am not altogether sure what to expect.

Consequently, I don't know whether I will need witnesses. I am very unsure that they represent a complete record and since I don't believe they

represent a complete record, I am not sure that I won't come back before Your Honor and tell you I need more time because we have to hire consultants to go into the national archives.

THE COURT: Of course you people have a command of the records that the petitioner does not have.

MR. STONE: That's not true, Your Honor. I know you say that those records in the --

THE COURT: They may not be more available, but you have all sorts of people.

MR. STONE: Just like when I get someone from the outside on a nuclear energy subject. I have already been told what I will have to do is get an outside man, probably historical research people, if I need them, to search the records, and I will have to have them go through those records but completeness is what worries me the most, and I will need substantial lead time in order to make those kinds of investigations.

Also, another item which -- I would like to get this but --

THE COURT: You go ahead.

MR. STONE: I was going to say there are a couple of things I would like the Court orally to rule on. The first is I want the Court to understand from

day one in this case and other cases, the Government has been trying not to make this case more public and more messy than it needs to be.

Consequently, we have intentionally attempted to resolve it informally and not to file documents which we thought tended to do no more than reopen issues that might not need be reopened before they were absolutely necessary. I would like the Court's permission to continue to operate in that mode. I don't wish to have to file things long in advance of knowing that we actually are going to require them.

I would also like to be assured this is a post-conviction criminal proceeding because I don't wish to have to file a plethora of motions to shorten times and have opposition to motions that I frankly find frivolous in a hearing. I don't want to have to do that. I hope you will set that to rest by saying this is a post-conviction criminal proceedings and if there are special rules to be applied, we will agree then. We will always agree to give them more time.

THE COURT: Well, I am afraid I can't put out a blanket ruling now on these things because I don't know really what they are, but Susan Barnes is right here in the city and she and her office always has access to my office. If something comes up that

she feels or you feel is improper, a motion could quickly be made to me.

MR. STONE: It is not so much that as we want to put on the record that we don't feel, in the exercise of our discretion, that it is appropriate to be filing things as soon as possible. Indeed, just the opposite is true, because these are very sensitive issues. We propose to file them as near to actual hearing dates as possible, because if I am filing a document that may in some newspaper reporter's mind impugn the integrity of Mr. McCloy or Mr. Ennis, who are in their eighties, I don't wish to have to do that.

I don't think in their eighties they should be bombarded with reporters on Sixty Minutes who still thinks it's time to face these things. It is particularly sensitive.

I know just from having seen Mr. McCloy write letters to the New York Times that he can -- he is eighty-eight -- he gets pretty agitated, personally, because he feels the issues often go to his integrity as a person and have nothing to do with the way he may have handled his job, and I would like the Court to give me permission to recognize those concerns while we handle this litigation.

THE COURT: Well, I just really cannot put

out orders in advance on that, saying to you that --

MR. STONE: Okay.

THE COURT: -- that you are to withhold and have the privilege of withholding your exhibits to trial time because, of course, they've got to see them.

MR. HALL: I think we can work something out between us.

THE COURT: You should be able to. You can identify the exhibit in the pretrial order and show the exhibit in private to counsel.

MR. STONE: Okay.

THE COURT: Let's see if we can work out some kind of a procedure here. Let me get back to you on a date. Although the suggestion that you make about getting the thing ready so that if time opens up for me I could give you time, maybe what we ought to do is to go far in advance with a time where we definitely could hear it and give you that date, and put it on your calendar so we've got it.

THE CLERK: June, 1985?

THE COURT: June of '85.

THE CLERK: All right. The 17th.

THE COURT: That will be the ultimate date, June, 1985.

Now, on the pretrial order, I think what we

ought to do is to have the petitioner by a certain date, and I will give you the date pretty soon, come out with your contentions, and our rule is not more than two pages. We don't want a whole bunch of specifics about your contentions, but I would assume it would be something like this: Petitioner was deprived of due process because the Government concealed information which it had, and that sort of thing, with more specificity than what I am saying right there, and then I would want the petitioner to set forth the list of exhibits that it would propose to introduce, and it may be before that time that you could serve some kind of request for admissions upon the Government that these are genuine documents.

MR. HALL: Exactly. I just wrote that down. And if they are incomplete, in what way are they incomplete, and so forth.

THE COURT: Right. I don't know whether you have live witnesses at this time that you intended to put on, other than perhaps the petitioner.

MR. HALL: We may wish to take - I don't know if they are adverse witnesses, but Mr. Ennis. I don't know. I think that's a definite possibility.

THE COURT: Well, his position is pretty well set forth in his memorandum, isn't it?

MR. HALL: I think so. I'm not sure what he can add.

MR. STONE: No, Your Honor. He is going to be able to add why he signed those pleadings, why he filed them, why for twenty years he never said anything to his clients about what interpretation that now could be put on it; committed misconduct, left the Government, joined that group and never told them about it. Those would have been relevant. None of that is in those pleadings.

THE COURT: On the requirements I have set down for the petitioner, when can you do that? By what time?

MR. HALL: I would think it would take about three months.

THE COURT: This is May. June, July, August. Is that right? Why don't you give me a date in August?

MR. HALL: Basically what we're doing is preparing the initial draft, our initial proposal of pretrial order for submission to counsel.

THE COURT: I think that would be a good way to look at it, and then you will have an idea by seeing that and the exhibits and the contentions what you will need to do to meet it.

THE CLERK: July 27th is the last Friday.

THE COURT: I thought I said August. They want three months. Why don't you give me a Friday?

THE CLERK: August the 17th.

MS. BARNES: Your Honor, I would like to ask, there is a new pretrial effective rule.

THE COURT: Do it under the new rule.

MS. BARNES: Well, the new rule, notwithstanding its title, does everything else as well. It sets out schedules for discovery cutoff, sets up schedules for the cutoff of dispositive motions and all kinds of other things. I think this is a criminal proceeding. There is no problem with tracking that, but we are already starting to vary from it. I guess we need to know whether we are following it.

THE COURT: I would think that because this is a rather peculiar proceeding, what we might do is move along the lines that I'm talking about now.

MS. BARNES: Set our own time schedule?

THE COURT: Set our own time schedules so that by August 17th, the petitioner is to serve on opposing counsel your proposed segments of the pretrial order.

MR. STONE: Plus Xerox exhibits?

MR. HALL: Or references to.

MR. STONE: References to exhibits we already

have.

MR. HALL: Yes. All right.

THE COURT: Yes. Just so that you either have a copy or have access to a copy. That's right. Then, how much time, and if something comes up that makes it necessary for you to come in to ask for more time, I think I would probably grant it, but how much time do you think you would need to respond with your section of the proposed pretrial order?

MR. STONE: I would like about five months.

THE CLERK: That would be January 25th, 1985.

MR. STONE: I would like to know that if I need to get requests for admissions from the end of discovery at that point, that is still permissible, Your Honor?

THE COURT: Let me ask about discovery. What is your mutual pleasure about discovery, that is, do you want to move ahead with the discovery now?

MR. STONE: No, Your Honor. I would like to wait until I see what actual documents I get.

MR. HALL: I think probably the first thing we would do is send out a request for admissions and interrogatories with regard to any admissions or requests they are not able to admit and why, for example, is the

document not complete, or whatever, that kind of thing, and also maybe a request with regard to admissibility.

THE COURT: What?

MR. HALL: With regard to trial admissibility, or if it is not admissible, in their opinion why.

MS. BANNAI: Another thing that comes to mind is that counsel mentioned the supplemental report. We would like to learn what documents are behind the Government's position on that.

THE COURT: First, I might say that on the -- is it "Personal Justice Denied?" Am I saying it correctly?

MR. STONE: Yes.

THE COURT: I would not consider either that or the supplemental report, either of those documents to be admissible because they are secondary sources. Just by chance, because I thought of the people having something to do with it, I have gone through all the books on magic, eight or ten volumes, I believe. I don't know that they would have any great relevance.

MR. STONE: Oh, they will, Your Honor.

THE COURT: You think so?

MR. STONE: I guarantee it.

THE COURT: I'll leave it up to you.

MS. BANNAI: We may have some discovery from the Government.

MR. STONE: They have already seen all of the original documents, files. Particularly, Irons came and for the second time went through our files. To the extent I have information gleaned from the National Archives, I will have to find out whether the Department will give me permission to use that. I will tell you very bluntly right now that the Department instructed me not to prepare for Your Honor a reply that went to the merits because they did not wish to throw open to the public a record and make it appear we still wished to deny relief, substantively. I don't know whether they will change their position and until I know that, I am not in a position to take any materials and turn them over.

If none of them are Government documents, I am not required consequently under discovery to give them to them. They are all public materials in the National Archives. It is just that I spent a reasonable amount of time -- if we decide to use them, then certainly at that point they will come out in the pretrial order. I don't propose to use anything that is a Government possessed document at this point that we possess and, consequently, if that determination is made, I will let Your Honor know.

That is one of the kinds of things -- that is one of the kinds of points I was making before. The Commission itself wouldn't wish to reopen the very touchy question of whether the magic documents themselves, whether all the rest of the hundreds of pages and the Government itself was loath to get into that. We may well.

THE COURT: Well, with this schedule, if we put January 25th as being the date when you make your proposal, it sort of puts out of the question that time may open up and we can try it before June.

Now, I would be inclined myself to defer deposition discovery until after we get these other things filed and then have another conference and let me look at it and see what discovery is needed, and let me rule on it.

MR. HALL: May I suggest that no one has made a secret of the fact that some of these witnesses are elderly. I would respectfully suggest it might be appropriate to permit some preservation depositions earlier than January 25th or February 25th of next year.

THE COURT: Well, I think I am going to stay the discovery until after these filings have been made. Then let's take a look at it and see what if any

depositions needs to be taken.

MR. HALL: I think the record should reflect that we respectfully take exception to that for the reasons I have stated.

THE COURT: Now, is there anything else we can do other than work towards these particular dates? Anything else we can do today?

MR. HALL: Maybe we can open up dialogue again.

MR. STONE: I gather, Your Honor, on the basis of what you said before about your not wanting to grant the Government's motion at this time, that perhaps down around January 25th you might be in a position to consider it again?

THE COURT: I made that ruling today without prejudice to your renewing the motion, and I will take a look at it. I certainly can understand and really be sympathetic with the positions being taken by both sides. The petitioner here wants vindication and I think he has a right to have a court rule upon that. On the other hand, I can well understand the Government's really laudible motive here in not reopening old wounds. I really am not critical of the position taken by the Government. I fully understand it.

Well, then, let's leave it that way. I will

get out an order about the rulings I made today. I know it is going to be a skeleton order on the motion I considered and my ruling upon it.

MR. STONE: I hope you will at least treat -- I hate to ask you to treat one thing -- I hope you will at least treat the fact of our reply -- in fact, maybe I should give you the section that deals not with whether that is newly discovered and not with whether they go to whether relief is warranted.

THE COURT: Materiality?

MR. STONE: The section that talks about whether or not we have some case in controversy. That runs from page 5 through 17.

THE COURT: I don't want to hear it on argument, but why do you say there is no case or controversy?

MR. STONE: Well, Your Honor, there are an awful lot of cases that say that social stigma is simply not grounds for a coram nobis.

THE COURT: Let me look at the brief and the response made by the petitioner to that.

MR. STONE: If I can say two more sentences, Your Honor, because they got the last word and I haven't replied. Let me just say if Your Honor wants me, after reading our brief, to make some answer, we will be

happy to. They cited two cases, one of which is a felony case and the other they describe as a misdemeanor contempt case. Under 18 USC, all contempt cases would be classified as felonies. That is a point we would ask to address.

THE COURT: All right. The trial date, would you give me that again?

THE CLERK: June 17th.

THE COURT: June 17th. That will be the trial date unless we get together and agree on another date. Then, with respect to the pretrial order, the petitioner's sections are due August 17th; the Government's sections due January 25th, and then at that time we will have a status conference.

MS. BANNAI: Your Honor, one question on the pretrial order format. You have talked about doing the admitted facts and the exhibits. I take it we probably couldn't do the witness sections because we haven't had discovery.

MR. HALL: We will fill in as much of the format as possible and leave the rest blank.

THE COURT: That's right, with the privilege of putting the witnesses in later.

MS. BANNAI: But use the format of the new rule?

THE COURT: That's right.

Anything else?

Then have a nice weekend.

(End of proceedings.)

CERTIFICATE

I, Vernon E. Sorensen, Official Court Reporter for the United States District Court, Western District of Washington, do hereby certify that I was present in court and in attendance upon the hearing of the foregoing matter; that I reported said proceedings in shorthand and thereafter caused the same to be transcribed under my direction;

I do further certify that the foregoing transcript is a true and accurate transcription of said proceedings, to the best of my ability.

Vernon E. Sorensen
Official Court Reporter