

University of San Diego

Digital USD

---

Petitions and Briefs

Hirabayashi v. United States

---

5-15-1984

## Government's Supplemental Points and Authorities

United States District Court Western District of Washington

Follow this and additional works at: [https://digital.sandiego.edu/hirabayashi\\_petitions](https://digital.sandiego.edu/hirabayashi_petitions)

---

### Digital USD Citation

United States District Court Western District of Washington, "Government's Supplemental Points and Authorities" (1984). *Petitions and Briefs*. 12.

[https://digital.sandiego.edu/hirabayashi\\_petitions/12](https://digital.sandiego.edu/hirabayashi_petitions/12)

This Book is brought to you for free and open access by the Hirabayashi v. United States at Digital USD. It has been accepted for inclusion in Petitions and Briefs by an authorized administrator of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

STEPHEN S. TROTT  
Assistant Attorney General  
Criminal Division

JUDGE VOORHEES  
Motion Set for 2:00p.m.  
May 18, 1984

GENE S. ANDERSON  
United States Attorney

SUSAN E. BARNES  
Assistant U.S. Attorney  
Western District of Washington  
Seattle, Washington  
FTS 399-5196

FILED  
LOGGED  
RECEIVED

MAY 15 1984

VICTOR D. STONE  
Counsel for Special and  
Appellate Matters  
General Litigation and  
Legal Advice Section  
U.S. Department of Justice  
P.O. Box 887  
Washington, D.C. 20044-0887  
FTS 724-7144

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
DEPUTY  
BY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Respondent. )  
 )

No. C83-122V  
(Former Crim. No. 45738)

GOVERNMENT'S SUPPLEMENTAL POINTS AND AUTHORITIES

In his responsive pleading petitioner relied extensively upon the district court's ruling in Korematsu v. United States (N.D. Cal., CR-27635 W, post-conviction motion for coram nobis relief). Consequently, a discussion of the April 19, 1984 written opinion in that case (G. Ex. 1), which substantially undercuts this petitioner's position, is appropriate.

49A

INTRODUCTION

The recent Korematsu opinion noted that the question before that court, as in this case and in Yasui v. United States (No. C16056 & 83-151BE, D. Or., January 26, 1984) (G. Ex. 2), "is not so much whether the conviction should be vacated as what is the appropriate ground for relief." (G. Ex. 1, p.3). The Korematsu court concluded that there was jurisdiction under 28 U.S.C. 1651(a) and rejected the government's argument that there was jurisdiction under Rule 48(a), Fed. R. Crim. Pro., see Argument III, infra. Nonetheless, despite that different statutory reliance, the court's rulings did follow the course of action proposed by the government in that case and in this one.

Like the Yasui court, the Korematsu court found that factual hearings and findings were "unnecessary" (G. Ex. 1 pp.9-10, 12; G. Ex. 2 p.2). Specifically, the Korematsu court stated that when "the government joins in a similar request for relief, an expansive inquiry is not necessary" (G. Ex. 1, p.10) ... "to reopen partially healed wounds of an earlier period..." (id. at p.12).

The court also concluded that despite the public documents cited to the court, in the absence of evidentiary hearings it would be inappropriate under Fed. R. Evid. 201(g) to take judicial notice of such documents or the findings of the Commission on Wartime Relocation and Internment of Civilians to the extent that they bore on the ultimate issue of governmental misconduct (G. Ex. 1 pp.15-17, 20). (This court should act likewise.) The Korematsu court further concluded that it had no

power to correct "any errors of law" and that "the Supreme Court's [1944] decision stands as the law of this case ... for whatever precedential value it may still have." (G. Ex. 1, p.27).

With respect to the basis for the government's motion, the court acknowledged that the 1976 repeal of the statute under which petitioner was convicted and the 1976 presidential proclamation "are compelling reasons for concluding that vacating the conviction is in the best interests of this petitioner, respondent and the public ..." (G. Ex. 1, p.12).

As noted above, because the Korematsu court concluded that Rule 48(a) was not available as a jurisdictional basis for relief, it exercised its discretion under 28 U.S.C. 1651(a) to go beyond these valid reasons for relief. Consequently, the court discussed documents and the Commission's Report (which the court had held could not be relied upon to show government misconduct) and stated "that the public interest is served" by vacating the conviction. (G. Ex. 1, p.20).

The Yasui court disagreed. It had held that relief was available under Rule 48(a), granted the government's motion, and declined to engage in any discussion of these forty year old events since it concluded that such discussion was not necessitated by any "legal consequences". (G. Ex. 2, p.2).

We argue below that the Yasui decision (which the Korematsu court refused to take note of when the government proffered it and which the court did not even try to distinguish) was correctly decided. We also argue that the Korematsu court has

badly misconstrued controlling Ninth Circuit decisions on these jurisdictional matters, i.e., United States v. Weber, 721 U.S. 266 (9th Cir. 1983) and United States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866 (1981). In addition, we also show that factual differences make petitioner Hirabayashi's legal position less tenable than Korematsu's.

I. The Only Issue Now Before the Court  
is the Government's Motion to Dismiss.

Prior to being ordered by the Court to respond to the outstanding petition in this case, the government has moved sua sponte to give petitioner more relief than, as a matter of law, he is otherwise entitled (see below, Argument II). That motion should be granted (see below, Argument III). In the event that the government's motion is denied, the government will need at least thirty days in order to prepare a formal answer addressing the petitioner's detailed factual allegations (and we expect to so move the court at the appropriate time).

II. The Petition is Procedurally  
Deficient and Cannot be Granted.

Petitioner continues to press his petition in his Reply to our motion. On its face and without any investigation of its substantive merits, the petition cannot be granted due to three different jurisdictional deficiencies. The government's sua sponte motion was filed to give the court a valid basis upon which to grant some relief, despite the jurisdictional deficiencies in the petition.

It is well established in the case law, see, e.g., United States v. Darnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983), that:

A coram nobis petitioner . . . is confronted with judicially-created standards that severely circumscribe the availability of the writ. [Coram nobis] limits the issues that may be raised to those "of the most fundamental character." United States v. Morgan, 346 U.S. [502] at 511. \* \* \* It is presumed that the challenged proceedings were correct and a heavy burden rests on the petitioner to demonstrate otherwise. In addition, a standard akin to the "actual prejudice" standard is applied: the coram nobis petitioner must demonstrate that but for the fundamental errors committed a more favorable judgment would have been rendered. United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981). The petitioner also must demonstrate present adverse legal consequences flowing from the conviction sufficient to satisfy the "case or controversy" requirement of Article III. Id. Finally, in Morgan, the Supreme Court stated that there must be "sound reasons" for the petitioner's "failure to seek appropriate earlier relief." United States v. Morgan, 346 U.S. at 512. . . \* \* \* The doctrine of laches adequately protects against "sandbagging" and ensures that coram nobis relief will not be granted where a petitioner's inexcusable delay in raising this claim has prejudiced the government. See Norris v. United States, 687 F.2d at 910 (Cudahy, J., concurring). These safeguards against abuse of the writ serve essentially the same function as the cause and prejudice standard.

1. Petitioner has not demonstrated any present adverse legal consequences flowing from the conviction sufficient to satisfy the "case or controversy" requirement of Article III.

Petitioner's affidavit admits that during World War II he intentionally undertook unpopular public positions based upon his personal beliefs. (Hirabayashi Aff. 3). He alleges that he still suffers from "antagonism" which was provoked by the "criminal convictions" (emphasis added) for which he "was arrested, convicted and imprisoned" (id.). Those convictions included:

- (1) The 1942 misdemeanor violations of the wartime curfew and evacuation orders, upheld by the Supreme Court (320 U.S. 81, 105) at issue here; and
- (2) A 1944 felony violation of the Selective Service physical examination requirement also bottomed on petitioner's opposition to his exclusion and internment, in violation of 50 U.S.C. § 311 (1940 ed.) now § 462 (Gov. Ex. 3). In 1947 petitioner was pardoned for this violation. 12 Fed. Reg. 8737 (Dec.

24, 1947). And see Personal Justice Denied, p. 247, n.11.

Despite these misdemeanor and felony convictions, petitioner's affidavit reveals that he did achieve a "professorship teaching and researching" (Hir. Aff. 5). The only present adverse consequence which petitioner identifies is the fact that "the position I had taken for my principles provokes antagonism against me" because historical "misconceptions which led to the curfew and exclusion orders continue to exist" (Hir. Aff. 5). Consequently, he seeks to have this Court redécide constitutional issues in order "to reduce the probability that other members of minority groups will be similarly treated" (Hir. Aff. 5-6).

Any lingering antagonism traceable to petitioner's public position on historical events and not traceable to the fact of his conviction are social consequences which may continue regardless of any ruling here. They are clearly not legal consequences which the law recognizes or redresses. Moreover, petitioner has not explained why the earlier misdemeanors, but not the later pardoned but not expunged felony conviction, are the sole source of the antagonism about which he now complains. Indeed, we submit that it is not possible to separate the sources. Moreover, this independent source of antagonism is not before this Court. Consequently, even if the court granted all the relief requested, there is no reason to believe that it would or could mitigate all the vestiges of public antagonism which petitioner perceives.

Collateral attacks upon old criminal convictions, where the sentence has already been served, are moot "if it is shown that

there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

Sibron v. New York, 392 U.S. 40, 57 (1968); United States v. Morgan, supra, 346 U.S. at 512-513; Ybarra v. United States, supra; Chavez v. United States, 447 F.2d 1373 (9th Cir. 1971).

This doctrine was recently discussed in Lane v. Williams, 455 U.S. 624, 632 (1982). There, the Supreme Court noted that the typical legal consequences which warranted an exercise of collateral relief involved civil penalties such as loss of the right to vote, the right to serve as an official of a labor union for a specified period of time, or to engage in certain businesses. None of those allegations are made here. The misdemeanor conviction at issue does not deprive petitioner of any of his civil rights (to vote, etc.). As in Lane v. Williams, supra, since no felony violation are involved,

\*\*\* No civil disabilities such as those present in Carafas [v. La Valle], 391 U.S. 234] result . . . At most, certain nonstatutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected  
\*\*\* The discretionary decisions that are made by an employer or a sentencing judge, however, are not governed by the mere presence or absence of a recorded violation . . . Any disabilities that flow from what respondents did . . . are not removed or even affected by a District Court order . . . In these circumstances, no live controversy remains.

This language from Lane v. Williams is particularly apt here. Petitioner seeks to have the court engage in a difficult historical inquiry at a time when no legal consequences are at issue. Petitioner asserts that his interest is in "reducing the



probability that other members of minority groups will be similarly treated" (Hir. Aff. 5-6) and he contends that vacating his conviction is not enough. He moves to obtain a declaration from this district court now that the curfew which he intentionally violated in 1942 was unconstitutional, despite the Supreme Court's holding in 1943 that it was constitutional [Pet. 86]. The cases make plain that such purely historical pursuits, even if intended to dispel moral stigma, do not constitute a sufficient jurisdictional basis upon which to base a criminal collateral attack. Lane v. Williams, supra, 455 U.S. at 632 n.13; St. Pierre v. United States, 319 U.S. 41, 43 (1943); United States v. National Plastikwear Fashions Inc., 368 F.2d 845 (2nd Cir. 1966); Ybarra v. United States, 461 F.2d 1195 (9th Cir. 1972).

Even if moral stigma from the fact of a misdemeanor conviction -- standing alone -- were enough, which we emphatically deny, the record conclusively shows it has been dispelled. Petitioner recognizes that the current precedential significance of his conviction has long been questioned (see Reply to Government's Response at p.18) and that as a legal matter, this series of Supreme Court curfew and evacuation cases have "been discredited or abandoned" and lie "overruled in the court of history". Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Civilians (1982), p. 238-239.

With respect to petitioner's specific situation, the public record reflects that one of his current counsel (see Pet. at 1) has recently written a book describing his 1942 actions in

excruciating detail, see Justice at War, Peter Irons (Oxford Univ. Press, New York, 1983). In these circumstances, one is hard pressed to see how the factual basis of his 1942 conviction and his public positions warrant judicial investigation or, by their mere existence, adversely affect him at the present time.

There are not even de minimis legal collateral consequences resulting from the conviction, now 41 years old. The character and age of the convictions (malum prohibitum misdemeanors not showing moral turpitude and not punishable by more than one year imprisonment) would render them, unlike petitioner's pardoned felony conviction, inadmissible for impeachment purposes at a subsequent legal proceeding, compare Rule 609(a) & (b), Fed. R. Evid. 1/ This misdemeanor conviction is also irrelevant in any enhanced sentencing procedure for multiple felony offenders, compare 18 U.S.C. 3575(e)(1). And, as noted above, it has not prevented petitioner from pursuing the profession of his choice.

Although the facts surrounding a misdemeanor conviction would be available to a sentencing judge at a subsequent

---

1/ Even the few states which have liberal statutes that allow impeachment in civil trials by prior misdemeanor convictions appear to exclude such evidence if, as here, it is remote in time, see e.g. People v. Smith, 296 N.W. 2d 169 (Mich. 1980); State v. Prather, 290 S. 2d 840, 842, (La. 1974); or unless the underlying conduct (independently admissible) is relevant to a character trait at issue in the civil trial, Magee v. State, 22 So. 2d 245 (Miss. 1945). Moreover, since petitioner's (pardoned) felony conviction would be admissible for impeachment in state jurisdictions, see e.g. State v. Taylor, 133 So. 349 (La. 1931), the additional information concerning nonviolent test case misdemeanors, even if not too remote in time, would carry no additional probative weight.

proceeding (18 U.S.C. 3577), that fact alone will not support collateral review, Lane v. Williams, supra, 455 U.S. at 632 n.13. This is as it should be since Congress has determined that a sentencing judge shall have statutorily protected access to all facts, irrespective of their legal significance. See 18 U.S.C. 3577. Even so, the current value of the facts surrounding this violation is virtually nil. The violation was nonviolent, it stood on uncontested facts, and it is more than forty years old. 2/

In addition, there is no reasonable possibility that any citizen "would be subject to the same action again," Weinstein v. Bradford, 423 U.S. 147, 149 (1975) cited in Lane v. Williams, supra, 455 U.S. at 634. This is, therefore, not a situation where mootness can be avoided by invocation of the doctrine that this case raises legal issues "capable of repetition, yet evading review." Lane v. Williams, supra, 455 U.S. 633-634.

To insure that it will not recur, in 1971 Congress enacted 18 U.S.C. 4001(a) at the specific behest of the Japanese-American community. See, H. Rep. No. 92-116, reprinted at 1971 U.S. Code

---

2/ United States v. Danks, 357 F. Supp. 193, 195 (D. Hawaii) upon which petitioner relies (Pet. Points and Auth. at p.2), is not persuasive. There, without any analysis, the court relied on Holloway v. United States, 393 F.2d 731 (9th Cir. 1968), a case which involved a felony violation with its attendant loss of civil rights. Both of those cases predate Lane v. Williams, supra, and discuss the presumption of legal consequences when the issue is not contested. We, however, seriously question the existence of continuing legal consequences in this forty-year old misdemeanor situation. In any event, as we discuss infra, we have already moved to vacate and dismiss the underlying misdemeanor conviction and indictment.

1  
2 Cong. & Adm. News, 1945, 1436. It provides that "No citizen  
3 shall be imprisoned or otherwise detained by the United States  
4 except pursuant to an Act of Congress." The only Act of Congress  
5 which had previously enforced the curfew and evacuation, Public  
6 Law 77-503, most recently embodied in 18 U.S.C. 1383, was explic-  
7 itly repealed by Public Law 94-412, Title V, § 501(e), September  
8 14, 1976, 90 Stat. 1258.

9 Furthermore, the underlying executive order which the now  
10 repealed statute had enforced, Executive Order 9066, terminated  
11 in 1946. And, in 1976 the President of the United States, on  
12 behalf of the Executive Branch of the Government, vowed "that  
13 this kind of action shall never again be repeated". Presidential  
14 Proclamation 4417. There is, therefore, no possibility that any  
15 continuing legal consequence will be imposed upon petitioner or  
16 any other person on the basis of this 41-year old misdemeanor  
17 conviction or Public Law 77-503. This is especially true since  
18 the government has offered to vacate the conviction and dismiss  
19 the underlying indictment (here and in all similar cases),  
20 thereby granting petitioner all the relief to which a criminal  
21 defendant could possibly be entitled, even if his interest were  
22 not purely historical and symbolic, as here, but involved present  
23 legal consequences.

24 There are, therefore, no continuing collateral legal conse-  
25 quences which this court could address and which are a necessary  
26 predicate in order to establish that an Article III case or  
27 controversy exists. In County of Los Angeles v. Davis, 440 U.S.  
28

625, 631 (1979), the Supreme Court stated that a case is moot when:

(1) it can be said with assurance that "there is no reasonable expectation . . . " that the alleged violation will recur, see id., at 633; see also SEC v. Medical Committee For Human Rights, 404 U.S. 403 (1972), and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973).

Since the state of war, as well as Executive Order 9066 and the underlying statutory authority no longer exist, and indeed have been officially and conclusively repudiated, there is no continuing case or controversy.

In the absence of an adversarial case or controversy, action by this Court would expose it to the charge that unless it had the same specific legislative authorization as the Commission on Wartime Relocation and Internment of Civilians, see P.L. 96-317, 94 Stat. 964, the Court was without judicial power to delve into this matter and was improperly acting as a "roving commission." See Laird v. Tatum, 408 U.S. 13-15 & fn. 7 (1972) (Article III courts are not the forum for broad scale investigations employing the subpoena power of federal district court to probe into the Army's intelligence gathering activities so that a litigant may seek redress for injuries done to others.) Historical review is not the function of this or any other court. Valley Forge College v. Americans United, 454 U.S. 464, 483-487 (1982) (the federal courts were "not constituted as ombudsmen of the general welfare"). Even when old Supreme Court precedents are discarded

1  
2 by that very body, those cases are not routinely reopened by the  
3 judiciary and redecided for historical reasons. And, of course,  
4 there can be no conceivable contemporary stare decisis effect of  
5 advisory district court dicta concerning the constitutionality of  
6 a long repealed Executive Order and statute. The nonexistence of  
7 any possible future legal injury redressable by such an advisory  
8 opinion is a further reasons it should not issue. Valley Forge  
9 College v. American United, supra, 454 U.S. at 472; Simon v.  
10 Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

11 This court is, no doubt, well aware of the long hallowed  
12 precedent that prohibits the rendition of advisory opinions from  
13 Article III courts. In Muskraat v. United States, 219 U.S. 346,  
14 361 (1911), Cherokee Indian citizens sued the United States to  
15 obtain a declaration of their statutory property rights. The  
16 Supreme Court felt bound to reject the case, stating that "the  
17 United States is made a defendant to this action, but it has no  
18 interest adverse to the claimants." The judicial power, the  
19 Court said, "is the right to determine actual controversies  
20 arising between adverse litigants . . ." (id.). The advisory  
21 opinion which was prohibited there "could not be executed, and  
22 amounts in fact to no more than an expression of opinion. . ."  
23 (id. at 362).

24 The Supreme Court has long recognized that the concreteness  
25 and adverseness necessary to avoid the prohibition against  
26 advisory opinions may be destroyed when, as here, new legislation  
27 is passed or old legislation is repealed. See Socialist Labor  
28 Party v. Gilligan, 406 U.S. 583, 588-589 (1972) (legislative

revision of challenged statute rendered the controversy "abstract" and presented an "insuperable obstacle" to the exercise of the Court's jurisdiction); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-415 (1972) (new legislation after the judgment below mooted the case and left the Court with no live controversy); Hall v. Beals, 396 U.S. 45, 48 (1969) (amendatory action of legislature renders case moot); United States v. Alaska Steamship Co., 253 U.S. 113, 116 (1920) (an Article III court "is not empowered to decide moot questions on abstract propositions, or to declare, for the government of future cases, privileges or rules of law" where subsequent legislation mooted the case).

We point out, however, that petitioner and the amici are not without a proper forum in which to seek the broad symbolic declaration they desire. In 1980 Congress and the President specifically delegated the investigation and recommendations for disposition of these forty year old loyalty issues to the Commission on Wartime Relocation and Internment of civilians. P.L. 96-317. 3/ It is uniquely the job of Congress, which has several

---

3/ One purpose of the Commission was to rekindle interest in and public awareness of these historical events with the wisdom and historical perspective that only hindsight affords.

The Commission's sponsors succeeded in that people like Peter Irons studied these historical events in the course of preparing to testify before the Commission (Irons Affidavit), decided to educate others by writing a book presenting his version of those historical events (Justice at War, Oxford Univ. Press, 1983), and visited the three individuals whose Supreme Court test cases were nearly forty years old, convincing them to allow him to move to reopen and relitigate their cases on the basis of his research (Justice at War, supra at p. 366). But Mr.

(Footnote Continued)

"Japanese redress" bills before it (see e.g., S.2116, 98th Cong. 1st Sess. (1984)), and not the courts to create commissions and redress complaints of this sort. United States v. Sioux Nation of Indians, 448 U.S. 371, 397, 401 (1980) (Congress has the power to recognize and pay moral or honorary debts, although the debt could obtain no recognition in a court of law); Glidden v. Zdanok, 370 U.S. 530, 566-567 (1962) (same); United States v. Realty Co., 163 U.S. 427, 440 (1896) (The power of Congress extends to claims growing "out of general privileges of right and justice" and based upon a moral or honorary nature "although the debt could obtain no recognition in a court of law.\*\*\* To no other branch of the government than Congress could any application be successfully made . . .").

In addition to the total absence of any continuing legal consequences of the conviction, there is another reason that no Article III case or controversy is presented. The collateral attack now before the court is presented in a non-adversarial setting.

As a policy matter, the Executive Branch no longer wishes to defend convictions obtained under this criminal enforcement program due to the Congressional repeal of Public Law 77-503, the President's 1976 repudiation of the policy behind Executive Order

---

(Footnote Continued)

Irons' belated knowledge of these cases and his differing strategic preferences (arrived at with the benefit of historical hindsight) about how these cases should have been handled forty years ago, while interesting, do not afford a legal basis for relief or for excusing four decades of inaction (see infra) by petitioner.



9066 in Presidential Proclamation 4711, and the Commission on Wartime Relocation and Internment of Civilians' 1983 endorsement of pardons.

Indeed, the Executive Branch has agreed to do more than the Commission recommends and upon request, to vacate this and similar convictions and dismiss those indictments. The only record of petitioner's 42 year old behavior over which the trial court has control is the historical record of the convictions. Both parties have now moved to vacate that entry. There are, therefore, no sufficient adversarial differences between the parties to this criminal case at this time.

This lack of adversarial concrete difference between the parties, which precludes a judicial redetermination of constitutional questions, Los Angeles v. Davis, supra, 440 U.S. at 633, manifests itself in the following manner. The only non-procedural issue which was ever ripe for decision in the context of this coram nobis petition concerns the issue of alleged improper Brady-type suppression of exculpatory evidence during the handling of petitioner's case. If the claim of suppression of evidence (which we deny) were proved, it could either require a retrial or -- if of extreme character -- possibly result in an order of this court precluding a retrial. If it precluded a retrial, the issue of the lawfulness of the promulgation of Executive Order 9066 and Japanese-American loyalty during the 1940's would never be reached. Similarly, the issue would not be reached if the government had the option to retry the case but chose not to retry it.

In short, unless the government now decided to retry petitioner and to defend such a criminal conviction based upon this repealed and long disused criminal statute (which we do not plan to do), no Article III adversarial case or controversy could exist in which to litigate, nunc pro tunc, the statute's validity in 1942. As the Supreme Court stated in County of Los Angeles v. Davis, 440 U.S. 625, 634 (1979) "whatever might have been the case at the time of trial, the controversy has become moot..."

This is the precise result reached in the procedurally similar case of Yasui v. United States, (D. Or. January 26, 1984, on petition for coram nobis relief). There the court granted the government's motion to vacate the underlying forty-two year old misdemeanor conviction and dismiss the underlying indictment for violation of Public Law 503, 56 Stat. 173, and dismissed the petitioner's petition. The court held in words equally applicable here (G. Ex. 2 at p.2):

I decline to make [findings concerning governmental acts of misconduct] forty years after the events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The petitioner would have the court engage in fact finding which would have no legal consequences. Courts should not engage in that kind of activity.

2. Petitioner has not articulated "sound reasons" for his "failure to seek appropriate earlier relief."

Assuming arguendo for the purposes of this argument that petitioner's factual allegations of misconduct are true (which we deny), none of those allegations -- that only racial motivation

and no objective facts supported the curfew and evacuation orders -- are "recently discovered" as petitioner contends.

The 1943 Supreme Court briefs filed on petitioners behalf argued at great length that the curfew and evacuation orders had no rational basis but were the result of unconstitutional racial discrimination by General DeWitt. Petitioner's 1943 briefs cited the Harper's October 1942 magazine article (G. Ex.4) written by naval intelligence officer Ringle of the ONI. (See G. Ex. 5 Hirabayashi's 1943 Opening Brief p. 21; G. Ex. 6, the Japanese-American Citizens League Amicus Brief at pp. 92-95, 107-115; G. Ex. 7, A.C.L.U. Amicus Brief p. 15 n.3; G. Ex. 8, the Government's Opening Brief at p.29).

The 1944 Supreme Court ACLU amicus brief in United States v. Korematsu, 323 U.S. 214 (1944), filed after the 1944 publication of General DeWitt's Final Report, demanded at pp. 22-25 (G. Ex. 9) that the omission of FBI and naval intelligence data in DeWitt's Final Report be construed as conclusive proof that no factual support existed for General DeWitt's orders, absent proof by the government to the contrary. The government did not in fact offer such proof. On the contrary, the government's brief (G. Ex. 10, p.11 n.2) openly cautioned the court against relying generally on DeWitt's Final Report (See, Personal Justice Denied, p. 237-238) and clearly disclaimed reliance on "objectively ascertainable facts" stating (G. Ex. 10, 1944 Gov't Br., at p. 57):

In essence, the military judgment that was required in determining upon a program for the evacuation was one with regard to tendencies and probabilities as evidenced

by attitudes, opinions, and slight experience, rather than a conclusion based upon objectively ascertainable facts.

The 1944 Supreme Court opinions in Korematsu also called attention to the lack of factual support for the evacuation decision. As the Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied, states (at p. 237):

\*\*\*If the Court had looked hard, it would have found that there was nothing there -- no facts particularly within military competence which could be rationally related to the extraordinary action taken. Justice Murphy's vehement dissent made that plain as he dissected and destroyed General DeWitt's Final Report. It was also the conclusion of those who carefully studied the opinion, the briefs and the record immediately after Korematsu was decided. \*\*\* (emphasis added)

In fact, that record was carefully studied by historical scholars. In 1946, the Director of the War Relocation Authority and the Secretary of the U.S. Department of Interior published a report entitled "Wartime Exile: The Exclusion of the Japanese from the West Coast" by historian Ruth E. McKee, which was sold by the U.S. Government Printing Office for 45 cents (G. Ex. 11). This 167-page report provided the War Relocation Authority's version of the evacuation. It included an account of then Attorney General Biddle's exchange of letters with Chairman Fly of the FCC in 1944 and reprinted in full the body of the Chairman's April 4, 1944 four-page letter (Pet. App. N) to Attorney General Biddle, denying that there was any unlawful or unidentified radio transmissions, indicating that the FBI had found no unlawful signalling, and suggesting that General DeWitt had all this information at his disposal since early 1942.

In 1949 the University of Chicago Press published Morton Grodzins' seminal work on the evacuation decision, Americans Betrayed, Politics and the Japanese Evacuation.

In a chapter (see, e.g. Americans Betrayed, supra 289-294) analyzing and refuting DeWitt's Final Report and its claim of espionage and sabotage (anticipating the instant petition by 32 years), Mr. Grodzins excerpted and analyzed all of the 1944 FBI and FCC documents discussing radio transmissions and visual signalling now newly "discovered" by petitioner. This included the relevant portions of the previously published "Fly to Biddle" FCC letter dated 4/7/44 ; (Pet. App. V) (Americans Betrayed, supra, 292-293 & fn. 52 and 54); the similar FCC letter dated 4/1/44 (id.); the "Hoover to Biddle" FBI letter dated 2/7/44 (Pet. App. W) (Americans Betrayed, supra, 291 fn. 49 and 293 fn. 53), and the "Biddle to Fly" Justice Department letter dated 2/26/44 (Americans Betrayed, supra, 291 fn. 50 and 293 fn. 54). We have reproduced the cited pages in G. Ex. 12.

Mr. Grodzins' book is cited extensively in the Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied, at pp. 375-383 and in Justice at War by Peter Irons, at pp. 371, 373-377. Mr. Grodzins collected his data starting in the Spring of 1942 while a member of the Evacuation and Resettlement Study of the University of California,

because "Documents, memories, careers, and even lives disappear rapidly." (G. Ex. 12, p. viii-x). 4/

In addition, Ed Ennis, Chief of the Justice Department's Enemy Alien Control Unit and according to petitioner the discoverer of the allegedly newly discovered exculpatory evidence in 1944 (Pet. 44-46, 66-67), left the Justice Department in 1946, immediately joined the ACLU's national board (Justice at War, supra, at 349), and represented the Japanese-American Citizens League, helping them draft the Japanese American Claims Act and touring the country explaining its use (G. Ex. 13, obtained from the public working papers of the Commission on Wartime Relocation and Internment of Civilians, at p.20). He was a director of the ACLU in 1946, its General Counsel from 1950 to 1969, and Chairman of its Board of Directors from 1969 to 1977. Nonetheless, no collateral attack was filed until 1983.

---

4/ Grodzins' 1949 book also detailed virtually all the same intelligence information discussed in the current petition including the work of the Office of Naval Intelligence (Americans Betrayed 145-146 & n.46 188-189), the FBI (id., p. 188 n.23, 257-258 & n.49), and the FCC (id., 291-293), which contradicted any evidence of the off-shore or radio signalling. Grodzins' book also highlights the position of General DeWitt, the conflict between the War Department and the Department of Justice, the characterization by the military of sociological and political issues as military issues, and the acceptance of that characterization by the Supreme Court. Finally, Grodzins suggested re-evaluation of the cases by the Supreme Court in light of Grodzins' book (id., 357). The research for Grodzins' book included access to and examination of the Department of Justice files (id., 182 n.6, 208 n.6) and personal interviews with Ed Ennis (id., 231 n.1, 232 n.3, 255 n.57), James Rowe, Jr., then assistant to the Attorney General (id., 240 n.21, 266 n.78), John J. McCloy, then Assistant Secretary of War (id., 259 n.65, p. 264 n.74), and Francis Biddle, then Attorney General (id., 270 n.85).

Since 1949 most of the government's most knowledgeable personnel and potential witnesses have died (e.g., General DeWitt, Secretary of War Stimson, Franklin Delano Roosevelt, Secretary of the Navy Knox, Army Chief of Staff George C. Marshall, Attorney General Biddle, John Burling, Herbert Wenig, and Morton Grodzins) and those who have not died have only dim recollections of the particulars of these forty-one year old events (e.g., Charles Horsky, see Justice at War, supra, at p.305; Ed Ennis, see Gov't. Ex. 9, p.14). Many critical documents have also been lost (e.g., from the Office of Naval Intelligence). 5/

A recent Ninth Circuit opinion, Maghe v. United States, 710 F.2d 503 (9th Cir. 1983), cert. denied, \_\_\_ U.S. \_\_\_ (June 27, 1983), restated the rule announced by the Supreme Court in United States v. Morgan, 346 U.S. 502, 5123 (1954) that:

To be entitled to a writ of coram nobis, Maghe must show that, there are "sound reasons" for his failure to seek relief earlier. United States v. Morgan, 346 U.S. 502, 512, 74 S.Ct. 247, 253, 98 L.Ed. 248 (1954). The district court properly denied

5/ It is also not newly discovered that a soldier (Captain Herbert Weing) under General DeWitt's command, who had previously been a California state employee, aided California in the preparation of its Supreme Court amicus brief. This fact was openly admitted by the California Attorney General in a February 1943 letter to Al Wiren, a defense attorney who filed the Japanese American Citizen's League amicus brief on Hirabayshi's behalf, long before the Hirabayshi case was decided in the Supreme Court. Justice at War, supra, at p.196.

We also note that the "original" April 15, 1943 version of DeWitt's Final Report is part of a record group that has been publicly available in the National Archives since 1956. See G. Ex. 14.

Maghe's petition without a hearing because he failed to allege an adequate factual basis justifying his 25-year delay in seeking relief. See United States v. Taylor, 648 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866, 102 S.Ct. 329, 70 L.Ed.2d 168 (1981). \*\*\*

The court then went on to explain that a prior lack of interest or a newly acquired interest in seeking relief is not a "sound reason" that will justify a long delay in seeking legal relief. Accord, United States v. Correa-DeJesus, 708 F.2d 1283, 1286 (7th Cir. 1983).

This rule compels the conclusion in the instant case that this petition, as in Maghe v. United States, supra, must be denied without an evidentiary hearing. Since all the allegedly critical intelligence documents have long been matters of public record 6/, petitioner's "inexcusable delay in raising his claim" -- during which delay the most knowledgeable witnesses have died and the most important documents have been lost -- cannot be justified and the petition must be dismissed. United States v. Darnell, supra, 716 F.2d at 481 n.5.

---

6/ See the supporting affidavits of Peter Irons and John Heriz filed by petitioner confirming and identifying the various publicly available records used.

To the extent that particular internal Department of Justice memoranda and opinions (Pet. App. Q, AA and BB) have been freely made available by the government in response to requests made under the Freedom of Information Act in 1981 (which requests could have been made as early as 1967, see 5 U.S.C. 552), these documents only confirm and particularize Ed Ennis' broader misgivings about this whole affair and its handling by government officials and intelligence agencies, information which has been well known and available from Ed Ennis himself since 1946 (see supra, p.18).



3. The petition does not raise issues  
of the most "fundamental character."

A third independent reason that the petition cannot be entertained is that on its face, the petition does not identify any significant prosecutorial misconduct (most of which it is alleged occurred in 1944) which could have affected the outcome of petitioner's trial in 1942 and Supreme Court appeal in 1943.

a. The Factual Background

On October 20, 1942, petitioner was convicted after a jury trial conducted before United States Judge Lloyd L. Black. At trial petitioner testified that he decided to violate the evacuation and curfew orders because he believed that they unconstitutionally discriminated against him and other American citizens of Japanese ancestry. (G. Ex. 15, pp. 34-35). 7/ Consequently, on May 16, 1942 petitioner voluntarily made his way to the Seattle, Washington office of the FBI and announced to them that on May 11 & 12, 1942 he had knowingly violated the evacuation orders and would continue to violate them. There was also testimony that on May 9, 1942 petitioner intentionally violated the curfew regulation due to his stated belief that they too were unconstitutional. (G. Ex. 15, pp. 32-33).

Prior to trial, petitioner moved to dismiss the charges on legal but not factual grounds. In rejecting that motion, the district court stated in pertinent part (G. Ex. 15, p.10):

---

7/ Attorney Arthur G. Barnett, who did not represent petitioner at trial but is listed as counsel on the petition (Pet. at 1)  
(Footnote Continued)

The matter was presented to the court after oral argument supplementing very extensive briefs which in the aggregate cited about one hundred thirty court decisions and several texts. It is obvious that no analysis of such a mass of citations can be here indulged in without most tediously extending this opinion.

In substance and effect the defendant's position is that regardless of how critical the war perils, of how necessary and vital the military area, and of how essential to American success in this conflict the curfew provisions and evacuation orders applicable to those of Japanese ancestry in such military area, may be that the armed forces of this country and our government are absolutely helpless to make or enforce any such curfew provisions or exclusion orders until a Constitutional amendment has been proposed, voted by both houses of Congress, and finally adopted by three-fourths of the states.

In the Supreme Court, Hirabayashi's attorneys made exactly the same arguments that they seek to resurrect now. They argued that there was evidence from FBI Director J. Edgar Hoover that no American citizen of Japanese ancestry had engaged in espionage, sabotage, or reasonable activities and that "This was conceded by government counsel [Ed Ennis] during the argument in the Circuit Court" (G. Ex. 5, p.6). They argued that the court could not take judicial notice of the military situation since "nothing in the record indicates what facts were considered by the military authorities." (G. Ex. 16, pp. 1-2). They argued that General DeWitt was a racist and brought to the attention of the Supreme

---

(Footnote Continued)

testified as a witness at trial "that he had counseled with defendant as his friend" and defendant had made statements consistent with petitioner's testimony. (G. Ex. 15, p.33).

1  
2 Court General DeWitt's statement that "A Jap's a Jap ..." (G. Ex.  
3 16, p.1 n.2 & p.25). They argued that there was no sufficient  
4 military reason for evacuation but only improper political  
5 reasons. (G. Ex. 16, pp.2-3, 22). Finally, they argued that  
6 even if "some small" number of American citizens of Japanese  
7 ancestry were dangerous, that did not permit exclusion of the  
8 whole group without any individual hearings (G. Ex. 16, p.3).

9 The government argued that in the wake of the Pearl Harbor  
10 attack and Japan's successes in the Pacific, the military  
11 officials concluded that a potentially dangerous situation was  
12 presented in the west coast states if even a small group of "a  
13 few hundred or thousand" strategically placed disloyal individu-  
14 als were among the large group of Japanese aliens and citizens of  
15 Japanese descent G. Ex. 8, p.61). The government's brief went on  
16 to argue that the military officials believed that the months or  
17 years required for hearings was both too slow a response (id. at  
18 61-62) and, even if there had been time, of "doubtful utility" in  
19 evaluating with the degree of certainty necessitated by the  
20 possibility of an invasion the "intangible forces which might  
21 bind" individuals of Japanese descent "to the members of an  
22 invading Japanese army." (id. at 65).

23 The Supreme Court unanimously decided in Hirabayashi v.  
24 United States, 320 U.S. 81 (1943), that the post-Pearl Harbor  
25 Japanese victories in the Pacific and the apparent danger of an  
26 invasion or air-raid attacks upon the West Coast aircraft and  
27 shipbuilding plants had to be considered by responsible military  
28 officials (320 U.S. at 94, 99, and 101). See also 320 U.S. at

106-107, 110-113, 114, and Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J.,) citing Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-5 (1851). It concluded that the prompt action of imposing a curfew without conducting administrative hearings appeared to be necessary and not irrational in the particular circumstance presented (Hirabayashi, supra, at 95, 99, 101). Moreover, the Supreme Court restated petitioner's position upon submission of the case to be that petitioner did "not deny that, given the danger, a curfew was an appropriate measure against sabotage." Hirabayashi v. United States, 320 U.S. 81, 99 (1943).

b. Petitioner's current claims could not have affected the 1943 judgment in his case.

Petitioner argues in Point Two and Point Three of the petition (Pet. pp. 58-69) that Justice Department officials committed official misconduct in 1944 during the handling of the Korematsu case after General DeWitt's Final Report was published. The petition alleges that "the [alleged] falsity of DeWitt's espionage allegations was . . . concealed from the Justice Department during consideration of the Hirabayashi and Yasui cases by the Supreme Court." (Pet. p.58, lines 4-7).

Since all of the alleged attorney misconduct about which petitioner complains occurred at least six months after the termination of the lower court litigation and the Supreme Court decision in his case (in June 1943), none of the alleged misconduct in the handling of the Korematsu case, even if it were true, could have affected the trial or Supreme Court decision in petitioner's case. And, as we noted supra, the facts which persuaded petitioner in 1983 to collaterally attack the

reasonableness of the military's belief in 1942 (Pet. pp. 34-57) have been matters of public record since at least 1949.

Petitioner argues at Point One of the petition (pp. 22-23) that misconduct within the military led to the suppression within the War Department of General DeWitt's belief that any loyalty hearings were useless, even if there had been enough time to employ them. Not only was this point openly argued to the Supreme Court in the government's Hirabayashi brief (G. Ex. 8, 62), but General DeWitt's unedited first draft of his Final Report and correspondence related to it has been publicly available for inspection at the National Archives since 1956 (G. Ex. 14). In any event, the revised version of General DeWitt's Final Report was not published until 1944, six months after the Supreme Court decision in petitioner's case, and DeWitt's Final Report is nowhere referred to in the Supreme Court's 1943 opinions or, indeed, in the entire Hirabayashi record, including the amicus briefs which were before the court in petitioner's case. 8/ Thus, the allegations about the allegedly improper preparation or use of the Final Report could not have fundamentally affected the outcome of petitioner's 1942 trial or 1943 Supreme Court appeal.

With respect to the Fourth Point in the petition (pp. 70-83) alleging the improper use of the doctrine of judicial notice, the

---

8/ In addition to the prior exhibits, see also G. Ex. 17 (Gov'ts. 1943 Supreme Court Yasui brief) and G. Ex. 18 (1943 Amicus briefs of California, Oregon and Washington in Hirabayashi).

record refutes any notion that the Supreme Court was misled in 1943. To the extent that the government sought judicial notice of the historical context of the curfew decision, it clearly noted that request in its brief (G. Ex. 8, p.11) which brief also openly cited at p.29 the October 1942 published version of the Ringle Report (G. Ex. 15). The request for judicial notice was made at a time in 1943 when, even under petitioner's version of the facts, no contrary FBI or FCC intelligence reports were known to or possessed by the Department of Justice attorneys (Pet. p.58).

Moreover, the request for judicial notice was open to attack and in fact attacked as racial and unfounded by petitioner and his amici. (See, e.g. G. Ex. 16, pp.1-4). Like any legal argument, it could have been rejected or accepted by the Supreme Court. In sum, irrespective of whether or not the request for judicial notice had merit and should have been granted (an issue which is not before this court at this time), it was an argument made openly, in good faith, and without any indicia of misconduct.

In addition, petitioner is barred by the doctrine of res judicata from reopening this case simply to relitigate issues because his decision to disobey the statute in 1942 might have been more favorably treated in 1983. The Supreme Court in Federated Department Stores Inc. v. Moitie, 452 U.S. 394 (1981), stated in words equally applicable here (452 U.S. at 401-402):

\*\*\*This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the

result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931). We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets:

"The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation - a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." Reed v. Allen, 286 U.S., at 198-199.

Even when hindsight causes courts to abandon "old" precedents, under the principle of res judicata such subsequent case law cannot retroactively mandate a different result in the original "old" case. As the Supreme Court stated in Federated Department Stores, supra, 452 U.S. at 398:

. . . the res judicata consequences of a final . . . judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Angel v. Bullington, 330 U.S. 183, 182 (1947); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Dean, 121 U.S. 525, 534 (1887).

Current case law may or may not divest petitioner's Supreme Court decision (and the Mitchell v. Harmony, -54 U.S. (13 How.) 115, 134-5 (1851) line of cases) of any current stare decisis effect. But such subsequent rulings cannot redecide the earlier case for the particular individual who litigated and lost that earlier case. 9/

Even if res judicata did not bar petitioner, the Fifth Point in the petition (pp. 84-85), that current "non-war power's" case law would not permit such a curfew, is irrelevant. The Supreme Court opinion in the Hirabayashi case notes on its face that non-war powers cases were inapposite and it distinguished this "particular war setting" (320 U.S. at 101). The Court carefully stated its very limited holding:

\*\*\*We decide only the issue as we have defined it -- we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. \*\*\*  
(320 U.S. at 102).

Petitioner's current case law does not relate to this particular situation, i.e., the legal rights under the War Powers

---

9/ Since petitioner argues that the Supreme Court erroneously decided the issues in his case, a reappraisal of those old legal rulings would necessarily constitute "a clear break with the past" and would have been nonretroactive. United States v. Johnson, 457 U.S. 537, 549 (1982). Thus, petitioner's conviction would not have been vulnerable to collateral attack on these grounds alleging "new case law" even if another litigant (such as Korematsu) not barred by the doctrine of res judicata had succeeded in overturning the Hirabayashi case law in the very next term.

In other words, even if United States v. Korematsu, 323 U.S. (Footnote Continued)



Clause of the Constitution of citizens in the Pacific coast states during the initial difficult months of World War II, after the successful surprise attack at Pearl Harbor and before the battle of Midway in June 1942.

The recent Korematsu opinion was not troubled by these impediments to coram nobis relief for two reasons. That court concluded that the government had waived various jurisdictional problems which that court implicitly held were waivable (G. Ex.1, p.25). Those factual and legal circumstances -- even if true in that case (which we deny) -- are not true here. In addition, the Korematsu court stated that the Ninth Circuit decision in United States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866 (1981) permitted a district court to grant coram nobis relief even when "arguable prejudice" is not shown, therefore creating an exception to the well-established contrary rule laid down in United States v. Morgan, 346 U.S. 502 (1954), (G. Ex.1, p.26).

The opinion in Korematsu misreads the Taylor opinion. The Taylor court stated that "...we address solely the issue of whether Taylor has demonstrated that he is entitled to a hearing and do not decide whether relief is warranted." 648 F.2d at 570. The court went on to cite Morgan and restate the general rule that coram nobis relief is only available "to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid." Id. at n.14. Then the court

---

(Footnote Continued)  
214 (1944) had been decided differently, that would not have helped this petitioner.

1  
2 stated that "Taylor's claim gives rise to the somber prospect  
3 that the Government committed a fraud on the court which ulti-  
4 mately worked a great prejudice to Taylor's case." 648 F.2d at  
5 571 (emphasis added). In this context -- where great prejudice  
6 to the petitioner's case was at issue -- the Taylor court stated  
7 that a hearing on a coram nobis petition (not ultimate relief)  
8 could be premised on allegations of prosecutorial misconduct.

9 All of these predicates for the Taylor language were ignored  
10 by the Korematsu court which improperly relied on language in the  
11 opinion -- taken out of context -- as the basis for a new Ninth  
12 Circuit exception to the Morgan rule allowing ultimate coram  
13 nobis relief (not simply a hearing), when no actual prejudice has  
14 been proved. Moreover, even if this conclusion were not contrary  
15 to the intent of the Taylor court, see 648 F.2d at 570 & n.14, it  
16 runs contrary to the spirit of Morgan itself, as well as United  
17 States v. Hasting, \_\_U.S.\_\_, 103 S.Ct. 1974 (1983) and United  
18 States v. Morrison, 449 U.S. 361, 365-367 (1981). 10/

19 There are, therefore, insuperable difficulties which  
20 preclude the rendition of coram nobis relief.

21 III.

22 The Court Has Power to  
23 Grant the Government's Motion

24 Where, with hindsight, the Executive Branch of government  
25 decides as a matter of policy that a prior criminal prosecution

26  
27 10/ Of course, the district court Korematsu opinion has no  
28 collateral estoppel effect upon this or any other case. United  
(Footnote Continued)

was a mistake and it no longer wishes to defend but instead wishes to vacate a particular conviction, the court has the power to grant that request.

In United States v. Weber, 721 F.2d 266, 267 (9th Cir. 1983) the Ninth Circuit ruled that a prosecutor retains the power under Rule 48(a) to dismiss even "after conviction and sentencing" and "regardless of the stage of prosecution at which the government moves to dismiss the indictment." Weber, supra, citing United States v. Hamm, 659 F.2d 624, 629 n.16 (5th Cir. 1981) (en banc), United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), and Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). Moreover, the opinion in Weber states that the government's Rule 48(a) motion in that case was not made until after Weber's direct appeal had been dismissed by the Ninth Circuit. 721 F.2d at 267. Consequently, the rule in this circuit is that neither guilty plea (see Hamm), trial verdict (see Weber), judgment and sentencing (see Rinaldi), appeal and petition for certiorari (see Rinaldi), nor dismissal of appeal (see Weber), divest the government of its Rule 48(a) power.

In the instant case, the motion for coram nobis relief "is a step in the criminal case" and not "the beginning of a separate civil proceeding," United States v. Morgan, 346 U.S. 502, 505 n.4 (1954). Petitioner invokes the district court's original criminal jurisdiction. At the point when the government is put

---

(Footnote Continued)

States v. Mendoza, \_\_\_ U.S. \_\_\_ (No. 82-849, Jan. 10, 1984);  
Standefer v. United States, 447 U.S. 10, 24-25 (1980).

1  
2 to the burden of responding to such a motion (if not before), it  
3 is indisputable that the government's role in the criminal case  
4 has not terminally concluded. The government is put to the  
5 burden of finding and reviewing the original records of the case  
6 in order to respond to procedural issues, discovery, and on the  
7 merits. See e.g., the lengthy appendices and exhibits filed in  
8 this case. Moreover, the government will have to consider  
9 whether, if the writ is granted, it wishes to appeal and,  
10 independently of that decision, whether or not the government  
11 plans to retry the case. Thus, the necessity of a government  
12 response to a coram nobis petition presents at least as "active"  
13 a criminal prosecution as the situation in Weber, where  
14 defendant's appeal was dismissed prior to the filing of the Rule  
15 48(a) motion.

16 Nor does the making of allegations of prior government  
17 misconduct require any special hearings, findings of fact, or  
18 otherwise limit the court's power to dispose of the case under  
19 Rule 48(a). Rinaldi itself was summarily reversed by the Supreme  
20 Court because the district court refused to grant Rule 48(a)  
21 relief since there was prosecutorial misconduct underlying the  
22 Rule 48(a) request.

23 The recent Korematsu opinion reaches a contrary conclusion,  
24 i.e., that the district court has no power to grant the govern-  
25 ment's motion. That conclusion is faulty because it rests on the  
26 erroneous factual assumption that the "prosecution has come to  
27 rest" (G. Ex.1, p.7), rebutted above, and dicta from an old  
28 district court case, United States v. Brokaw, 60 F. Supp. 100  
(S.D. Ill. 1945) which is inconsistent with Weber (G. Ex.1, p.5).

The Brokaw case states that after the verdict the prosecutor's power to enter a nolle prosequi "revives and continues until such time as judgment is entered and sentence imposed." 60 F.Supp at 102. A literal interpretation of this thirty-nine year old dicta is flatly inconsistent with Weber, as we point out above. The current rule of law in this circuit, which is supported by the rationale of Brokaw, is that after the verdict the prosecutor's power to enter a nolle prosequi revives even after "judgment is entered and sentence imposed" and continues during each occasion that the prosecutor is required, adversarially, to continue defending his case in the manner that he, in his discretion, thinks best, i.e., on appeal, on motion for new trial, on petition for certiorari, and on motion for coram nobis relief.

The Supreme Court, like the Ninth Circuit in Weber, has also expressed the view that entry of the judgment, even "final judgment", does not conclusively terminate the power of the prosecutor and the court to dismiss the case.

In Hamm v. Rock Hill, 379 U.S. 306 (1964) the defendants were convicted of criminal trespass for participating in civil disobedience "sit in" demonstrations at lunch counters of retail stores in South Carolina and Arkansas. After conviction, Congress legislatively permitted such conduct and disapproved of the criminal enforcement program by passing the Civil Rights Act of 1964. In the majority opinion in Rock Hill, supra, 379 U.S. 313-316, the Supreme Court reaffirmed the rule "exemplified" by United States v. Chambers, 291 U.S. 217 (1934) that the conviction for the "peaceful conduct for which petitioners were

1  
2 prosecuted" (*id.* at 315) should be vacated when "Congress, as  
3 well as the two Presidents who recommended the legislation,  
4 clearly intended to eradicate an unhappy chapter in our history"  
5 (*id.*) since "the supposed right to discriminate on the basis of  
6 race . . . was nullified" (*id.* at 316).

7 Although in Rock Hill the judgment in the original state  
8 trespass conviction did not become final prior to the Supreme  
9 Court's decision, the Supreme Court stated that its result, which  
10 relied extensively on United States v. Chambers, 291 U.S. 217  
11 U.S. 217 (1934), would have been the same even after a final  
12 judgment. The court stated (379 U.S. at 313):

13 Although Chambers specifically left open the  
14 question of the effect of its rule on cases  
15 where final judgment was rendered prior . . .  
16 and petition [for relief] sought thereafter,  
17 such an extension of the rule was taken for  
granted in the per curiam decision in Massey  
v. United States, supra, handed down shortly  
after Chambers.

18 This language approving the "extension of the rule" vacating  
19 non-final judgments to "cases where final judgment was rendered"  
20 supports the result in the Weber case where ultimate relief was  
21 not ordered until after the petitioner's timely appeal was  
22 dismissed.

23 Even if there were some doubt about the prosecutor's  
24 independent post-judgment power under Rule 48(a), if a court  
25 grants the prosecutor's motion, the additional authority of the  
26 court resolves any doubts about the sufficiency of the legal  
27 power or authority for such relief. In Price v. Johnston, 334  
28 U.S. 266, 283-284 (1948), the Supreme Court discussed the broad  
power of the federal courts under the All Writs Act:

\*\*\* The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. The fluidity of the writ is especially desirable in the setting of a statute where Congress has given . . . courts . . . the power to issue the writ in aid of their . . . jurisdiction wherever "reasonably necessary in the interest of justice." [Adams v. United States ex rel. McCann, 317 U.S. 269, 274 (1942).] The ordinary forms and purposes of the writ may often have little relation to the necessities of the . . . jurisdiction of those courts. Justice may on occasion require the use of a variation or a modification of an established writ. It thus becomes essential not to limit . . . courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in [the All Writs Act]. It follows that we should not write in limitations which Congress did not see fit to make.

Formulation of the limitations of [the All Writs Act] which do exist must await the necessities of . . . jurisdiction in particular cases. \*\*\* Only in that way can we give substance in this case to our previous statement that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." Adams v. United States ex rel. McCann, *supra*, 274.

\* \* \* \* \*

In so deciding, however, we emphasize that the power of a . . . court . . . to issue such a writ is discretionary. And this discretion is to be exercised with the best interests of both the prisoner and the government in mind. \*\*\* (emphasis added.)

Accord, United States v. New York Telephone Co., 434 U.S. 159, 173, (1977). See also, Wayman v. Southland, 23 U.S. (10 Wheat.) 2, 21-23 (1825) (Mr. Chief Justice Marshall); United States v. State of Washington, 459 F. Supp. 1020, 1116 (W.D. Wash. 1978), *aff'd*. 645 F.2d 749 (9th Cir. 1981).

From the above, we submit that where a defendant has taken action which revives the prosecutor's role in determining the proper disposition of a criminal case, a district court has the power to act as the Yasui court did and grant a Rule 48(a) motion.

IV.

CONCLUSION

We submit that a fair reading of petitioner's affidavit, his Reply, and the various amicus briefs, reveal that on the basis of judicial notice and collateral estoppel, petitioner desires a declaration that this 1942 criminal enforcement scheme was invalid when instituted because allegedly improper behavior of those who authorized it was intentionally withheld during the judicial review of this program forty years ago.

If petitioner had been convicted of a felony or could otherwise demonstrate continuing adverse legal consequences of his misdemeanor conviction;

and if the very same amici that now demand declaratory relief in addition to the vacation of the conviction had not successfully persuaded the government to repeal the relevant statutes and abandon this criminal enforcement scheme during the 1970's (see supra p.10), so that someone somewhere was under some present legal disability which the government was in an adversarial posture to defend;

and if this challenge to the constitutionality of the underlying scheme were based upon events or documents showing misconduct that was newly discovered and not several decades old and barred by the doctrine of laches;



and if the alleged misconduct could be shown to have misinformed and misled the Supreme Court on facts relevant to the issues before the Court in 1943 and critical to the outcome of those issues;

then, and only then, this Court would be justified in ordering a hearing in order to determine the truthfulness of those particular allegations of misconduct found to be relevant. 11/ In this case, where none of these prerequisites to the holding of an evidentiary hearing has been satisfied, the petition and request for findings cannot be granted.

On the other hand, the court does have the power and should grant the government's motion to vacate and dismiss where the policy reasons for the government's action -- i.e., the hindsight determinations by the President and Congress that the whole program was a national mistake -- are matters of indisputable public record and cannot be fairly characterized as "clearly contrary to manifest public interest," Rinaldi v. United States, 434 U.S. 22, 30 (1977). Moreover, the current Congressional and Executive rejections of the curfew and evacuation program, which forms the basis for the government's motion, are evidenced by

---

11/ As in the Korematsu and Yasui coram nobis cases, the government denies that the alleged misconduct occurred or played any significant part in the outcome of this case. As petitioner himself now argues in connection with certain events in 1942, judicial notice is not appropriate with respect to disputed issues of fact. And see Fed. R. Evid. 201(g), discussed supra p.2. (We will be happy to respond in full to the request for judicial notice should the court decide that a response is appropriate and so order.)

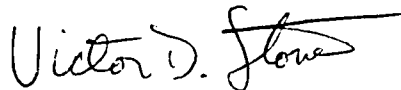
public law ([P.L. 92-128, §§ 1(a)] and Presidential Proclamation  
(No. 4417). As a result, there is no necessity for any  
evidentiary hearing in connection with the government's motion.

Respectfully submitted,

STEPHEN S. TROTT  
Assistant Attorney General  
Criminal Division

GENE S. ANDERSON  
United States Attorney

SUSAN E. BARNES  
Assistant U.S. Attorney  
Western District of Washington  
Seattle, Washington  
FTS 399-5196



VICTOR D. STONE  
Counsel for Special and  
Appellate Matters  
General Litigation and  
Legal Advice Section  
U.S. Department of Justice  
P.O. Box 887  
Washington, D.C. 20044-0887  
FTS 724-7144